

# **North Carolina Media Law Handbook**

**Edited by Cathy Packer, Hugh Stevens  
& C. Amanda Martin**

The North Carolina Press Foundation &  
The University of North Carolina at Chapel Hill  
School of Journalism and Mass Communication  
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# About This Handbook

Welcome to the third edition of the North Carolina Media Law Handbook. The handbook is intended to serve as a guide for journalists, attorneys, judges, teachers, students and other persons concerned with freedom of the press, the newsgathering process and open government.

We are very grateful to the authors of the individual chapters, each of whom donated his or her valuable time and expertise; without them, this publication would not be possible.

We also are indebted to the North Carolina Press Foundation and the UNC-CH School of Journalism and Mass Communication, which co-sponsored the project that led to the handbook's creation, and to the Z. Smith Reynolds Foundation, whose generous grant funded the production costs for the first edition.

The handbook copyright is owned by the North Carolina Press Foundation, Post Office Box 911, Raleigh, North Carolina 27602. The Foundation, which is a not-for-profit organization, places the proceeds from sales of the handbook into a special fund that is used to defray the costs of subsequent editions.

We hope you will find this handbook useful and that you will enjoy its new format. We welcome your comments and suggestions.

--- The Editors

# About the Contributors

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Mary Hall McArver, a senior graphics student in the School of Journalism and Mass Communication at the University of North Carolina at Chapel Hill, designed this book. She also is a page designer for the student-run Blue & White magazine and interned as an advertisement designer with University Directories in the summer of 2006. As a member of Kappa Delta Sorority, Mary Hall served on the executive council as vice president of public relations. She designed and edited the alumnae/parents newsletter and was in charge of all public relations for the sorority. She is also a member of Sigma Alpha Lambda honors fraternity. She will graduate from UNC-CH in spring 2007.

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# Libel

Defamation is a false communication made with fault that damages a person's reputation. Libel and slander are the two types of defamation. Traditionally the term libel referred only to written communication while slander referred to spoken messages. Historically, libel was treated as the more serious of the two offenses, largely because the written word was capable of reaching a larger audience and was more lasting than the spoken word. In most states, including North Carolina, broadcast defamation is now treated as libel because it can have both the reach and permanency of printed defamation.<sup>1</sup> Also, if statements are spoken with the intention that they be printed and they are, in fact, printed, a person who feels he has been defamed by the statements can sue for both libel and slander. Thus, a source who defames someone in an interview with a reporter could be sued for both.<sup>2</sup>

Libel law is concerned with the effect a particular communication has on the defamed individual's relationships with others. It is insufficient for a libel plaintiff to claim hurt feelings or embarrassment.<sup>3</sup> A defamatory message must affect the way other

people view the plaintiff; the message must expose the plaintiff to hatred, contempt or ridicule, lower him in the esteem of others or cause him to be shunned or avoided.

## Who can sue for libel?

- 1) Any living person.<sup>4</sup> Unlike property rights, which survive death and can be passed on to heirs, personal rights, including the right to reputation, die with the individual.<sup>5</sup>
- 2) A corporation. A corporation can sue for libel to vindicate its corporate reputation or the reputation of its product.
- 3) An unincorporated association, organization or society, including a labor union, charitable foundation or fraternal organization. Suits by such groups are uncommon. However, it is possible for a religious or charitable organization, for example, to sue if a news story damages its ability to raise money or attract members.

Agencies and units of government — cities, counties, states, the U.S. government — may **not** sue for libel. Because in a democratic society citizens have the right to criticize and comment upon their government, courts consistently have held that governments cannot be defamed. However, indi-

1 Woody v. Catawba Valley Broad. Co., 272 N.C. 459, 158 S.E.2d 578 (1968). N.C. GEN. STAT. §28A-18-1 (2005); Gilliken v. Bell, 254 N.C. 244, 118 S.E.2d 609 (1961).

2 See, e.g., Aycock v. Padgett, 131 N.C. App. 164, 166, 516 S.E.2d 907, 909 (1999); Phillips v. Winston-Salem/Forsyth County Bd. of Educ., 117 N.C. App. 274, 278, 450 S.E.2d 753, 756 (1994), *cert. denied*, 340 N.C. 115, 456 S.E.2d 318 (1995); Clark v. Brown, 99 N.C. App. 255, 261, 393 S.E.2d 134, 137, *cert. denied*, 327 N.C. 426, 395 S.E.2d 675 (1990).

3 Flake v. Greensboro News Co., 212 N.C. 780, 788, 195 S.E. 55 (1938).

4 N.C. GEN. STAT. §28A-18-1 (2005); Gilliken v. Bell, 254 N.C. 244, 118 S.E.2d 609 (1961).

5 See RESTATEMENT (SECOND) OF TORTS § 560 (1977).

vidual government officials and employees can — and do — sue for libel when they feel their individual reputations are harmed by news stories.

## What must a libel plaintiff prove?

A plaintiff usually must prove six elements to win a libel suit:

- 1) Publication
- 2) Identification
- 3) Defamatory content
- 4) Falsity
- 5) Injury
- 6) Fault

In the following sections, each of those elements will be discussed in detail.

### Publication

Libel involves at least three people: the defamer, the defamed and a third person who heard or saw the defamatory message. Obviously, publication is not difficult to prove when a story has been printed in a newspaper or broadcast on radio, television or cable. Reporters must recognize, however, that they can defame someone in the course of gathering news as well as by publishing news. For example, suppose a reporter has heard rumors about a local high school principal embezzling school funds. In an interview with the school superintendent, the reporter says, “I’ve got some reliable sources who tell me Principal X is being investigated for using school funds to purchase computer equipment for his own home. Can you confirm that for me?” Such a newsgathering technique could result in a slander lawsuit against the reporter, even if the rumor about Principal X is never printed or broadcast.<sup>6</sup> The Al-

ton (Ill.) Telegraph was successfully sued for libel as a result of a memo two of its reporters sent to the U.S. Justice Department suggesting that a local developer had ties to the Mafia. No story was published in the newspaper, but transmitting the memo to government officials was sufficient to meet the publication requirement of libel law.<sup>7</sup>

**The republication rule.** Republication of a libel meets the publication requirement. That means both the reporter who accurately quotes the libelous statements of another person and the publication that prints the libelous quotes can be sued along with the source of the statement.<sup>8</sup> Likewise, a newspaper that prints a letter to the editor containing defamatory statements can be sued. It is also possible that a broadcast station can be held legally liable for defamatory statements made over the air by guests on programs or members of the public during a “call-in” show.<sup>9</sup> Broadcasters, however, are immune from libel suits for statements made by political candidates to whom they are required to provide airtime under the Communications Act of 1934.<sup>10</sup> Because the Communications Act prohibits broadcasters from censoring candidates’ comments,<sup>11</sup> the U.S. Supreme Court in 1959 ruled broadcasters could not be legally liable for such comments. Of course, many libel suits against the repeaters of libelous statements fail on other grounds, especially the plaintiff’s inability to prove the requisite level of fault on the part of the repeater. Nonetheless, it’s critical for journalists to realize that “I was just quoting someone

<sup>6</sup> See T.B. LITTLEWOOD, *COALS OF FIRE* (1988).

<sup>7</sup> See *Taylor v. Kinston Free Press Co.*, 237 N.C. 551, 75 S.E.2d 528 (1953); *Lewis v. Carr*, 178 N.C. 578, 101 S.E. 97 (1919).

<sup>8</sup> See N.C. GEN. STAT. §99-5 (2005), providing that a broadcaster can be held liable for airing defamatory comments by non-employees of the station if the broadcaster is “guilty of negligence in permitting any such defamatory statement.” See also *Snowden v. Pearl River Broad. Corp.*, 251 So.2d 405 (La. App. 1971).

<sup>9</sup> *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525 (1959).

<sup>10</sup> 47 U.S.C. §315 (2000).

<sup>11</sup> See, e.g., *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975).

else” isn’t an adequate defense in a libel suit.

Congress created a major exception to the republication rule in 1996 when it passed a law declaring that Internet service providers (ISPs) and users of interactive computer services could not be held liable for defamatory material posted by someone else. Section 230 of the Telecommunications Act of 1996 says, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>12</sup> Congress passed the law in an effort to encourage ISPs to screen material on their systems to eliminate sexually explicit messages from the Internet. The provision was part of the Communications Decency Act, the main goal of which was to ban indecent material from the Internet. While the U.S. Supreme Court struck down the indecency ban as a violation of the First Amendment, the provision granting ISPs and users immunity for republishing libelous statements was allowed to stand.<sup>13</sup>

Thus far, most courts have interpreted Section 230 very broadly to provide absolute immunity to ISPs and Internet users for third-party postings.<sup>14</sup> The seminal case, *Zeran v. AOL*, resulted from anonymous postings on an AOL bulletin board linking Kenneth Zeran to the sale of tee shirts, bumper stickers and other items carrying “offensive and tasteless slogans” related to the 1995 Oklahoma City federal building bombing.<sup>15</sup> The sham ads said to call “Ken” at Zeran’s home phone number. Zeran received hundreds of angry and abusive phone calls, some includ-

ing death threats. Despite the fact Zeran contacted AOL and obtained a promise the initial posting would be taken down, additional postings with Zeran’s phone number continued to appear on the site.<sup>16</sup> Zeran sued AOL, but the U.S. Court of Appeals for the Fourth Circuit (which includes North Carolina) took an expansive view of the immunity provided by Section 230, holding that even Zeran’s notification of AOL that the postings were false and defamatory did not remove the protection provided by the statute.<sup>17</sup>

## Identification

Identification is seldom at issue in lawsuits against the media. However, there are a few pitfalls with which the reporter ought to be familiar. For example, identification can occur even if names are not used. People can be identified through pictures, sketches, pen-names, nicknames, initials and even descriptions.

A classic case in this area occurred when a New York gossip columnist wrote: “Palm Beach is buzzing with the story that one of the resort’s richest men caught his blonde wife in a compromising spot the other day with a former FBI agent.” Rich men and blonde women may abound in Palm Beach, but apparently former FBI agents do not. Frederick Hope convinced the court that his friends and co-workers were able to identify him as the subject of that item because he was a former FBI agent who had recently joined the county attorney’s staff, an event that received considerable publicity. In addition, he was able to prove that he was the only former FBI agent who “traveled in the resort’s high society circles.”<sup>18</sup> More recently,

12 47 U.S.C. §230 (c) (1) (2000).

13 *Reno v. ACLU*, 521 U.S. 844 (1997).

14 See, e.g., *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Green v. Am. Online*, 318 F.3d 465 (3d Cir. 2003); *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980 (10th Cir. 2000); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *Barrett v. Rosenthal*, Cal. Rptr. 3d , 2006 WL 3346218 (2006).

15 *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

16 *Id.* at 329.

17 *Id.* at 333.

18 *Hope v. Hearst Consol. Publ’ns, Inc.*, 294 F.2d 681 (2d Cir. 1961), cert. denied, 368 U.S. 956 (1962).

a U.S. District Court ruled that a rape victim was identified in a TV news story that did not use her name but did say she was a student at Bryn Mawr, a Pennsylvania college with an enrollment of about 1,500; lived in a dorm; drove a Nissan; and had attended a party at the University of Pennsylvania shortly before the crime. The young woman sued for libel after the station reported comments of a police officer that cast doubt on the truth of the victim's story. Noting that Bryn Mawr is a small school, the court said, "In this type of environment, it would not be surprising if some people could identify plaintiff from the information supplied in the broadcast."<sup>19</sup>

Incorrect identification — carelessness in reporting names, using incorrect middle initials or addresses, or placing the wrong photo with a story — can result in successful libel suits. For example, in 1940 a reporter for the Greensboro Record, acting on a tip from an FBI agent, examined old city directories and found listings for a Harry Roth, the name of a man who had been arrested on white slavery charges in New York. Without any further checking, the reporter wrote a story saying the Harry Roth arrested in New York was a former Greensboro resident who "was for a time connected with the Palace Theatre in Greensboro." The former North Carolinian, however, was living at the time in Suffolk, Va., and had nothing to do with the white slave trade. The N.C. Supreme Court upheld a jury award of \$5,000 to Roth.<sup>20</sup>

Incorrect use of pictures can also result in libel suits. In the 1930s, singer Nancy Flake sued the Greensboro Daily News when her photo was inadvertently used in a bread ad and she was identified as "Mlle. Sally Payne, exotic red-haired Venus" appearing with the Folies de Paree. The use of her photo was suf-

ficient to meet the identification requirement, but Ms. Flake lost her libel suit because the court did not feel the content of the ad was defamatory.<sup>21</sup> (She did win on her appropriation claim, however. See the next chapter, *Invasion of Privacy and Infliction of Emotional Distress*.)

**Group libel.** Occasionally the media are sued by individuals who claim they suffered reputational harm because a group to which they belong was attacked, even though they were not named or specifically identified. Most such suits are unsuccessful because the plaintiffs are unable to convince the courts the libels were "of and concerning" them. For example, after The Boston Globe ran an editorial saying the Manchester (N.H.) Union Leader was "probably the worst newspaper in America" and was a paper run "by paranoids for paranoids," three of the paper's eight editors and 24 of the other 325 employees sued for libel. The judge dismissed the suit because of lack of identification.<sup>22</sup>

With small and well defined groups, though, the results can be different. In a 2002 suit resulting from a televised campaign ad, the N.C. Court of Appeals held that a reference to "Dan Boyce's law firm" defamed not only state attorney general candidate R. Daniel Boyce and his firm, Boyce & Isley, but also each of the individual attorneys who were part of the firm. "The fact that the advertisement did not specifically name each present plaintiff does not bar their suit. . . . By claiming that 'Dan Boyce's law firm' had committed unethical business practices, defendants maligned each attorney in the firm, of which

21 Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938).

22 Loeb v. Globe Newspaper Co., 489 F. Supp. 481 (D. Mass. 1980). But see Fawcett Publ'ns, Inc. v. Morris, 377 P.2d 42 (Okla. 1962), cert. denied, 376 U.S. 513 (1964) (upholding a \$75,000 award to fullback Dennit Morris as the result of an article that said members of the 60-man Oklahoma University football team used an amphetamine nasal spray before games to make them more aggressive.).

19 Weinstein v. Bullick, 827 F. Supp. 1193, 1199 (E.D. Pa. 1993).

20 Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1940).



there are only four,” the court concluded.<sup>23</sup>

The wording of the charge also can make a difference. To refer to “a member” of a group is less dangerous than saying “most members” or just the nebulous “members.” This point was underscored in 1996 when the N.C. Court of Appeals dismissed the defamation claims of nine individuals who owned or were employed at businesses located in the Colonial House business complex in Raeford. The nine had sued Hoke County and two county EMS officials because the officials allegedly had said “someone” at a restaurant in the Colonial House had AIDS. The statement subsequently appeared in the Fayetteville Observer-Times and Raeford News Journal and on WTVD 11 news. “Since the alleged statements referred only to ‘someone’ in a group of nine, they clearly do not refer to some, most or all of the group,” the court noted, dismissing the defamation claims because plaintiffs failed “to show that the alleged defamatory statements were ‘of and concerning’ them.”<sup>24</sup>

In reaching its decision, the Court of Appeals distinguished the facts of the 1996 case from one decided nearly 80 years earlier by the N.C. Supreme Court, which had resulted from a letter saying, “I note what you say about the jury standing eleven to one; this was due entirely to whiskey and the appeal made to their prejudice.” One of the unnamed 11 jurors accused of being swayed by whiskey and prejudice sued the letter writer and won \$1,500. According to the state Supreme Court, “It was as harmful to libel and slander the plaintiff collectively as one of the eleven jurors as it would have been to have libeled him individually.”<sup>25</sup> In explain-

ing why the Supreme Court precedent was inapplicable to the 1996 case, the Court of Appeals noted that in the earlier case “eleven of the jurors were accused of misconduct; so all of them had potential causes of action. In contrast, here the statements concern only one person in a group of nine.”<sup>26</sup>

## Defamatory content

As discussed above, defamatory content consists of words that damage an individual’s reputation. The N.C. Supreme Court has recognized three categories of libelous content: 1) libel *per se*, consisting of “obviously defamatory” publications; 2) “publications which are susceptible of two reasonable interpretations, one of which is defamatory and the other is not”; and 3) libel *per quod*, “publications which are not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances.”<sup>27</sup>

The last two categories recognized by the N.C. Supreme Court might seem rather frightening at first glance because they imply a journalist could be held liable for words she never suspected of being harmful or for a meaning she never intended to impart. Fortunately, the N.C. high court has imposed restrictions on the last two types of libel, making it difficult for plaintiffs to succeed in such cases. There are no reported N.C. cases in which a claim based on either libel *per quod* or libel resulting from a publication susceptible of two meanings succeeded.

In a case involving words that are susceptible of two meanings, the plaintiff must prove the “defamatory meaning was intended and was so understood by those to whom the

<sup>23</sup> Boyce & Isley, PLLC v. Cooper, 153 N.C.App. 25, 33, 568 S.E.2d 893, 900 (2002).

<sup>24</sup> Chapman v. Byrd, 124 N.C. App. 13, 17-18, 475 S.E.2d 734, 737-38 (1996).

<sup>25</sup> Carter v. King, 174 N.C. 549, 552-53, 94 S.E. 4 (1917).

<sup>26</sup> 124 N.C. App. at 16, 475 S.E.2d at 737.

<sup>27</sup> Flake v. Greensboro News Co., 212 N.C. at 785.

publication was made.”<sup>28</sup> In a 1985 case, a boutique claimed a cartoon in an advertising supplement had two meanings, one of which defamed the business. The cartoon pictured a cat saying, “Look what I got at Cathy’s Boutique . . . a designer flea collar!” The Court of Appeals saw only one meaning in the ad, one that was humorous and not defamatory.<sup>29</sup>

In cases of libel *per quod*, the plaintiff must prove the innuendo, that is, must prove the special circumstances that make a seemingly innocent statement defamatory. It is up to the judge to determine if the statement is capable of having a defamatory meaning. If so, then the jury determines whether the audience understood the defamatory implication or connotation. “The circumstances of the publication are pertinent, as well as the hearers’ knowledge of the facts which would influence their understanding of the words used.”<sup>30</sup> In addition, in cases of libel *per quod*, plaintiffs must prove special damages, that is, actual monetary loss as a result of the libel.<sup>31</sup>

The first category, libel *per se*, accounts for the vast majority of libel actions. It consists of statements that are harmful on their face. The reader or listener needs no additional information to understand the charge, nor is the meaning of the statement unclear or subject to interpretation.<sup>32</sup> “The general rule is that publications are to be taken in the sense which is most obvious and natural according to the ideas that they are calculated to convey to those who see them. . . . The question always is how would ordinary men

naturally understand the publication. . . . The fact that super-sensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein is not sufficient to make it libelous.”<sup>33</sup>

The N.C. Supreme Court has identified four specific types of libel *per se*: 1) accusing a person of having committed “an infamous crime”; 2) charging that a person has “an infectious disease”; 3) impeaching a person in his or her trade or profession; and 4) a catch-all category consisting of communication that “tends to subject one to ridicule, contempt, or disgrace.”<sup>34</sup> According to the state Supreme Court, “[I]t is not essential that the words should involve an imputation of crime, or otherwise impute the violation of some law, or moral turpitude, or immoral conduct.” Libel encompasses any message that tends “to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule or cause him to be shunned and avoided.”<sup>35</sup>

The first type of defamatory statement listed by the court — accusing a person of having committed an infamous crime — is one of the most common bases for libel suits. It includes reporting a person was charged with, arrested for or convicted of a serious criminal act.<sup>36</sup> However, in 1999, the Court of Appeals said that not every felony constitutes an “infamous crime” sufficient to meet the libel *per se* definition. An unsuccessful candidate for the Black Mountain Board of Aldermen sued a citizen who publicly accused the candidate of not living in the town

28 *Renwick v. News & Observer Publ’g Co.*, 310 N.C. 312, 317, 312 S.E.2d 405, *cert. denied*, 469 U.S. 858 (1984).

29 *Cathy’s Boutique, Inc. v. Winston Salem Joint Venture*, 72 N.C. App. 641, 325 S.E.2d 283 (1985).

30 *Tyson v. L’Eggs Prods., Inc.*, 84 N.C. App. 1, 13, 351 S.E.2d 834 (1987).

31 See *Jolly v. Academy Collection Serv., Inc.*, 400 F. Supp. 2d 851, 863–64 (M.D.N.C. 2005); *Flake v. Greensboro News Co.*, 212 N.C. at 785.

32 *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 28, 588 S.E.2d 20, 27 (2003).

33 *Flake*, 212 N.C. at 786.

34 *Id.* at 787.

35 *Id.* at 786.

36 See, e.g., *Woody v. Catawba Valley Broad. Co.*, 272 N.C. 459, 158 S.E.2d 578 (1968); *Greer v. Skyway Broad. Co.*, 256 N.C. 382, 124 S.E.2d 98 (1962); *Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67 (1962); *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775 (1891); *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 291 S.E.2d 852 (1982); *Walters v. Sanford Herald, Inc.*, 31 N.C. App. 233, 228 S.E.2d 766 (1976).

when he filed to run for office. Because it is a Class I felony “to swear falsely with respect to any matter pertaining to any primary or election,”<sup>37</sup> the plaintiff contended the accusation constituted libel *per se*. Noting that throwing rocks at railroad cars, offering prizes of more than \$50 for beach bingo games and taking polluted shellfish at night are also Class I felonies, the appellate court disagreed. “[I]t cannot be seriously contended that this particular felony carries with it the infamy accorded to those such as murder and treason,” the court said in determining that at most the accusation could be libel *per quod*.<sup>38</sup> The plaintiff could not win on a *per quod* claim either, though, since the court held that loss of an election does not constitute special damages.<sup>39</sup>

Because North Carolina, as well as other states, deemed sodomy a felony,<sup>40</sup> individuals falsely labeled homosexuals sometimes claimed that allegation constituted libel *per se* because it accused them of a crime. In a 1994 slander case, the N.C. Court of Appeals said that calling someone “gay and bisexual” did not constitute accusing a person of “a crime or offense involving moral turpitude,” one of the three types of slander *per se*.<sup>41</sup> Referring to the decisions of other courts in other states, the state appeals court said, “[T]he label of ‘gay’ or ‘bisexual’ does not carry with it an automatic reference to any particular sexual activity; indeed, . . . it does not necessarily connote sexual activity at all, but rather

inclination or preference.”<sup>42</sup> While this was a slander, not a libel, case, it is reasonable to assume that the Court of Appeals would have reached a similar decision in a libel *per se* case based on the “infamous crime” category.

The second category listed by the court — charging a person with having an infectious disease — reflects societal views of an earlier era when smallpox, diphtheria, tuberculosis and other communicable diseases were leading causes of death. Today an accusation of this sort seldom is the basis for a libel action, but journalists need to be very careful about identifying an individual as having AIDS or some other sexually transmitted disease. In a 1912 N.C. Supreme Court slander case involving the “infectious disease” category, the court ruled it was slander *per se* to say someone had “a loathsome venereal disease.”<sup>43</sup>

Statements tending to harm a person’s occupational or professional reputation are another common basis for libel suits. Allegations of incompetence, unethical behavior, lack of integrity or occupational crime are all actionable. In the 2002 campaign ad case mentioned above in the section on identification, the N.C. Court of Appeals found the following content “directly maligned plaintiffs in their profession by accusing them of unscrupulous and avaricious billing practices”<sup>44</sup>:

I’m Roy Cooper, candidate for Attorney General, and I sponsored this ad.

....

Dan Boyce-his law firm sued the state, charging \$28,000 an hour in lawyer fees to the taxpayers.

The Judge said it shocks the conscience. Dan Boyce’s law firm wanted more than a police officer’s salary for each hour’s work.

37 N.C. GEN. STAT. §163-275 (4) (2005).

38 *Aycock v. Padgett*, 131 N.C. App. 164, 167, 516 S.E.2d 907, 909-10 (1999).

39 *Id.* at 168.

40 N.C. GEN. STAT. § 14-177 (2005). *But see* *State v. Whiteley* 172 N.C. App. 772, 616 S.E.2d 576 (2005), (limiting applicability of the statute in light of *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L.Ed.2d 508 (2003))

41 *Donovan v. Hunter*, 114 N.C. App. 524, 528, 442 S.E.2d 572, 575 (1994) (quoting *Williams v. Freight Lines*, 10 N.C. App. 384, 388, 179 S.E.2d 319, 322 (1971)). The other two types of slander *per se* are impeaching a person in his or her trade or profession and imputing to a person a loathsome disease. *Id.*

42 114 N.C. App. at 531, 442 S.E.2d at 577.

43 *Hamilton v. Nance*, 159 N.C. 56, 74 S.E. 627 (1912).

44 *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 32, 568 S.E.2d 893, 899 (2002).

Dan Boyce, wrong for Attorney General.<sup>45</sup>

In 1970 a court ruled it was libelous for Sports Illustrated to report that Neil Johnston, an assistant basketball coach at Wake Forest University and former NBA player, “was at one time during his career as a professional player destroyed psychologically, practically run out of organized basketball, and playing so ludicrously that the players on the bench were laughing.” According to the court, “It seems that this would tend to subject him to ridicule, contempt and/or disgrace; and, since the plaintiff is presently an assistant basketball coach at Wake Forest University, this might also tend to impeach him in his trade or profession.”<sup>46</sup> In 2005, a dispute over a billboard resulted in the N.C. Court of Appeals upholding a jury’s decision that calling one of the plaintiffs a “lease jumper,” “bitch” and “billboard whore,” and accusing her of “unprofessional, unethical and despicable” actions constituted libel.<sup>47</sup>

Even though it is difficult for a public official to win a libel suit because of the constitutional fault requirement (discussed below), accusing a government employee of corruption, dereliction of duty or incompetence can result in a libel suit. In North Carolina, such cases have resulted from an editorial accusing a sheriff of having “openly lied to the public” when he denied having sex with a jail inmate’s girlfriend;<sup>48</sup> letters to state officials and news media accusing county election officials of election fraud;<sup>49</sup> a report that an assistant district attorney was fired for incompetence;<sup>50</sup>

allegations that a deputy sheriff may have violated federal law and been involved in a conspiracy in connection with the fatal shooting of a burglary suspect;<sup>51</sup> and, in 1904, an article in The News & Observer charging the director of the state prison with illegally profiting from the state prison’s purchase of over-priced horses and mules.<sup>52</sup>

The N.C. Supreme Court’s fourth catchall category of libelous statements can include charging someone with immoral, bizarre or socially unacceptable behavior; saying a person is of bad character or lacks personal integrity; suggesting a person engages in deviant sexual conduct; or accusing a person of holding radical political beliefs or being associated with generally discreditable organizations, such as the Nazi Party or Ku Klux Klan. In 1969 the N.C. Court of Appeals ruled it was libelous for the Winston-Salem Journal to erroneously report that a woman’s husband divorced her for adultery.<sup>53</sup> Three decades earlier, the N.C. Supreme Court held that an article in The State magazine asserting that a woman’s home was unsanitary and her manner of living indecent because of the numerous dogs she kept could be considered defamatory.<sup>54</sup>

However, not every statement that upsets or embarrasses a person is defamatory. In the 1994 slander case discussed above, the Court of Appeals said, “[A]s North Carolina progresses through the mid 1990’s, we are unable to rule the bare allegation that an individual is ‘gay’ or ‘bisexual’ constitutes today an accusation which, as a matter of law and absent any ‘extrinsic, explanatory facts,’ . . . per se holds that individual up to ‘disgrace, ridicule or con-

45 153 N.C. App. at 27, 568 S.E.2d at 897.

46 Johnston v. Time, Inc., 321 F. Supp. 837, 849 (M.D.N.C. 1970), *aff’d in part, vacated in part*, 448 F.2d 378 (4th Cir. 1971).

47 Beroth Oil Co. v. Whitehart, 173 N.C. App. 89, 100-01, 618 S.E.2d 739, 747 (2005), *cert. denied*, 633 S.E.2d 674 (2006). See also Bell v. Simmons, 247 N.C. 488, 495, 101 S.E.2d 383 (1958); Badame v. Lampke, 242 N.C. 755, 757, 89 S.E.2d 466 (1955); Lay v. Gazette Publ’g Co., 209 N.C. 134, 137, 183 S.E.2d 416 (1936).

48 Proffitt v. Greensboro News & Record, Inc., 91 N.C. App. 218, 371 S.E.2d 292 (1988).

49 Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962).

50 Clark v. Brown, 99 N.C. App. 255, 393 S.E.2d 134, *cert. denied*,

327 N.C. 426, 395 S.E.2d 675 (1990).

51 Cline v. Brown, 24 N.C. App. 209, 210 S.E.2d 446 (1974), *cert. denied*, 286 N.C. 412, 211 S.E.2d 793 (1975).

52 Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

53 Littlejohn v. Piedmont Publ’g Co., 7 N.C. App. 1, 171 S.E.2d 227 (1969).

54 Harrell v. Goerch, 209 N.C. 741, 184 S.E. 489 (1936).



tempt.”<sup>55</sup> Similarly, in one of the state’s classic cases, decided in 1938, the N.C. Supreme Court said it was not defamatory to incorrectly identify a woman as a member of a vaudeville troupe. “To do so would in effect hold that such type of entertainment is disreputable and those connected therewith are persons of ill-repute. This would constitute an unwarranted reflection upon and condemnation of many young ladies who earn their living in this manner.”<sup>56</sup> In a 1987 case, the Court of Appeals ruled a letter sent to the media attacking two women who had complained about working conditions at a chicken processing plant was neither libel *per se* nor libel *per quod*. The letter called the women’s complaints “a bunch of hog wash” and added, “The two ladies . . . have always been out of work for numerous reasons. . . . We are not saying there is nothing wrong with these ladies, we definitely think there is.”<sup>57</sup>

Businesses also can sue for libel. Recall that in the campaign ad case discussed above, the law firm itself was a plaintiff along with the individual attorneys.<sup>58</sup> Charging that a business engages in deceptive practices; has ties to organized crime; is financially unstable or insolvent; intentionally sells dangerous or shoddy products; mistreats its employees; violates labor, tax, health and safety or other laws; or is otherwise disreputable can all damage a corporate reputation. In 1990 Ellis Brokerage Co. won a libel suit against another company that had sent letters to El-

lis customers accusing Ellis of sending out unauthorized price lists. The N.C. Supreme Court held that the disputed passage, in the context of the entire letter, “can only be read to mean that Ellis Brokerage Company, acting in its capacity as broker for Northern Star, did an unauthorized act.” This, said the court, “impeaches Ellis Brokerage in its trade as a food broker.”<sup>59</sup> An attack on a product, as opposed to the business producing the product, is known as product disparagement or trade libel. In a product disparagement suit, the plaintiff must prove all the usual elements of the offense, plus monetary loss resulting from the defamation.<sup>60</sup> Product disparagement suits against the media are rare; they usually result from battles between competitors and involve other issues, such as unfair competition and deceptive trade practices.<sup>61</sup>

## Falsity

In 1986 the U.S. Supreme Court ruled that the First Amendment requires a libel plaintiff to prove the falsity of the defamatory statement if the statement involves a matter of public concern.<sup>62</sup> The case in which the Court established the falsity requirement, *Philadelphia Newspapers v. Hepps*, involved a charge that plaintiffs were linked to organized crime, but the Court did not define what constitutes “a matter of public concern,” simply asserting that crime certainly qualified. In a subsequent case, the Supreme Court said that a confidential credit report did not constitute a matter of public concern.<sup>63</sup> Certainly most of what fills a daily newspaper or an evening

55 *Donovan v. Hunter*, 114 N.C. App. at 538, 442 S.E.2d at 580 (quoting *Badame v. Lampke*, 242 N.C. at 757, 89 S.E.2d at 467, and *West v. King’s Dept. Store, Inc.*, 321 N.C. 698, 703, 365 S.E.2d 621, 624 (1998)). Plaintiffs had argued that the N.C. Supreme Court created a new category of slander *per se* akin to the fourth category of libel *per se* in *West*. The court of appeals flatly rejected that contention but nonetheless, “assuming arguendo that a new class of slander *per se* was created in *West*,” went on to conclude that such a category was inapplicable here. 114 N.C. App. at 536, 442 S.E.2d at 580.

56 *Flake v. Greensboro News Co.*, 212 N.C. at 789.

57 *Tyson v. L’Eggs Prods., Inc.*, 84 N.C. App. 1, 11-14, 351 S.E.2d 834 (1987). See also *Robinson v. Nationwide Ins. Co.*, 273 N.C. 391, 159 S.E.2d 896 (1968).

58 *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 568 S.E.2d 893 (2002).

59 *Ellis v. Northern Star Co.*, 326 N.C. 219, 224, 388 S.E.2d 127 (1990).

60 See *Am. Rockwool, Inc. v. Owens-Corning Fiberglas Corp.*, 640 F. Supp. 1411 (E.D.N.C. 1986).

61 See, e.g., *id.*; *Pinehurst, Inc. v. O’Leary Bros. Realty, Inc.*, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

62 *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

63 *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

news broadcast would qualify as matters of public concern, but the Court's failure to define the term raises many questions. For example, would gossip column items, especially about private individuals, qualify as "matters of public concern"? What about intimate details about prominent individuals?

In one of the more thorough discussions of what constitutes a matter of public concern, the N.C. Court of Appeals in 2005 said that the determination requires examining "the content, form, and context" of the speech.<sup>64</sup> The court concluded that a radio broadcast blaming a construction company for the appearance of two sinkholes in the parking lot of a Hickory restaurant after a heavy rainfall addressed a matter of public concern. The court first cited widespread national and even international news coverage of the sinkholes. "The record reveals that, more than merely being newsworthy, the sinkholes were a matter of public study: two days after they developed, the sinkholes were discussed at the Western Piedmont Council of Government which was attended by a number of influential people, including members of North Carolina's Department of Transportation; North Carolina State University and University of North Carolina at Charlotte began teaching on the sinkhole subject; and that the Hickory Visitors Bureau received calls from as far away as Michigan asking how to find the sinkholes. Based on this record and in light of the clear safety ramifications the sinkholes posed to the community of Hickory, we find that determining the cause of the sinkholes was a matter of "public concern."<sup>65</sup>

In most cases, whether the plaintiff must

prove falsity or the defendant must prove truth is not a factor in the outcome of a libel suit. However, in those cases in which truth is hard to prove, the *Hepps* rule can be of real benefit to the press. For example, in the *Hepps* case, the Philadelphia Inquirer had relied on confidential sources for its story alleging that Hepps and his company were linked to organized crime. Proving the truth of the allegation would have required the Inquirer to reveal the identities of those sources. The Supreme Court acknowledged that sometimes plaintiffs would be unable to meet their burden of proof even though the defamatory statements were false. The Court felt, however, that to require defendants to bear the burden of proving truth would have a "chilling effect" on the discussion of matters of public concern.<sup>66</sup>

Even before the U.S. Supreme Court ruled that the First Amendment requires plaintiffs to prove falsity in most libel suits, the N.C. Court of Appeals had placed that burden of proof on those bringing libel actions. In a 1979 libel case brought by a private person plaintiff, the court said, "If the plaintiff's case is to succeed, he must show that the factual statements concerning him and his actions were false."<sup>67</sup> In 1983 the Court of Appeals again ruled a private plaintiff must prove falsity in his libel action against a newspaper. The court did not explicitly restrict the requirement to reports involving matters of public concern although both cases involved articles that would fall into that category.<sup>68</sup>

## Injury

As discussed above, in some types of libel

64 *Neill Grading & Const. Co., Inc. v. Lingafelt*, 168 N.C. App. 36, 45, 606 S.E.2d 734, 740 (2005) (quoting *Corum v. Univ. of North Carolina*, 330 N.C. 761, 775, 413 S.E.2d 276, 285 *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, 506 U.S. 985 (1992)).

65 168 N.C. App. at 45-46.

66 475 U.S. at 776-77.

67 *Brown v. Boney*, 41 N.C. App. 636, 648, 255 S.E.2d 784, *cert. denied*, 298 N.C. 294, 259 S.E.2d 910 (1979).

68 *Cochran v. Piedmont Publ'g Co.*, 62 N.C. App. 548, 549, 302 S.E.2d 903, *cert. denied*, 309 N.C. 819, 310 S.E.2d 348 (1983), *cert. denied*, 469 U.S. 816 (1984).

suits — those involving libel *per quod* and trade libel — plaintiffs must prove monetary loss in order to win. In most libel suits, however, injury need not be tangible. The more common types of harm libel plaintiffs allege include “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.”<sup>69</sup> The U.S. Supreme Court has said a libel plaintiff must prove injury to win, unless he or she is able to prove actual malice, which is discussed below.

Generally, the injury requirement is not a key issue in libel suits. In most cases, it is not difficult for a plaintiff to convince a court that a news article accusing him of committing a crime, taking a bribe or engaging in unethical business practices hurt his reputation. However, it is important to remember that mere hurt feelings or embarrassment are not enough for a libel suit to succeed. As the N.C. Supreme Court said in 1938, “The law seeks to compensate for damage to the person, the reputation or the property of an individual. It cannot and does not undertake to compensate for mere hurt or embarrassment alone.”<sup>70</sup> The type and degree of harm the plaintiff suffered are related to the damages ultimately awarded the successful libel plaintiff. Damages are discussed briefly below.

## Fault

Fault is the most complicated of the elements a libel plaintiff must prove. Only an overview of the fault requirement can be provided here.

Until 1964, when the U.S. Supreme Court issued its landmark opinion in *New York Times v. Sullivan*,<sup>71</sup> libel law in most states was

based on the concept of strict liability. Strict liability meant that if a newspaper or broadcast station disseminated a defamatory story, it was responsible for the damage done to the subject’s reputation regardless of whether the journalists involved were careful and responsible in their reporting. Application of this strict liability standard can be seen in early North Carolina cases in which the courts held that when a statement was libelous *per se*, both malice and falsity were presumed.<sup>72</sup>

In *Sullivan*, the Supreme Court said the rule of strict liability offended the First Amendment, at least when the libel plaintiffs were public officials. The Court said a public official couldn’t win a libel action unless he or she demonstrated “with convincing clarity” that the defamatory statement was published with knowledge it was false or with reckless disregard for the truth, a fault level the Court termed “actual malice.”<sup>73</sup> A few years later, the Court extended the actual malice requirement to public figures<sup>74</sup> and candidates for elected office.<sup>75</sup> In 1974 the Court said that private person plaintiffs also would have to prove at least some degree of fault to win their libel suits.<sup>76</sup> In North Carolina, the level of fault that must be proved by private person plaintiffs — those who are neither public officials nor public figures — is negligence. However, even private person plaintiffs must prove actual malice to collect punitive damages if they were defamed in a report that involved a matter of public interest.<sup>77</sup> Because of the fault requirement, it is especially difficult for a public official or public figure to win a libel suit.

72 See, e.g., *Ramsey v. Cheek*, 109 N.C. 270, 273, 13 S.E. 775 (1891).

73 376 U.S. at 279-80, 285-86.

74 *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967).

75 *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

76 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

77 *Id.* at 349; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).

69 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

70 *Flake v. Greensboro News Co.*, 212 N.C. at 788.

71 376 U.S. 254 (1964).

## Who is a public official?

All elected government officials are subject to the actual malice requirement, but not every non-elected government employee qualifies as a public official. The U.S. Supreme Court said the public official category includes “at the very least . . . those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”<sup>78</sup> Clearly the definition applies to high-level appointed officials, such as heads of governmental agencies and departments, public school superintendents, the president of the University of North Carolina and the various campus chancellors. Thus, the N.C. Court of Appeals had no trouble deciding that Knightdale’s town manager and the deputy county manager/ finance officer of Moore County were public officials in their defamation suits.<sup>79</sup> It is also clear that the definition does not include relatively low-level employees with no policy-making responsibility, such as receptionists, maintenance workers and highway construction workers. In between these two extremes are thousands of government workers not so easily categorized.

In deciding whether an individual is a public official, courts ask if the person has the power to set public policy or make governmental decisions; has control over the expenditure of public funds; is directly responsible for public health, safety and welfare; exercises power or control over citizens; or has high public visibility. Thus most law enforcement officials are considered public officials because of their responsibility for public safety and the power they can exert over an individual’s liberty and property. In 1974 the N.C. Court of Appeals, in holding that

a deputy sheriff qualified as a public official, noted that state law specifically provides for the appointment of deputies. “The deputy is the representative of the sheriff in his official capacity. He is a public officer whose authority and duties are regulated and prescribed by law. . . . [T]hough the office of deputy sheriff may be a comparatively low ranking one in the hierarchy of government, nevertheless, if the deputy’s office be abused, it has great potential for social harm and thus invites independent interest in the qualifications and performance of the person or persons who hold the position.”<sup>80</sup> Relying on that decision, the N.C. Court of Appeals also ruled a uniformed taxicab inspector for the City of Charlotte<sup>81</sup> and an IRS agent<sup>82</sup> were public officials. In the latter case, the court said, “Insofar as the average taxpayer is concerned, the Internal Revenue Service agent is the federal government for tax assessment purposes. No constitutional difference exists between ‘police work’ entailed in the assessment and collection of taxes and that involved in the enforcement of other governmental laws.”<sup>83</sup>

In *New York Times v. Sullivan*, the Supreme Court said public officials must prove actual malice when the defamatory statements relate to their “official conduct.” Courts have interpreted the “official conduct” requirement very liberally and have found that “anything which might touch on an official’s fitness for office” is subject to the actual malice rule.<sup>84</sup> Accusations of “dishonesty, malfeasance, or improper motivation”<sup>85</sup> and criminal activity<sup>86</sup> have been found to relate to a person’s fitness for office and thus meet

<sup>78</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

<sup>79</sup> *Griffin v. Holden*, N.C. App. , 636 S.E.2d 298 (2006); *Varner v. Bryan*, 113 N.C. App. 697, 440 S.E.2d 295 (1994).

<sup>80</sup> *Cline v. Brown*, 24 N.C. App. 209, 215, 210 S.E.2d 446 (1974), cert. denied, 286 N.C. 412, 211 S.E.2d 793 (1975).

<sup>81</sup> *Dellinger v. Belk*, 34 N.C. App. 488, 238 S.E.2d 788 (1977), cert. denied, 294 N.C. 182, 241 S.E.2d 517 (1978).

<sup>82</sup> *Angel v. Ward*, 43 N.C. App. 288, 258 S.E.2d 788 (1979).

<sup>83</sup> 43 N.C. App. at 292-93.

<sup>84</sup> *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

<sup>85</sup> *Id.*

<sup>86</sup> See *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971).



the official conduct requirement.

## Who is a public figure?

The Supreme Court has identified two types of public figures, both of whom must prove actual malice in libel suits. The **all-purpose public figure** is an individual with widespread fame or notoriety or special prominence in society, one who has “persuasive power and influence” or occupies a position of continuing news value.<sup>87</sup> One court has described the all-purpose public figure as “a well-known ‘celebrity,’ his name a ‘household word.’”<sup>88</sup> Johnny Carson, Carol Burnett, William F. Buckley Jr., Wayne Newton and Ralph Nader have been found to be all-purpose public figures. Occasionally courts have found corporations to be all-purpose public figures, but only when they meet the requirement of special prominence or persuasive power and influence.<sup>89</sup>

An individual can be deemed an all-purpose public figure on a local level, although this is rare. For example, in 1979 the Kansas Supreme Court ruled that a prominent attorney was a local all-purpose public figure. The man had practiced law in the county for 32 years, including eight as county attorney, had served as special counsel to the county commissioners during a controversial construction project and, according to the court, “was a prominent participant in numerous social activities and served as an officer and representative for many professional, fraternal and social activities.”<sup>90</sup>

The second category, known as **limited-purpose or vortex public figures**, is much

more common in libel suits. The U.S. Supreme Court has defined limited-purpose public figures as people who “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”<sup>91</sup> Three critical elements in this definition must be present for an individual to be classified a limited-purpose public figure. First, the allegedly defamatory statements must relate to a public controversy. The D.C. Court of Appeals has defined a public controversy as a “real dispute” over an issue affecting a segment of the general public, the resolution of which will have “foreseeable and substantial ramifications for nonparticipants.”<sup>92</sup>

Second, the libel plaintiff must have voluntarily injected himself or herself into the debate over the public controversy. Although the Supreme Court said it might be possible for a person to become an involuntary public figure,<sup>93</sup> the Court has never found anyone to fit that category. In a few cases, lower courts have found plaintiffs to be involuntary public figures, but this has been very rare, and journalists should not expect the involuntary public figure category to provide them with the protection of the constitutional actual malice rule.

Third, the plaintiff must have entered into the public controversy in an effort to affect the outcome or influence public opinion. The plaintiff’s involvement in the public controversy must precede the defamatory publication or broadcast. A news medium cannot defame an individual and then when that individual steps forth to defend himself — perhaps through a news conference or interviews with journalists — contend that the plaintiff has voluntarily sought to affect the

87 *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345, 351-52.

88 *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1294 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980).

89 *See Reliance Ins. Co. v. Barron’s*, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977).

90 *Steere v. Cupp*, 602 P.2d 1267, 1273 (Kan. 1979).

91 *Gertz*, 418 U.S. at 345.

92 *Waldbaum*, 627 F.2d at 1296-97.

93 *Gertz*, 418 U.S. at 345.

resolution of the controversy.<sup>94</sup>

Determining whether an individual qualifies as a limited-purpose public figure is not easy, and courts frequently disagree. Just because a person has become the subject of news coverage or has a well-known name does not mean that person will be considered a public figure. Perhaps the best example of this is a 1976 case involving the ex-wife of Russell Firestone, heir to the Firestone tire fortune. Mary Alice Firestone sued Time after the magazine incorrectly reported that Russell was granted a divorce on the grounds of “extreme cruelty and adultery.” Mrs. Firestone was a prominent member of Palm Beach society, whose divorce, according to the Florida Supreme Court, was a “veritable *cause celebre* in social circles across the country.”<sup>95</sup> Nonetheless, the U.S. Supreme Court said Mrs. Firestone was not a public figure. First, her divorce case was not a public controversy but a private matter. Second, Mrs. Firestone’s involvement was not deemed voluntary because she had no choice but to go to court to dissolve her marriage, and third, Mrs. Firestone’s press conferences were held to “satisfy inquiring reporters” and “should have had no effect upon the merits of the legal dispute . . . or the outcome of (the divorce) trial.”<sup>96</sup>

In contrast, Richard Jewell, the security guard who went from hero to suspect in the 1996 bombing at Centennial Olympic Park in Atlanta, was found to be a limited-purpose public figure because of his many interviews and public appearances immediately after the bombing. Jewell, who was ultimately cleared of suspicion in the bombing, sued the Atlanta Journal-Constitution for its coverage of him. In reaching its public figure decision, the Georgia Court of Appeals noted: “While we can envision situations in which news cover-

age alone would be insufficient to convert Jewell from private citizen to public figure, we agree with the trial court that Jewell’s actions show that he voluntarily assumed a position of influence in the controversy. . . . The fact is that Jewell was prominent enough to require the assistance of a media handler to field press inquiries and coordinate his media appearances.”<sup>97</sup>

A person does not become a limited-purpose public figure merely by being arrested for, charged with or even convicted of a crime. While crime and the functioning of the law enforcement and judicial systems may qualify as public controversies, criminal suspects typically do not voluntarily seek public attention. The Supreme Court has expressly rejected the “contention . . . that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction.”<sup>98</sup>

Heads of businesses or corporations may or may not be limited-purpose public figures, depending on the subject of the defamatory report and the business leader’s involvement in that subject. For example, in 1987 the D.C. Court of Appeals ruled that William Tavoulareas was a limited-purpose public figure for purposes of his libel suit against the Washington Post not because he was the president of Mobil Oil but because he had voluntarily injected himself into the debate over regulation and reform of the U.S. oil industry through his own controversial speeches and Mobil “advertorials” in numerous publications. Thus when Tavoulareas sued the Post because of a story alleging he set up his son Peter as a partner in a shipping company

94 See *Hutchinson v. Proxmire*, 443 U.S. 111, 134-36 (1979).

95 *Firestone v. Time, Inc.*, 271 So.2d 745, 751 (Fla. 1972).

96 *Time, Inc. v. Firestone*, 424 U.S. 448, 454-55 n. 3 (1976).

97 *Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808, 818, 555 S.E.2d 175, 184 (2001), *cert. denied*, 537 U.S. 814 (2002).

98 *Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157, 168 (1979). See also *McKinney v. Avery Journal*, 99 N.C. App. 532, 393 S.E.2d 295, *cert. denied*, 327 N.C. 636, 399 S.E.2d 123 (1990).

that did millions of dollars of business with Mobil, the court ruled he had to prove actual malice.<sup>99</sup> In contrast, the Minnesota Supreme Court ruled that entrepreneur Thomas Jadwin did not become a public figure simply by heavily advertising and promoting a double tax-exempt, no-load bond mutual fund he developed because soliciting media attention for such an offering was a normal business practice.<sup>100</sup>

Nor is a corporation or business, even one that advertises heavily, automatically a public figure. For example, in 1990 a federal appeals court ruled that neither Blue Cross/Blue Shield nor its competitor U.S. Healthcare, the largest HMO in the Philadelphia area, was a limited public figure. In approximately a six-month period, Blue Cross/Blue Shield had spent \$2.175 million on direct mail, radio, television and print ads, while U.S. Healthcare had spent \$1.255 million on its ad campaign in southeastern Pennsylvania. It was those comparative ad campaigns that resulted in the two “giants of the health care industry in the Delaware Valley” suing one another for libel and other things. Nonetheless, the court ruled the two companies were not public figures because they “have acted primarily to generate revenue by influencing customers, not to resolve ‘the issues involved.’”<sup>101</sup> Similarly, the Oregon Supreme Court ruled that the Bank of Oregon was not a public figure in its lawsuit against the Willamette Week newspaper. “Merely opening one’s doors to the public, offering stock for public sale, advertising, etc., even if considered a thrusting of one’s self into matters of public interest, is not sufficient to establish a public figure.”<sup>102</sup> On

the other hand, courts have said that corporations that engage in unusual or unconventional advertising,<sup>103</sup> are heavily regulated by the government,<sup>104</sup> and/or enjoy a high level of public prominence can be public figures.<sup>105</sup>

In only a few N.C. cases have courts found libel plaintiffs to be public figures. In one case, a physician who performed in vitro fertilizations and a fertility clinic were considered limited-purpose public figures in a libel suit that resulted from a newspaper article about infertility treatments and the medical training needed to perform such procedures. The plaintiffs did not sue *The Charlotte Observer*, which published the story, but instead sued several infertility specialists who were quoted in the article regarding the plaintiff-physician’s training and expertise as an infertility specialist.<sup>106</sup> A lawyer who was actively seeking appointment as the U.S. Attorney for the Middle District of North Carolina was labeled a public figure without any discussion in a case resulting from letters written to President Reagan opposing the appointment.<sup>107</sup> In 1980 John J. Ryan, the former vice president and general manager for North Carolina for Southern Bell Telephone Co., was deemed a public figure when he sued the author and publisher of a book that accused him of extorting money from Southern Bell executives for political campaign contributions and filing “false vouchers.”<sup>108</sup> And in a

99 *Tavoulareas v. Piro*, 817 F.2d 762, 773 (D.C. Cir.), *cert denied*, 484 U.S. 870 (1987). *See also* *Silvester v. ABC*, 839 F.2d 1491 (11th Cir. 1988).

100 *Jadwin v. Minneapolis Star*, 367 N.W.2d 476, 486 (Minn. 1985).

101 *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 939 (3d Cir. 1990).

102 *Bank of Oregon v. Indep. News*, 693 P.2d 35, 42, *reh. denied*, 696 P.2d 1095 (Ore.), *cert. denied*, 474 U.S. 826 (1985).

103 *See, e.g., Steaks Unlimited v. Deaner*, 623 F.2d 264 (3d Cir. 1980).

104 *See, e.g., Harris Nursing Home, Inc. v. Narragansett Television, Inc.*, 24 Media L. Rep. (BNA) 1671 (R.I. 1995); *Beech Aircraft v. National Aviation Underwriters*, 11 Media L. Rep. (BNA) 1401 (D. Kan. 1984).

105 *See, e.g., Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1329 (5th Cir. 1993).

106 *Gaunt v. Pittaway*, 135 N.C.App. 442, 520 S.E.2d 603 (N.C. App. 1999). Despite the plaintiffs’ objections to being deemed public figures, the N.C. Court of Appeals did not discuss that issue because plaintiffs committed a procedural error.

107 *Smith v. McDonald*, 713 F. Supp. 871 (M.D.N.C. 1988), *rev’d* 895 F.2d 147 (4th Cir. 1990), *cert. denied*, 498 U.S. 814 (1990). The reversal of the trial court’s decision had nothing to do with Smith’s status as a public figure but was because McDonald’s letters to the President were absolutely privileged.

108 *Ryan v. Brooks*, 634 F.2d 726, 728 n.2 (4th Cir. 1980).

1976 case, a man who led an effort to change certain Interstate Commerce Commission rules conceded he was a public figure for purposes of his libel suit against a truckers magazine that accused him of diverting legal defense fund donations to his own personal use.<sup>109</sup>

**Passage of time.** An issue that occasionally arises in libel suits is whether a public figure retains that status over time, even if he or she has returned to relative anonymity.<sup>110</sup> Most courts that have considered the question have indicated that once a person becomes a public figure for a certain issue, he or she retains public status for discussions of that issue. For example, the 4th Circuit U.S. Court of Appeals reached just such a conclusion in reviewing the Neil Johnston case, discussed above. The trial court had held that Johnston, who played in the NBA in the 1950s, had lost his public figure status by 1968, when *Sports Illustrated* ran the allegedly libelous article. The appellate court disagreed. “[M]ere passage of time will not necessarily insulate from the application of (the actual malice requirement) publications relating to the past public conduct of a then ‘public figure.’ No rule of repose exists to inhibit speech relating to the public career of a public figure so long as newsworthiness and public interest attach to events in such public career.”<sup>111</sup>

## What is actual malice?

To win a libel suit, a public official or public figure must prove actual malice, *i.e.*, that the libelous material was published or broad-

cast with knowledge of its falsity or reckless disregard for the truth. Knowledge of falsity consists of purposely and knowingly publishing lies. This type of actual malice is seldom at issue in libel suits against the media.

In a well-publicized 1991 case, the U.S. Supreme Court held that altering quotes does not necessarily constitute knowing falsification. Psychoanalyst Jeffrey Masson sued *The New Yorker* magazine, author Janet Malcolm and book publisher Alfred A. Knopf, charging Malcolm attributed fabricated quotations to him, thereby injuring his reputation. Masson contended that altering a direct quote, except to correct grammar or syntax, constituted knowing falsification. The Court, however, rejected that stringent interpretation, taking note of the difficulties journalists encounter “in the task of attempting a reconstruction of the speaker’s statement.” The Court concluded “that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement.” In other words, if changing the speaker’s words gives a different meaning to his or her statements, knowingly altering direct quotations can constitute actual malice.<sup>112</sup>

In January 2007, the N.C. Court of Appeals relied on the Masson case to rule in favor of the Durham Herald-Sun in a libel suit brought by former Durham County Commissioner Joe Bowser.<sup>113</sup> The article, based on a letter written to the County Commission, stated: “In the letter, Assistant Health Director Gayle Harris says Bowser attempted to pressure her to help his friend Lois Murphy, a disgruntled county employee who has alleged mistreatment by County Manager

109 *Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

110 See *Wolston v. Reader’s Digest Ass’n.*, 443 U.S. 157, 166 n.7 (1979).

111 *Time, Inc. v. Johnston*, 448 F.2d at 381. See also *Street v. NBC*, 645 F.2d 1227 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981).

112 *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 514-17 (1991).

113 *Bowser v. Durham Herald Co.*, N.C. App. , S.E.2d , 2007 WL 3535 (Jan. 2, 2007).

Mike Ruffin.”<sup>114</sup> Bowser contended the paper was guilty of actual malice because the phrase “attempted to pressure” was not actually in Harris’ letter. Citing Masson, the N.C. Court of Appeals said the phrase “was a rational interpretation of the allegations contained in the letter.” Furthermore, the court noted that the phrase was not within quotation marks. “Thus, there was no attempt on the part of defendant to indicate that Harris actually made this statement.”<sup>115</sup>

Reckless disregard for the truth is more frequently at issue in libel suits than knowing falsification and more difficult to define. The U.S. Supreme Court has provided a number of definitions:

- 1) A high degree of awareness of probable falsity.<sup>116</sup>
- 2) Serious doubts as to the truth of the publication.<sup>117</sup>
- 3) Purposeful avoidance of the truth.<sup>118</sup>

It is important to note that carelessness or failure to follow standard journalistic procedures is not enough to constitute actual malice, nor is evidence of ill will, bad motives or intent to harm. As the N.C. Court of Appeals has said, “[P]ersonal hostility is not evidence of actual malice.”<sup>119</sup> The U.S. Supreme Court emphasized that even evidence of “extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers” was insufficient to prove actual malice.<sup>120</sup> However, evidence regarding motive or care taken in the preparation of a story can be used to bolster other

proof of actual malice, the Court said.<sup>121</sup>

In determining whether actual malice is present, courts generally consider two types of evidence: intrinsic or direct state-of-mind evidence, aimed at determining what the journalist thought and believed at the time the story was being produced; and extrinsic, indirect or circumstantial evidence, which relates to the circumstances surrounding production and publication of the libelous material. Because actual malice ultimately depends on the journalist’s state of mind, the U.S. Supreme Court has said libel plaintiffs may probe the minds of reporters and editors, questioning them about their thought processes as they worked on stories and about their conversations with editors, co-workers and sources.<sup>122</sup> Reporters can be forced to testify about their evaluations of the reliability of sources or information and why they did or didn’t use certain sources or information. Editors and co-workers can be called to give evidence about their conversations with the reporter who wrote the allegedly libelous story. Notes, drafts, tape recordings and outtakes can be used as evidence of what journalists thought and believed as they produced stories. Journalists must be careful about what they say and do in the course of researching and writing stories. Publicly expressing doubts about the veracity of a source or piece of information and then using that source or information in the story without further verification can be dangerous. Boasting that you’re “going to get” someone can come back to haunt you at a libel trial. Information in notes, drafts, tapes or outtakes that tends to contradict the libelous accusations, but which you did not include in the story, can become evidence of knowing or reckless falsification.

<sup>114</sup> *Id.* at \*1.

<sup>115</sup> *Id.* at \*2.

<sup>116</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

<sup>117</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

<sup>118</sup> *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989).

<sup>119</sup> *Griffin v. Holden*, N.C. App., 636 S.E.2d 298, 305 (2006). *See also Varner v. Bryan*, 113 N.C. App. 697, 704, 440 S.E.2d 295, 300 (1994).

<sup>120</sup> *Harte-Hanks Commc’ns*, 491 U.S. at 666 (quoting *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967)).

<sup>121</sup> *Id.* at 668.

<sup>122</sup> *Herbert v. Lando*, 441 U.S. 153 (1979).



Typically, direct state-of-mind evidence will be supplemented with indirect evidence. “Although courts must be careful not to place too much reliance on such factors, a plaintiff is entitled to prove the defendant’s state of mind through circumstantial evidence,” the U.S. Supreme Court said.<sup>123</sup> The circumstantial factors most commonly used to prove actual malice are 1) the sources used or not used in the compilation of the story; 2) the nature of the story itself — feature or breaking news — especially whether the reporter was working under deadline pressure; and 3) the inherent probability or believability of the defamatory charges themselves.

Using reliable sources is one of the best defenses a journalist can raise to charges of actual malice. For example, in the *Ryan* case discussed above, the court noted that author John Brooks “relied on two secondary sources which he had used in the past and which have an excellent reputation. He had no reason to doubt the accuracy of their accounts. . . . The reliability of the third source . . . is more questionable, but Brooks used nothing from it that was not also found in his other sources. . . . Clearly it would have been better journalistic practice to have verified the accuracy of these secondary sources. . . . But we cannot say that the failure to do so amounted to more than mere negligence.”<sup>124</sup>

A 1989 U.S. Supreme Court case demonstrated that using an unreliable source while ignoring other obvious sources can be evidence of reckless disregard for the truth. An unsuccessful candidate for municipal judge, Daniel Connaughton, sued the Hamilton (Ohio) Journal-News over a front-page story accusing him of using “dirty tricks” in his campaign. The story was based on the accusations of a woman with a criminal

record and a history of mental instability, who accused Connaughton of offering her and her sister jobs and a Florida vacation “in appreciation” for their help in discrediting the incumbent judge. Not only was the source questionable, but the paper also failed to verify the charges with the sister or even listen to tapes of conversations between Connaughton and the sisters, which Connaughton had provided the newspaper staff. Describing as “utterly bewildering” the paper’s failure to interview the sister, an obvious source to confirm or deny the allegations, the Court ruled the paper’s staff made a “deliberate decision not to acquire knowledge” that might have revealed the falsity of the charges and, therefore, was guilty of purposely avoiding the truth.<sup>125</sup>

In determining what constitutes reckless behavior, courts have also recognized the nature of the news business and the deadlines under which journalists often work. For example, in a pair of cases decided together in 1967, the Supreme Court recognized that an Associated Press story about the integration of Ole Miss “was news which required immediate dissemination.” In contrast, the Court said, a *Saturday Evening Post* story alleging that a college athletic director and a coach had conspired to fix a football game about a month prior to the publication “was in no sense ‘hot news.’” The magazine had time to check the allegations of its questionable source.<sup>126</sup>

In those cases, the Court also considered the inherent believability of the defamatory allegations. The AP story had accused retired Maj. Gen. Edwin Walker of taking command of a violent crowd and leading a charge against federal marshals at the University of Mississippi. According to the Court, the AP

123 *Harte-Hanks Commc’ns*, 491 U.S. at 668.

124 *Ryan v. Brooks*, 634 F.2d at 732-33.

125 *Harte-Hanks Commc’ns*, 491 U.S. at 682, 692.

126 *Curtis Publ’g Co. v. Butts*, 388 U.S. at 157-58.

reporter's dispatches, "with one minor exception, were internally consistent and would not have seemed unreasonable to one familiar with General Walker's prior publicized statements on the underlying controversy." The Court then quoted Walker's public statements, in which he opposed integration and urged defiance of court orders. In contrast, the Court noted The Saturday Evening Post staff failed to evaluate the believability of its game-fixing allegations by screening game films, determining whether game plans had been adjusted or consulting football experts.<sup>127</sup>

### What is negligence and who must prove it?

If a libel plaintiff is not a public official, a candidate for public office or a public figure, he or she is considered a private person for purposes of a libel suit. The U.S. Supreme Court has left it up to the states to determine what level of fault private person plaintiffs must prove, so long as they do not allow liability without proof of fault. In North Carolina private person plaintiffs must prove negligence, at least when the subject of the defamatory report is a matter of public concern.<sup>128</sup>

Generally, negligence means a failure to exercise ordinary or reasonable care. In deciding whether negligence occurred, some courts rely on professional standards, seeking to determine if defendants followed accepted journalistic practices in their investigation and verification of the information and sometimes allowing expert testimony on industry standards and procedures. Other courts use a "reasonable person" standard, which requires

the jury to decide how a reasonably prudent person would have acted under similar circumstances but does not focus on professional norms. The N.C. appellate courts, while holding in several cases that negligence is the applicable fault standard for private individuals, have not defined negligence; nor have they clearly indicated whether negligence is to be determined on the basis of professional norms or by applying a reasonable person standard. In 1982, however, a federal district court in North Carolina used a professional standards approach, holding that "normal publishing procedures" do not require reporters to investigate whether someone else might have the same name as a person arrested and charged with a crime.<sup>129</sup>

Generally, in determining whether journalists are guilty of negligence, courts consider the same factors they use in actual malice analysis: the sources used or not used, the existence of deadline pressure and the inherent probability of the information itself. A study of libel cases decided between 1974 and 1984 showed negligence is likely to be found when "there is a discrepancy between what a reporter says he was told by a source and what the source said he told the reporter," when a journalist makes little or no effort to contact the subject of the defamatory charges, when a story is based upon only one source or when information is not verified through official or reliable sources.<sup>130</sup> In other words, juries appear to place a great deal of emphasis on the use of proper sources, on accuracy in quoting or paraphrasing sources and on giving the person being attacked a chance to rebut the accusations. For example, in one of the few reported N.C. cases in which negligence was discussed, the Court of Appeals said it was not negligent for a journalist to

<sup>127</sup> *Id.* at 157-59.

<sup>128</sup> Neill Grading & Const. Co., Inc. v. Lingafelt, 168 N.C. App. 36, 47, 606 S.E.2d 734, 741 (2005). See also McKinney v. Avery Journal, Inc., 99 N.C. App. 529, 393 S.E.2d 295, cert. denied, 327 N.C. 636, 399 S.E.2d 123 (1990); Walters v. Sanford Herald, 31 N.C. App. 233, 228 S.E.2d 766 (1976).

<sup>129</sup> Nesbitt v. Multimedia, Inc., 9 Media L. Rep. (BNA) 1473, 1475-76 (W.D.N.C. 1982).

<sup>130</sup> W. Wat Hopkins, *Negligence Ten Years after Gertz v. Welch*, 93 JOURNALISM MONOGRAPHS 19 (Aug. 1985).

rely on the sheriff for “information regarding plaintiff’s being listed on Interpol or as to the status of warrants sworn out against plaintiff. In fact, consulting a law enforcement agency may have been the only avenue for obtaining this information.”<sup>131</sup> In an earlier case, the Court of Appeals said failure to run a retraction is not proof of negligence. “[T]he fault required . . . relates to some act or omission of the publisher at the time of publication. An allegation or showing of a failure to retract has no probative value or effect upon what a publisher did or failed to do at the time of publication.”<sup>132</sup>

**The wire service defense.** Normally it is not negligent for a news medium to use wire service stories without checking their accuracy. Courts have recognized that the major news services have reputations for reliability and that it would be impossible for newspapers and broadcasters to verify all of the wire service stories they run. However, it is possible that news media could be found guilty of negligence, or even actual malice, if they published wire service stories containing obvious errors or that were “so inherently improbable or inconsistent that the defendants had, or should have had, some reason to doubt their accuracy.”<sup>133</sup> In 1990 the N.C. Court of Appeals accepted the wire service defense in a libel suit against the Avery Journal and its editor. Joy McKinney sued over an article that recapped the bizarre story of her allegedly kidnapping and raping a Mormon missionary in London. The editor “relied on reputable wire services and daily newspapers” in recounting the McKinney story, the court noted. “There was nothing inconsistent or improbable in the articles upon which (the editor) relied which should

have prompted her to investigate the reliability of the stories. . . . The sources relied upon . . . are known for their accuracy and are regularly relied upon by local newspapers without independent verification.”<sup>134</sup>

## What defenses are available to journalists?

In addition to attempting to show that some vital element — usually fault — is absent from the plaintiff’s case, defendants in libel actions will often turn to legal defenses to prevent plaintiffs from winning. A defense is simply a legally acceptable justification for publishing defamatory material.

## The truth defense

Although the U.S. Supreme Court has said that in most cases libel plaintiffs must prove the falsity of defamatory statements to win, truth still is a libel defense available to journalists.<sup>135</sup> In other words, if a journalist can prove the truth of his or her story, the plaintiff loses. It is important to remember, though, that truth means the charges themselves are true, not merely that you accurately repeated defamatory allegations made by someone else. The defense does not require that every minor detail be correct, just that the defamatory statement is “substantially true,” *i.e.*, that the “gist” or “sting” of the story is true. This was well illustrated in a 1993 N.C. case in which security guard Janice Brewer sued the Hendersonville Times-News, a reporter and a source for saying she was not promoted to chief of security at a development because she had been convicted of “felony assault.” In fact, Brewer had been convicted of misdemeanor aggravated as-

131 McKinney v. Avery Journal, Inc., 99 N.C. App. 532, 532-33, 393 S.E.2d 295, *cert. denied*, 327 N.C. 636, 399 S.E.2d 123 (1990).

132 Walters v. Sanford Herald, 31 N.C. App. 233, 236, 228 S.E.2d 766 (1976).

133 Appleby v. Daily Hampshire Gazette, 478 N.E.2d 721, 726 (Mass. 1985).

134 McKinney v. Avery Journal, Inc., 99 N.C. App. at 532.

135 Lambert v. Harrell, 159 N.C. App. 466, 583 S.E.2d 428 (table), 2003 WL 21791656 (2003) (unpublished opinion).



sault. A N.C. Superior Court dismissed her complaint, saying that “the ‘gist’ or ‘sting’ of the publications at issue here would be no different than had the publications correctly characterized her assault conviction.”<sup>136</sup>

## The fair report privilege

By far the most important libel defense for journalists is the qualified or conditional privilege that protects accurate, fair, complete and non-malicious reports of official government proceedings and records. This includes accounts of legislative, judicial and quasi-judicial administrative proceedings and records at all levels of government. This qualified privilege, sometimes called the fair report privilege, is based on the premise that in a democratic society the citizens have both the right and responsibility of knowing how their government is operating and what government officials do and say. This journalistic privilege, however, is not absolute and can be lost if reports are inaccurate, unfair, incomplete or motivated by an intent to cause harm.

**Extent of the privilege.** Reports on the official proceedings of all legislative bodies — the U.S. Congress, N.C. General Assembly, city councils, town boards, county commissions and school boards — and their committees or subcommittees are protected against libel actions under the qualified privilege. The privilege covers meetings, public hearings, reports and other official documents, and it applies to statements made by all participants in the proceeding, including members of the public who testify or are given permission to address the legislative body. It is extremely important for journalists to recognize, however, that the privilege may not apply to comments made outside the legislative proceeding itself. For example, the

privilege may not apply to an interview with a legislator after the meeting, a phone conversation in which a reporter seeks to clarify or elaborate on what occurred during a meeting or a side conversation between members of the legislative body.

Judicial proceedings and records open to the public are covered by qualified privilege. Statements made during the proceeding by all participants — the judges, attorneys, witnesses, jurors and parties — are privileged if fairly and accurately reported. Likewise, reports based on judicial records, such as warrants, indictments, judicial orders, transcripts, judgments and liens, are covered.

In 2001, the N.C. Court of Appeals recognized the privilege in a case involving a news report of arrest warrants. In *LaComb v. Jacksonville Daily News Co.*,<sup>137</sup> the newspaper accurately reported in its “police blotter” section that Daniel and Gail LaComb were arrested and charged with contributing to the delinquency of a minor. The LaCombs sued for libel because, as the court put it, the newspaper’s punctuation and sentence structure were “grammatically lacking.”<sup>138</sup> The arrest warrants themselves were ambiguously worded, stating that the defendants “unlawfully, willfully did knowingly . . . cause, encourage and aid [the juveniles] to commit an act, drinking beer and smoking cigarettes, and engage in a sex act.” The Daily News reported, “The two were both accused of encouraging cigarette smoking; beer drinking and engaging in sex acts involving a 15-year-old boy and 16-year-old girl.” The LaCombs claimed the misplaced semicolon in the news report falsely implied that they themselves were accused of engaging in sex acts with the juveniles.<sup>139</sup>

136 *Brewer v. Dungan*, 21 Media L. Rep. (BNA) 1926, 1927 (N.C. Super. 1993).

137 142 N.C. App. 511, 543 S.E.2d 219, cert. denied, 353 N.C. 727, 550 S.E.2d 778 (2001).

138 142 N.C. App. at 514.

139 *Id.* at 513-14.

“Although the fair report privilege has never been explicitly defined by North Carolina case law,” the Court of Appeals wrote, “the privilege nonetheless exists to protect the media from charges of defamation.”<sup>140</sup> Quoting a federal district court case, the N.C. court declared that the privilege covers “reports of the arrest of persons and the charges upon which the arrests are based, as well as other matters involving violations of the law. This privilege remains intact so long as the publication is confined to a substantially accurate statement of the facts and does not comment upon or infer probable guilt of the person accused.”<sup>141</sup> The court concluded, “Although the semicolon is admittedly misused in the sentence, its use does not cause the article to fail the substantial accuracy test when compared to the warrant.”<sup>142</sup>

It is unclear whether the fair report privilege would apply to reports based on judicial documents that have been sealed or to judicial proceedings that are closed to the public, such as adoption proceedings. The appellate courts in this state have never addressed the question of whether fair and accurate articles based on non-public proceedings and documents are privileged. The general rule in other states seems to be that the non-public aspects of the judicial process are not subject to qualified privilege.<sup>143</sup> However, some courts disagree with that general rule. For example, a N.Y. court ruled that a fair and accurate report of a closed juvenile proceeding was entitled to qualified privilege.<sup>144</sup>

The extent of the qualified privilege relative to the activities of executive branch

officials is harder to pinpoint. The only N.C. case in this area involved a news report on a quasi-judicial proceeding, which the court said was clearly privileged. Quasi-judicial refers to proceedings in which administrative officials are required to make judicial-like decisions, such as settling disputes or gathering and evaluating facts and then making decisions based on those facts.<sup>145</sup> In *Kinloch v. News & Observer Publishing Co.*, a federal court, applying N.C. law, held that an article based on a hearing before the Alcoholic Control Board and a report by an ABC hearing examiner was entitled to qualified privilege.<sup>146</sup> The N.C. appellate courts, however, have never discussed whether qualified privilege applies to other types of executive branch proceedings and records.

Case law suggests, though, that qualified privilege in North Carolina may be even broader and more protective than in other states and may extend to reports on non-governmental matters that are of public interest and concern. In *Kinloch* the court provided a very expansive interpretation of qualified privilege: “The law of North Carolina, which controls this case, is equally clear. *Publication of matters of public interest* is conditionally privileged if fair, accurate, complete and not published for the purposes of harming the person involved, even though the information contained therein is false.”<sup>147</sup> In *LaComb*, the N.C. Court of Appeals also referred to the privilege as applying to “media reporting on a matter of public interest, such as an arrest.”<sup>148</sup>

**Mutual interest privilege.** The court in *Kinloch* relied on two early N.C. Supreme Court cases in which qualified privilege was applied to reports about religious organiza-

140 *Id.* at 512.

141 *Id.* at 513 (quoting *Piracci v. Hearst*, 263 F. Supp. 511, 514 (D.Md. 1966), *aff'd*, 371 F.2d 1016 (4th Cir. 1967).

142 *Id.* at 514.

143 PROSSER & KEETON ON THE LAW OF TORTS 837 (5th ed. 1984).

144 *Gardner v. Poughkeepsie Newspapers, Inc.*, 68 Misc. 2d 169, 326 N.Y.S.2d 913 (1971).

145 See *Angel v. Ward*, 43 N.C. App. at 293.

146 314 F. Supp. 602 (E.D.N.C. 1969), *aff'd*, 427 F.2d 350 (4th Cir. 1970), *cert. denied*, 403 U.S. 905 (1971).

147 *Id.* at 606-07 (emphasis added).

148 142 N.C. App. at 512.

tions. In the first case, decided in 1905, a report of proceedings before the Board of Trustees of Trinity College, published in both a pamphlet distributed to college patrons and general circulation newspapers, was held privileged.<sup>149</sup> Fifty-three years later, the N.C. Supreme Court ruled that a report on conditions of a church mission in Hong Kong was privileged.<sup>150</sup> In both cases, neither of which involved a media defendant, the court relied not on the fair report privilege, which protects journalists when they report on government activities, but on another type of qualified privilege, known as the privilege for communications of mutual interest. The N.C. Supreme Court defined this mutual interest privilege as applying to a statement made “about something in which (1) the speaker has an interest or duty; (2) the hearer has a corresponding interest or duty; and (3) when the statement . . . is made in protection of that interest or in performance of that duty. It must be uttered in the honest belief that it is true.”<sup>151</sup>

In 1962 the N.C. Supreme Court again relied on the privilege available for communications of mutual interest, this time to protect letters accusing county officials of election fraud written by the chairman of the N.C. Republican Executive Committee to the governor and State Board of Elections, with copies provided to the media. The court said release of the letters to the press was protect-

ed because “every citizen of North Carolina is interested in each State-wide election being properly held in each and every precinct in the State.”<sup>152</sup>

Based on those N.C. Supreme Court cases, a federal district court, applying N.C. law in a 1982 case, held that a newspaper story about a crime was privileged as a communication of mutual interest. In *Nesbitt v. Multimedia*, the court said: “Criminal conduct and activities have consistently been acknowledged as matters of public interest. . . . A newspaper has a valid recognizable interest in publishing reports of criminal investigations and activities and the public has a corresponding interest in receiving this information.”<sup>153</sup>

These cases indicate that in North Carolina journalists enjoy a very broad qualified privilege, not only when reporting on official government proceedings and records but also when covering other matters of interest and concern to the public.

**Conditions of privilege.** Reports of governmental proceedings or records can lose their privileged status if they are inaccurate, unfair, incomplete or motivated by malice. This does not mean, however, that privileged reports must be verbatim accounts or totally free from minor errors. In *Kinloch* the news story contained some inaccuracies, and in *LaComb* faulty punctuation and sentence structure made the report potentially misleading. Nonetheless, both courts found the news articles were substantially accurate. “The law does not require absolute accuracy in reporting. It does impose the word ‘substantial’ on the accuracy, fairness and completeness. It is sufficient if it conveys to the persons who read it a substantially correct ac-

149 *Gattis v. Kilgo*, 140 N.C. 106, 52 S.E. 249 (1905).

150 *Herndon v. Melton*, 249 N.C. 217, 105 S.E.2d 531 (1958).

151 *Gattis*, 140 N.C. at 107. See *Daimlerchrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 561 S.E.2d 276 (2002); *Market Am., Inc. v. Christman-Orth*, 135 N.C. App. 143, 520 S.E.2d 570 (1999); *Clark v. Brown*, 99 N.C. App. 255, 393 S.E.2d 134, *cert. denied*, 327 N.C. 4426, 395 S.E.2d 675 (1990); and *Phillips v. Winston-Salem/Forsyth County Bd. of Educ.*, 117 N.C. App. 274, 450 S.E.2d 753 (1994), for more recent discussions of the mutual interest privilege. In those cases, the court defined a communication as privileged if it is made “(1) on subject matter (a) in which the declarant has an interest or (b) in reference to which the declarant has a right or duty, (2) to a person having a corresponding interest, right, or duty, (3) on a privileged occasion, and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right or interest.” *Clark*, 99 N.C. App. at 262.

152 *Ponder v. Cobb*, 257 N.C. 281, 196, 126 S.E.2d 67 (1962).

153 9 Media L. Rep. (BNA) 1473, 1477 (W.D.N.C. 1982).

count of the proceedings,” the *Kinloch* court wrote.<sup>154</sup> Furthermore, the court rejected the plaintiff’s arguments that the article was not fair and complete. “It covered the pertinent bases of the examiner’s recommendation and plaintiff’s statement to the full Board at the August 14 hearing. The transcript of the May 30 hearing consumes 121 pages and the examiner’s report is a single-spaced, type-written document consisting of 21 pages. It was never contemplated that any newspaper could publish more than the highlights of any administrative or judicial proceeding.”<sup>155</sup>

There is some confusion in the case law over what type of malice is sufficient to overcome a journalist’s claim of qualified privilege. Traditionally the type of malice required to defeat a privilege involved ill will or an intent to cause harm. In *Kinloch*, for example, the court said the privilege applied because there was “no suggestion of personal ill-will.”<sup>156</sup> In more recent cases, however, courts have tended to combine the traditional definition of malice with the *New York Times v. Sullivan* definition of actual malice. For example, in *Nesbitt* the court said there was “no showing of actual malice either in terms of the traditional ill will or spite or under the *New York Times* standard of knowledge of falsity or reckless disregard.”<sup>157</sup>

## The neutral reportage defense

In recent years, a few courts in the United States have accepted a libel defense known as neutral reportage, which is related to the fair report privilege. The neutral reportage defense protects impartial news stories about accusations brought against public officials or

public figures by reliable and responsible individuals or organizations, even if the charges were made outside official proceedings or records and even if the reporter writing the story doubted the accuracy of the accusations. The N.C. courts have not discussed whether the neutral reportage defense applies in this state. However, if qualified privilege is as broad as the courts have indicated in such cases as *Kinloch* and *Nesbitt*, this new defense may be encompassed within the fair report privilege defense in North Carolina.

The U.S. Court of Appeals for the 2nd Circuit first recognized the neutral reportage defense in a 1977 case that resulted from a *New York Times* article reporting that National Audubon Society officials had accused three prominent scientists of being paid to lie about the effects of DDT on the bird population of North America. The article included the names of the scientists as well as their denials of the charges. The court ruled that the First Amendment protected “accurate and disinterested reporting” of newsworthy charges against public figures made by a “responsible, prominent organization,” such as the National Audubon Society, “regardless of the reporter’s private views regarding their validity. . . . What is newsworthy about such accusations is that they were made.”<sup>158</sup>

A handful of courts have accepted the neutral reportage defense, while a few have expressly rejected it. The vast majority of jurisdictions, like North Carolina, have taken no position.

## The opinion defense

There are two sources of protection for statements of opinion: the First Amendment

154 314 F. Supp. at 607. The *LaComb* court quoted this passage. 543 S.E.2d at 220.

155 314 F. Supp. at 606.

156 *Id.*

157 9 Media L. Rep. (BNA) at 1477.

158 *Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F.2d 113, 120 (2d Cir.), cert. denied, 434 U.S. 1002 (1977).

and the traditional common law defense of fair comment and criticism.

**Constitutional protection.** The First Amendment provides protection for two types of opinion statements. The first category consists of exaggerated, loose, figurative language, rhetorical hyperbole or parody, that is, statements no reasonable person would take as declarations of fact. This category includes such things as calling an employee who crosses a picket line a “traitor”<sup>159</sup> and saying that a developer was engaged in “blackmail” when he refused to sell a piece of property needed for a new high school until the city helped him change the zoning on another piece of property.<sup>160</sup>

The second type of constitutionally protected opinion consists of statements that are incapable of being proven true or false, such as imprecise evaluations like good, bad, untalented and ugly. This protection is simply the logical extension of the Court’s decision in *Philadelphia Newspapers v. Hepps*, which requires plaintiffs to prove falsity in libel cases resulting from reports on matters of public concern.<sup>161</sup>

In 2006, the N.C. Court of Appeals affirmed the dismissal of a libel suit by Sybil Daniels, an insurance adjuster, against Metro Magazine and its editor and publisher, Bernie Reeves, saying that all of the allegedly defamatory statements were “either (1) expressions of pure opinion not capable of being proven or disproven; or (2) rhetorical hyperbole which no reasonable reader would believe.”<sup>162</sup> In a column, Reeves recounted his experience and dissatisfaction with Daniels and the insurance company for which she worked

after his car was stolen and then crashed into a tree. Among other things, Reeves wrote that Daniels spoke to him in a “quiet Gestapo voice” and a “calm, sinister voice,” “lapsed into bureaucratic order-giving that would put former Soviet security police to shame” and accused him of stealing his own car.<sup>163</sup> The court said that “Reeves’ open and obvious emotion and irrationality, combined with the absurd tone of the piece, greatly detract from his credibility and provide the reader with facts from which his or her own conclusions may be drawn. . . . A reasonable reader would therefore recognize Reeves’ statements against plaintiff as an ‘expression of outrage,’ unsupportive of a claim of libel.”<sup>164</sup>

The N.C. court’s reference to providing “the reader with facts” relates to a 1990 U.S. Supreme Court decision in which the Court said that even unverifiable statements of opinion can be actionable if they 1) imply the existence of false, defamatory but undisclosed facts; 2) are based on disclosed but false or incomplete facts; or 3) are based on erroneous assessments of accurate information. Although the Court’s opinion is somewhat complex and confusing, it is clear that the Court intended to deny protection for opinions that are based on false or incomplete statements of fact or that imply the author knows — but doesn’t share with the audience — detrimental facts to support his or her opinion. The Court explained that the statement “John Jones is a liar” would not be protected opinion because it leaves the audience with the impression the author knows of facts to support that allegation. Because the truth or falsity of such supporting facts can be determined, the statement would not be protected as opinion. Furthermore, the Court said adding the phrase “in my opinion” or “I think” would not necessarily convert

159 Nat’l Ass’n of Letter Carriers v. Austin, 418 U.S. 264 (1974).

160 Greenbelt Co-op Publ’g Ass’n v. Bresler, 398 U.S. 6 (1970).

161 475 U.S. 767 (1986).

162 Daniels v. Metro Magazine Holding Co., L.L.C., N.C. App. , 634 S.E.2d 586, 592 (2006).

163 *Id.* at 591.

164 *Id.* at 592.



the accusation into a protected statement of opinion.<sup>165</sup> The best way for a journalist to ensure that he or she can claim First Amendment protection for statements of opinion is to provide the audience with accurate facts to support the opinions.<sup>166</sup>

**Fair comment and criticism.** Long before the U.S. Supreme Court decided the First Amendment protected some defamatory statements, states provided protection for opinion through a defense known as fair comment and criticism. Until *New York Times v. Sullivan*, the fair comment defense was the primary mechanism used to protect criticism of government officials and candidates for public office. Now the First Amendment is the primary source of such protection, but fair comment remains a viable defense for those who espouse opinions on subjects of legitimate interest and concern to the public, such as the performances of entertainers and athletes; the works of artists and writers; the operation of public institutions, like schools, churches and medical facilities; and the quality of services and products offered to the public, including restaurants, hotels, consumer products and the mass media.

In a 1955 case in which the mayor of Gastonia sued the Gaston Citizen over an editorial criticizing the city's purchase of some property, the N.C. Supreme Court said the fair comment privilege was based on the N.C. Constitution's free press clause. Quoting a New York case, the court said: "Every one has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose. Such comments or criticism are not libelous, however severe in their terms, unless they are written maliciously."<sup>167</sup> Note that, like the

fair report privilege discussed above, the fair comment defense can be destroyed by malice.

The fair comment defense requires that an opinion relate to a matter of legitimate public interest, but this requirement is generally interpreted quite broadly to include any person or organization that participates in public activities, seeks public patronage or support, offers goods or services to the public, or becomes involved in public issues. The opinion, however, must relate to the public aspects of an individual's life.

Just as the First Amendment defense requires a true factual basis for an opinion, the fair comment defense generally requires statements of opinion be based on facts that are either stated in the article, readily available to the public or widely known. Thus a movie reviewer need not provide all the details of a film to support her opinion because the facts are readily available to anyone who chooses to see the film. Or a columnist who criticizes a university president who frequently has been in the news can base his opinion on already publicized facts. The idea here is that the audience needs to know or be provided with the factual basis for opinion statements so it can evaluate their validity. If a factual basis is not provided, the audience might assume the author is privy to defamatory facts, and the opinion may be accorded more credibility than it deserves. The N.C. appellate courts have never indicated whether the factual basis requirement applies in this state although it is widely accepted elsewhere.

A good example of the factual basis requirement comes from a lawsuit against The New York Times and singer Janis Ian. The Times quoted Ian as saying that another sing-

165 *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990).

166 See, e.g., *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724 (1st Cir. 1992).

167 *Yancey v. Gillespie*, 242 N.C. 227, 229, 87 S.E.2d 210 (1955)

(quoting *Hoeppner v. Dunkirk Printing Co.*, 254 N.Y. 95, 172 N.E. 139, 140 (1930)). See also *R.H. Bouligny, Inc., v. United Steelworkers of Am.*, AFL-CIO, 270 N.C. 160, 154 S.E.2d 344 (1967); *Tyson v. LEggs Prods., Inc.*, 84 N.C. App. 1, 351 S.E.2d 834 (1987).

er, Phoebe Snow, had been “screwed” by her former manager. When the former manager sued, the court held that Ian was protected by the fair comment defense because in her interview she provided true facts to support her opinion. The Times, however, omitted those facts from the article and thus was unable to rely on the fair comment defense.<sup>168</sup>

## Retractions

Under N.C. law, publishing or broadcasting “a full and fair correction, apology and retraction” in accordance with state law eliminates the possibility of punitive damages in a libel suit.<sup>169</sup> A plaintiff can still win a libel suit if a retraction has been provided, but he or she will only collect actual or compensatory damages. The law provides that before instituting a libel action against a newspaper, periodical or broadcast station, a plaintiff shall inform the defendant, in writing, of the article and/or statements he or she contends are false and defamatory.<sup>170</sup> The N.C. Supreme Court, however, has ruled that failure to provide such notice does not prevent a plaintiff from suing but only eliminates the possibility of punitive damages.<sup>171</sup>

The state statute imposes a number of requirements on the retraction provisions. First, the defamatory statements must have been published or broadcast “in good faith,” their falsity the result of “an honest mistake,” and the publisher or broadcaster must have had “reasonable grounds for believing the statements . . . were true.” Second, the retraction must run within 10 days of the receipt of notice from the plaintiff. A newspaper or periodical must print the retraction “in as conspicuous place and type” as the original

article, and a radio or TV station must broadcast the retraction “at approximately the same time of day and by the same sending power so as to be visible and audible as the original acts or words.”<sup>172</sup> The notice and retraction provisions do not apply to anonymous communications.<sup>173</sup>

## What is the statute of limitations?

In North Carolina, a libel suit must be commenced within one year from the date on which the libelous material was published.<sup>174</sup>

## What types of damages are available to libel plaintiffs?

Under N.C. law, there are two types of damages available to successful libel plaintiffs: actual or compensatory damages, designed to repay the plaintiff for the harm he or she suffered; and punitive damages, designed to punish the defamer and serve as a deterrent. According to the N.C. Supreme Court, actual or compensatory damages “include (1) pecuniary loss, direct or indirect, i.e., special damages; (2) damages for physical pain and inconvenience; (3) damages for mental suffering; and (4) damages for injury to reputation.”<sup>175</sup>

Both the U.S. Constitution and N.C. law impose certain restrictions on damage awards. Under the First Amendment, a public official or public figure who sues for libel cannot win, and therefore cannot collect any damages, unless he or she proves actual malice. A private person plaintiff need prove only negligence to collect actual damages but must prove actual malice for punitive dam-

168 *Rand v. New York Times*, 430 N.Y.S.2d 271 (1980).

169 N.C. GEN. STAT. §99-2 (a) (2005).

170 *Id.* §99-1.

171 *Osborn v. Leach*, 135 N.C. 628, 640, 47 S.E. 811 (1904).

172 N.C. GEN. STAT. §99-2 (b).

173 *Id.* §99-3.

174 *Id.* §1-54 (3).

175 *Osborn*, 135 N.C. at 632.

ages if the subject of the defamatory report was a matter of public interest.<sup>176</sup>

As discussed above, under N.C. law, punitive damages are prohibited if a proper retraction was published or broadcast. Plaintiffs claiming libel per quod must plead and prove special damages, as must plaintiffs in trade libel or product disparagement suits.

### Where can you be sued?

The question of whether a journalist who lives and works in one state can be sued for libel in another state has existed for as long as publications have crossed the borders separating states. The Internet, however, has complicated the issue and given rise to numerous questions regarding interstate and even international libel suits. The threshold issue is whether a court in one state has “personal jurisdiction” over a citizen of another state. That is, does a court in, say, Virginia have the power to compel a North Carolina citizen to show up in the Virginia court and defend himself or herself against a libel suit. The answer to that question is, it depends. It depends on whether the defendant has certain “minimum contacts” with the state of Virginia such that allowing the lawsuit to proceed does not offend “traditional notions of fair play and substantial justice.”<sup>177</sup> What constitutes sufficient “minimum contacts,” though, is a complicated question.

In 1984, the U.S. Supreme Court unanimously held that a California court did have personal jurisdiction over a National Enquirer reporter and editor, both of whom lived in Florida, in a libel suit brought by actress

Shirley Jones, a California resident.<sup>178</sup> The Supreme Court wrote:

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the “effects” of their Florida conduct in California.<sup>179</sup>

The same day, the Supreme Court decided that a New Hampshire court had jurisdiction over Hustler magazine, an Ohio corporation, in a libel suit brought by a resident of New York.<sup>180</sup> Kathy Keeton sued in New Hampshire, which at the time had a six-year statute of limitations on libel suits, because the statute of limitations had run out in her home state. The Court held that the 10,000 to 15,000 copies of Hustler that circulated in New Hampshire monthly, out of a total circulation of about 1 million, constituted sufficient “minimum contacts” to give the New Hampshire court jurisdiction. Hustler, the Court said, “produces a national publication aimed at a nationwide audience. There is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed.”<sup>181</sup>

When Internet libel and other types of cases began arising, courts quickly recog-

176 *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).

177 *Int’l Shoe v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Miliken v. Meyer*, 311 U.S. 457, 463 (1940)).

178 *Calder v. Jones*, 465 U.S. 783 (1984).

179 *Id.* at 788-89 (footnote omitted).

180 *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

181 *Id.* at 781.



nized that broad application of those precedents could mean that a person posting information on the Internet might be haled into court in any of the 50 states. Consequently, courts began fashioning tests to determine when Internet-based contacts were sufficient to trigger personal jurisdiction. The Fourth Circuit, of which North Carolina is a part, has developed such a test, which provides that personal jurisdiction can be asserted over a nonresident if “the person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State’s courts.”<sup>182</sup> The court, however, has made it clear that simply posting material on the Internet, accessible to anyone anywhere in the world, does not meet that test.

For example, in a libel case brought by the warden of a Virginia prison against two Connecticut newspapers, the Fourth Circuit ruled that merely posting stories on the newspapers’ Websites was not sufficient contact with the State of Virginia to give a Virginia court jurisdiction over the out-of-state newspapers.<sup>183</sup> The papers had published stories about Connecticut’s decision to contract with Virginia to house some of its prisoners because of overcrowding in Connecticut correctional facilities. The warden claimed the stories defamed him, and he filed suit in a Virginia court. For Virginia to have personal jurisdiction, the court said, “[t]he newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers.” The Websites were “not designed to attract or serve a Virginia audience,” the court concluded and, therefore, did not constitute the “minimum contacts” required.<sup>184</sup>

Similarly, the U.S. District Court for the Middle District of North Carolina held it did not have personal jurisdiction over 12 individuals, none of whom lived in the state and several of whom were Canadian citizens, in a libel suit filed by an N.C. resident over postings on two Websites and a Web forum.<sup>185</sup> The plaintiff trained miniature horses to serve as guide animals for the vision-impaired and claimed that criticism of the guide training libeled her. Applying the Fourth Circuit precedents discussed above, the district court concluded that the operators of the Web forum and Websites, as well as the individuals who posted messages on them, aimed “to target and focus on individuals interested in miniature horses all over the world, no matter what their geographic location,” but did not specifically target North Carolina and its residents.<sup>186</sup>

182 *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002).

183 *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002).

184 *Id.* at 263.

185 *Burleson v. Toback*, 391 F. Supp. 2d 401 (M.D.N.C. 2005).

186 *Id.* at 415.

# Invasion of Privacy and Infliction of Emotional Distress

## Invasion of Privacy

In the United States, journalists are subject to being sued for four types of claims which, though legally distinct, commonly are grouped under the term “invasion of privacy.” They are:

- 1) The unauthorized appropriation of a person’s name or likeness for commercial purposes.
- 2) Intrusion into a person’s solitude.
- 3) The publication of truthful but embarrassing private facts.
- 4) Portrayal of a person in a “false light.”

Invasion of privacy claims can arise out of every facet of a news operation, from news-gathering to advertising to the publication of editorial cartoons. Fortunately, the North Carolina Supreme Court has decided that only the first two types – appropriation and intrusion – are recognized as part of the common law of this state; consequently, North Carolina journalists are less exposed to privacy claims than their peers in other states.

It's important to remember, however, that the jurisdiction of our courts ends at the state line; if your newspaper’s circulation area or your station’s signal extends outside North Carolina and you cover events or people in other states, you may be subject to invasion of privacy suits in less favorable jurisdictions. This concern is especially important in light of the growing

amount of information on the Internet.

This chapter reviews the four types of invasion of privacy claims, with emphasis on the two types that are recognized by the North Carolina courts. This chapter also discusses claims for the intentional or negligent infliction of emotional distress. Neither is among the claims grouped under “invasion of privacy,” but they are closely related, and plaintiffs often assert emotional distress claims in conjunction with privacy claims.

## What is the historical basis for invasion of privacy claims?

The concept of a legal right to privacy is a relatively recent and uniquely American invention. Privacy was not recognized as a common law right in England, Australia, New Zealand, Canada or other jurisdictions with whom we share a common legal heritage.<sup>1</sup> The recognition of privacy rights has spread rapidly in recent years, however, as the result of influences such as “globalization,” the Internet and the European Union’s 1998 Directive on Privacy.

Most legal commentators and scholars agree that the legal concepts underlying mod-

1 Frederick Davis, *What do We Mean By "Right To Privacy"?*, 4 S. DAK. L. REV. 1, 4 (1959). See also RODNEY A. SMOLLA, *SUING THE PRESS*, 123 (1986).

ern privacy rights were first articulated in an 1890 Harvard Law Review article entitled “The Right to Privacy” written by two young Boston lawyers, Samuel Warren and Louis Brandeis.<sup>2</sup> Because the Warren-Brandeis article had a significant impact on the recognition and development of the four “invasion of privacy” torts, it has been called the most influential law review article in history.<sup>3</sup> Much of its prestige undoubtedly stems from the subsequent personal fame of Brandeis, who became a legendary justice of the Supreme Court of the United States. However, when “The Right to Privacy” was written, Brandeis was only 33 years old. Moreover, in recent years the underlying premise of the article — i.e., that the Boston newspapers of the 1880s were scandal sheets that pried incessantly into the private lives of prominent persons — has been significantly discredited by several legal and historical scholars.<sup>4</sup>

Despite the questions that have been raised concerning the validity of “The Right to Privacy” in recent years, its influence has been undeniable, and state after state has recognized claims for invasion of privacy since its publication.

## What legal rules govern appropriation cases?

Appropriation, the first of the invasion of privacy claims to gain widespread acceptance,

is the unauthorized use of a person’s name or identity for trade or business purposes. Because of its emphasis on commercial exploitation, it is frequently called “commercialization.” Claims for appropriation arise most frequently in connection with advertisements that promote a product or service by associating it with a well-known person.

Although appropriation is classified as a type of invasion of privacy, most appropriation or commercialization cases actually have to do with publicity and are brought by celebrities seeking to prevent others from cashing in on their notoriety. For example, in 1980 Johnny Carson, the former host of the “Tonight” show, successfully sued a Michigan company that marketed its portable toilets under the name “Here’s Johnny.”<sup>5</sup>

In some states, such as New York, California and Florida, appropriation claims are based on statutes passed by the state legislature.<sup>6</sup> In many other states, including North Carolina, the courts have recognized appropriation claims as part of the common law — that is, as part of the body of law that has been passed down to us through centuries of legal precedents.<sup>7</sup>

The plaintiff in an appropriation case must show that the defendant, without permission, used the plaintiff’s “name or likeness” for his own benefit.<sup>8</sup>

The North Carolina Supreme Court recognized appropriation claims in 1938 in *Flake v. Greensboro News Co.*<sup>9</sup> The *Flake* case arose when the Greensboro Daily News published an advertisement for the “Folies de Paree,” a

2 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

3 Dean Prosser cites the article as “perhaps the outstanding illustration of the influence of legal periodicals upon the courts,” WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 117 (4th ed. 1971), and Justice Thurgood Marshall has referred to it as “the most famous of all law review articles.” *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 80 (1971) (dissenting opinion). One commentator suggests that no “other law review article, before or since, has achieved greater fame or recognition.” Davis, *supra* note 1.

4 See, e.g., James Barron, *Warren and Brandeis, The Right to Privacy*, 4 HARV. L. REV. 183; *Demystifying A Landmark Citation*, 13 SUFFOLK U.S. REV. 875 (1979); DON R. PEMBER, *PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT* (1970).

5 *Carson v. Here’s Johnny*, 498 F. Supp. 71 (E.D. Mich. 1980).

6 See N.Y. STAT. ANN. § 50-51 (1990); CAL. CIV. CODE § 3344 (West. Supp. 1980); FLA. STAT. ANN. § 540.08 (West 1972).

7 See, e.g., *Pavesich v. New England Mutual Life Ins. Co.*, 122 Ga. 190 (1905); *Flake v. Greensboro News Co.*, 212 N.C. 780 (1938).

8 RESTATEMENT (SECOND) OF TORTS § 652C (1977).

9 *Flake v. Greensboro News Co.*, 212 N.C. 780 (1938).

touring vaudeville show scheduled to appear at a local theater. The advertisement included a photograph of a swimsuit-clad young woman, who was described as “Sally Payne,” an “exotic red-haired Venus” appearing in the show. In fact, however, the young woman pictured was Nancy Flake, a singer who had made phonograph records and appeared with orchestras throughout North Carolina. The published photo, for which Ms. Flake had posed at the request of her recording company, was inserted into the advertisement accidentally by an employee of the newspaper. When the mistake was called to its attention, the Daily News immediately stopped running the advertisement, but Ms. Flake later sued the newspaper for libel and for invasion of privacy.

Ultimately, Ms. Flake’s case reached the N.C. Supreme Court, which upheld her right to sue the newspaper for appropriation of her likeness but limited the amount of damages that she could recover because she could not show any specific financial damages and because the use of her photograph was not intentional.<sup>10</sup> North Carolina’s appellate courts have not had occasion to address the appropriation tort since 1939, when the *Flake* case was decided.

Early on, courts rejected the notion that an appropriation claim could be based on the publication of a person’s name or photograph in connection with news stories. As early as 1908, for example, a New York man sued the New York World for publishing his picture on its front page.<sup>11</sup> He claimed that his picture attracted readers to the paper, resulted in the sale of more copies and therefore constituted a “trade or commercial” use. The New York courts rejected this argument, holding that claims for appropriation were not intended

to prohibit a newspaper from publishing a person’s name or picture as part of its coverage of newsworthy events.<sup>12</sup> This line of reasoning has been followed consistently by other courts. The fact that news organizations are for-profit businesses does not prevent their use of newsworthy photographs and information. Moreover, the concept of newsworthiness is usually interpreted broadly, as in a 1971 case brought against New York Magazine by a man whose photograph was taken as he marched in the St. Patrick’s Day parade dressed in an Irish hat, a green bow tie and an Irish pin. New York’s highest court ruled that his photo, which appeared on the magazine’s cover, was newsworthy because the parade was “an event of public interest to many New Yorkers.”<sup>13</sup>

### What legal rules govern intrusion cases?

Intrusion is the only one of the four “invasion of privacy” torts that does not necessarily involve the publication of information. Instead, it is based on the idea that everyone is entitled to solitude or seclusion in some places and circumstances and that a person who wrongfully intrudes upon this “zone of privacy” may be liable for damages.

The elements of an intrusion claim are defined as follows:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.<sup>14</sup>

The 1992 edition of this handbook fore-

<sup>10</sup> *Id.* at 793.

<sup>11</sup> *Moser v. Press Publ’g Co.*, 109 N.Y.S. 963 (1908).

<sup>12</sup> *Id.*

<sup>13</sup> *Murray v. New York Magazine*, 318 N.Y.S.2d 474 (1971).

<sup>14</sup> RESTATEMENT (SECOND) OF TORTS § 652B (1977).

cast that it was “highly likely that our courts would uphold an intrusion claim grounded on appropriate facts.” Indeed, in 1996 the North Carolina Court of Appeals permitted a husband to sue his estranged wife for intrusion for having installed a hidden camera in his bedroom.<sup>15</sup> This marked the first time either of our appellate courts formally recognized a claim for intrusion.

The appeals court said intrusion “is committed when a person intentionally intrudes into the solitude or seclusion of another.”<sup>16</sup> Such an intrusion must be highly offensive to a reasonable person to be actionable. In the *Miller* case, the court found the wife’s conduct so offensive as to allow the husband to seek punitive damages on his claims.

Although intrusion cases in North Carolina have been few, intrusion cases from other jurisdictions generally fall into three categories: surreptitious surveillance, traditional trespass and cases in which consent to enter a private setting is exceeded by the defendant. Potential problems of all three types arise frequently in the newsgathering process.

**Surveillance cases.** People who object to having their conversations quoted in the media or to having their photographs published or broadcast often threaten to sue for invasion of privacy. The courts have held, however, that in order to carry through successfully with such a threat, one must have a reasonable expectation of privacy. The law requires people in public and semi-public places to assume that they may be photographed or recorded. Indeed, it is often said that “what the eye may see, or the ear may hear, may be recorded and reported.”<sup>17</sup> In a typical case, a Washington state court ruled that a television

crew did not “intrude” by shining lights into a pharmacy in order to film persons inside because the same persons could have been seen by any passerby who looked into the store from the street.<sup>18</sup>

Likewise, courts have routinely upheld the media’s right to use traditional reporting techniques, such as asking questions of persons who have access to confidential information.<sup>19</sup> For example, a reporter who asks a college basketball coach about the SAT scores of a high school recruit does not commit an invasion of privacy, even though the coach has no legal right to disclose the information without the recruit’s permission.

Surveillance cases often turn on the specific circumstances in which the alleged intrusion occurs. For example, in a 1971 case, *Dietemann v. Time, Inc.*, two Life magazine employees used false identities to gain entrance to the home of an allegedly “quack” doctor. Once inside, one of the reporters secretly photographed the “doctor”<sup>20</sup> while the other transmitted their conversation with him to a recorder hidden in a nearby automobile. A federal court held that the doctor’s residence “was a sphere from which he could reasonably expect to exclude eavesdropping newsmen.”<sup>21</sup> The court also rejected Life’s claim that concealed cameras and secret recording devices are indispensable to investigative reporting and that their use is protected by the First Amendment. In a passage that has been cited frequently, the court said:

The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to

15 *Miller v. Brooks*, 123 N.C. App. 20 (1996).

16 *Id.* at 26.

17 See, e.g., *Mark v. King Broad. Co.*, 618 P.2d 512 (Wash. App.1980).

18 *Id.* at 519.

19 See, e.g., *Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 223 Cal. Rptr. 58 (1986).

20 *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971).

21 *Id.* at 248.



steal, or to intrude by electronic means into the precincts of another's home or office.<sup>22</sup>

By contrast, in a Kentucky case, a drug dealer told two newspaper reporters that an attorney had offered to arrange with a judge to keep her out of jail for a fee of \$10,000.<sup>23</sup> The reporters gave the drug dealer a tape recorder, which the dealer concealed on her person during a visit to the attorney's office. During the conversation, the attorney asked the woman if she was carrying a tape recorder, but she denied it. When the attorney sued the reporters' newspaper for intrusion, the Kentucky courts rejected his claim and distinguished his case from that of the doctor in *Dietemann*.<sup>24</sup> The courts said that because the attorney continued to talk with the woman even after he suspected that he was being recorded, he had a lesser expectation of privacy than the doctor did.<sup>25</sup>

Intrusion claims often arise out of attempts to eavesdrop on telephone conversations. Moreover, "bugging," wiretapping and eavesdropping on telephone conversations are illegal under both North Carolina and federal statutes.<sup>26</sup> The federal law, part of the Omnibus Crime Control and Safe Streets Act of 1968, makes it illegal to intercept not only traditional telephone conversations but also conversations and data transmitted via cellular telephones, electronic mail and satellites.<sup>27</sup>

It is important to note that although state and federal law prohibit the interception, surveillance or recording of telephone conversations by **third parties**, neither North Carolina law nor federal law prohibits your

recording a telephone conversation in which you are a **participant** unless the recording is made "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state."<sup>28</sup> Also, the Federal Communications Commission requires broadcasters to give advance warning if a recorded telephone message is intended for broadcast.

This means that print reporters may lawfully record a telephone interview with or without the knowledge or consent of the other party. Broadcast reporters must seek consent if the recording is to be aired.

Although it is illegal for someone who is not a participant to intercept or record a telephone conversation, journalists sometimes come into possession of tapes or transcripts made by eavesdroppers. One such incident occurred in the 1992 North Carolina gubernatorial campaign, when a supporter of one candidate used a police scanner to intercept a conversation between two supporters of the opposing candidate, one of whom was using a wireless phone. When the taped conversation was given to reporters, the news media had to decide whether they could legally disclose the contents of the conversation. In 2001, the U.S. Supreme Court ruled in *Bartnicki v. Vopper*<sup>29</sup> that a journalist's disclosure of such a tape was protected by the First Amendment because the contents related to a matter of public concern. Although this ruling is helpful to journalists, reporters who acquire recordings of telephone conversations should consult with an attorney knowledgeable about First Amendment issues before publishing or broadcasting them.

**Trespass cases.** Trespass is a tort that involves going onto private property or causing

22 *Id.* at 249.

23 *McCall v. Courier-Journal*, 6 Media L. Rep. (BNA) 1112 (Ky. App. 1980), *rev'd on other grounds*, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982).

24 *Id.*

25 *Id.*

26 See Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 (1970 & 1991 Supp.); N.C. GEN. STAT. § 14-155 (1986).

27 *Id.*

28 18 U.S.C. § 2511(2)(d) (1970 & 1991 Supp.). See Annot., 67 A.L.R. Fed. 429 (1984 & 1991 Supp.).

29 *Bartnicki v. Vopper*, 532 U.S. 514 (2001).



another to do so without the consent of the person who owns or is lawfully in possession of the property.<sup>30</sup> Intrusion cases involving trespass usually arise out of newsgathering activities in which media representatives go onto private premises or in which the media obtain documents or other private property as the result of a trespasser's efforts.

Intrusion problems frequently arise when reporters and photographers follow or accompany police, fire fighters and other officials into homes, offices and other private premises where crimes, arrests, accidents or natural disasters have occurred.<sup>31</sup>

The court decisions in such cases are not consistent, and the outcome often appears to depend upon the specific facts.<sup>32</sup>

For many years reporters and photographers followed the custom of seeking permission from law enforcement officers before entering onto private property that was the scene of a crime, fire or natural disaster. In 1999, however, the U. S. Supreme Court ruled that such permission is legally ineffective; accordingly, media representatives should not enter onto private premises in the face of an objection from the owner or other person having authority over the premises.

In the 1999 case, *Wilson v. Layne*, the Court held that police who invite media representatives to accompany them during the execution of search warrants may violate the Fourth Amendment rights of the individuals whose homes are the subject of the warrant.<sup>33</sup> The case arose when U.S. marshals invited

a photographer and a reporter from The Washington Post to accompany them while they executed a search warrant. At least five plainclothes officers with guns drawn entered a home at 6:45 a.m. in search of a man wanted for probation violations. When they entered the home with the reporter and photographer in tow, the marshals were confronted by the father of the man sought in the warrant. Cursing and wearing only briefs, the father was quickly subdued after demanding that the marshals state their business. His wife appeared wearing only a nightgown and witnessed her husband being restrained by the officers. The subject of the warrant was not found in the home.

The Post never published the photographs of the incident. Despite finding that the marshals violated the couple's Fourth Amendment rights, the Supreme Court found the marshals immune from liability, saying that the law in this area had not been previously established so as to give notice to law enforcement engaged in the practice. There is no indication that the Post was ever sued. However, the opinion clearly gives warning to police and the media that similar conduct after the opinion may be actionable.

In *Hanlon v. Berger*, a companion case to *Wilson v. Layne*, agents of the federal Fish and Wildlife Service obtained a warrant to search a 75,000 acre ranch in Montana for evidence of violations of federal wildlife laws. CNN accompanied the multiple-vehicle caravan when the search of the ranch was carried out.<sup>34</sup> Relying on *Wilson v. Lane*, the Supreme Court held that "police violate the Fourth Amendment rights of homeowners when they allow members of the media to accompany them during the execution of a warrant in their home."<sup>35</sup> Consistent with

30 RESTATEMENT (SECOND) OF TORTS § 158 (1965).

31 See, e.g., *Florida Publ'g Co. v. Fletcher*, 340 So.2d 914 (Fla. 1976), cert. denied, 431 U.S. 930 (1977).

32 See *Green Valley Sch., Inc. v. Cowles Florida Broad., Inc.*, 327 So. 2d 810 (Fla. App. 1976); *Prahl v. Brosomle*, 295 N.W.2d 768 (Wis. App. 1980); *Anderson v. WROC-TV*, 441 N.Y.S.2d 220 (Sup. Ct. 1981).

33 See *Wilson v. Layne*, 526 U.S. 603 (1999).

34 *Hanlon v. Berger*, 526 U.S. 808 (1999).

35 *Id.* at 810.

its decision in *Wilson*, the *Hanlon* Court also held that the police had a defense of qualified immunity for permitting CNN's access as the state of the law was not clear until its decisions. The opinion makes no mention of that qualified immunity extending to CNN.

After the U.S. Supreme Court decision returned the case to the Ninth Circuit Court of Appeals, the appeals court decided during further proceedings that because CNN had worked so closely with the Fish and Wildlife Service agents in the execution of the search warrant CNN staffers could be considered "joint actors" with the government and thus subject to claims for violation of the Bergers' Fourth Amendment rights. The circuit court declined to extend to CNN the qualified immunity defense recognized by the U.S. Supreme Court as being available to the federal agents involved.<sup>36</sup> The federal government and CNN settled the case in May 2001.<sup>37</sup>

Potential trespass situations require reporters and photographers to exercise common sense and good judgment, usually on the spur of the moment. It is often difficult to tell whether a particular place is private property, and media representatives often receive conflicting instructions or advice from law enforcement officers and others at the scene of a crime or accident. It is almost always best to comply with orders from police and fire officials, even if you think they are incorrect. If you think they are wrong, notify your employer and check with an attorney who is knowledgeable about this area of the law. If you find that the authorities overstepped their authority, you and your employer should seek a conference with the authorities and attempt to reach understandings to prevent further problems.

The leading case involving the media's receipt and publication of stolen property is *Pearson v. Dodd*, a 1969 case in which members of U.S. Sen. Thomas Dodd's staff made photocopies of private documents from his office and gave them to Drew Pearson, a nationally syndicated columnist.<sup>38</sup> A federal circuit court held that Pearson was not liable for intrusion because he had neither participated in nor encouraged the removal of the documents from the senator's files.<sup>39</sup>

A similar case is *Bilney v. Evening Star*, in which intrusion claims were dismissed against a newspaper that published the confidential academic records of University of Maryland basketball players.<sup>40</sup> The court reasoned that even though the newspaper knew that the information was unlawfully obtained, its employees did not participate in the trespass.<sup>41</sup>

Media representatives who obtain documents or copies of documents that may have been unlawfully taken should immediately contact an attorney who is knowledgeable about First Amendment and media law. Not only is there a risk of a trespass suit, individuals or companies whose documents fall into the hands of reporters may sue for conversion and/or threaten to prosecute the media representatives criminally for receiving stolen property. In practice, such prosecutions seldom occur because they require the cooperation of the district attorney, who usually has more important things to worry about. Moreover, the facts seldom support a criminal charge. Nevertheless, no use of such documents should be made without first consulting with a lawyer.

36 *Berger v. Hanlon*, 188 F.3d 1155, 1157 (1999).

37 See "CNN settles privacy suit over involvement in search of ranch." <http://www.rcfp.org/news/2001/0608cablen.html>.

38 *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969).

39 *Id.*

40 *Bilney v. Evening Star*, 43 Md. App. 460, 406 A.2d 652 (1979).

41 *Id.* at 568.

Media representatives who receive original documents that appear to belong to another should be especially careful. They and their attorneys may wish to contact the apparent owner and offer to return the documents if the owner will sign a receipt for them. This procedure not only will result in the return of the documents to their rightful owner, it will also serve to authenticate any copies that the reporter makes.

***Exceeding the scope of consent or invitation.*** Courts have upheld invasion of privacy claims in some cases where media representatives have exceeded the scope of express or implied consent granted by the plaintiff. In one of the best known of these cases, an intrusion claim was upheld against a television station whose camera crew burst into a restaurant with cameras rolling and television lights ablaze, disrupting the patrons' meals and causing several of them to flee.<sup>42</sup> The court held that although the television station had a legitimate right to report about the restaurant's inclusion on a list of establishments that violated the New York City sanitation code, the camera crew was unnecessarily intrusive because it entered without any intention of purchasing food and had unreasonably disrupted the restaurant's customers.<sup>43</sup>

In another well-known case, the Fourth Circuit Court of Appeals upheld nominal verdicts for trespass and breach of duty of loyalty claims against two ABC News producers who carried out a "hidden camera" investigation of a North Carolina-based supermarket chain.<sup>44</sup> In *Food Lion v. Capital Cities/ABC*, the producers falsified their work histories to obtain jobs in three Food Lion stores. The reporters secretly videotaped what appeared

to be questionable food-handling practices, and the tapes later were aired on the news magazine "PrimeTime Live."

Food Lion did not sue ABC for libel but instead for violation of the Racketeer Influenced and Corrupt Organizations Act, ownership of ABC's copyright in the broadcast, fraud, breach of the duty of loyalty, trespass and unfair and deceptive trade practices. Early on, the trial court dismissed the RICO and copyright claims but ultimately allowed Food Lion's other claims to be decided by a jury. After a three-stage trial, the jury awarded Food Lion \$1,400 in compensatory damages on the fraud claim, \$1 each on the duty of loyalty and trespass claims and \$5,545,750 in punitive damages. The trial court reduced the punitive damage award related to fraud to \$315,000.

Upon appeal by both Food Lion and ABC, the Fourth Circuit overturned the jury's damages award on fraud, saying Food Lion had not proved all of the elements necessary to maintain the verdict. The Fourth Circuit did, however, uphold the breach of the duty of loyalty award of \$1 in a narrow holding. The court indicated that the reporters' pursuit of two jobs (one for Food Lion and one for ABC) that were diametrically opposed in purpose breached their common law duty of loyalty to Food Lion. The court also upheld the jury's verdict of \$1 for trespass, not because the reporters misrepresented their experience to gain access to non-public areas of Food Lion's stores, but because the reporters exceeded the scope of their permission and duty of loyalty by filming in non-public areas.

## What legal rules govern false light cases?

Of the four invasion of privacy torts, claims arising out of the media's presentation

<sup>42</sup> *Le Mistral, Inc. v. CBS*, 402 N.Y.S.2d 815 (App. Div. 1978).

<sup>43</sup> *Id.* at 816-17.

<sup>44</sup> *Food Lion v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir.1999).

of the plaintiff in a "false light" are the most difficult to explain and categorize. False light, a sort of "double first cousin" of defamation, is so closely related to libel as to be virtually indistinguishable in many cases. In theory, the difference between the two is that a false light claim may rest on a publication that is false but is not defamatory.

Fortunately for the North Carolina media, the North Carolina Supreme Court decided in 1984 that false light claims should not be "recognized," or included, as part of the common law of this state.<sup>45</sup> The court's decision, which was issued in *Renwick v. News and Observer Publishing Co.*, was based primarily on two factors. First, the court pointed out that the "false light" tort often duplicated or overlapped claims for libel, making the law unnecessarily complicated; thus the tort was rejected in the interest of "judicial efficiency."<sup>46</sup> Second, the court noted that recognition of false light claims would add to the inherent "tension" between freedom of the press, as guaranteed by the state and federal constitutions, and the law of torts, which permits recovery of damages against the press.<sup>47</sup>

### What legal rules govern private facts cases?

Privacy claims that arise out of the publication of truthful, embarrassing private facts reflect most faithfully "the right to be let alone" on which Warren and Brandeis based their concept of privacy. This tort implicitly acknowledges and reflects sympathy for the fact that most of us are aware of facts about ourselves that we would prefer not to share

with the world at large. At the same time, it is a tort that, as the Oregon Supreme Court has observed, singles out the press for punishment that is not applied "to gossip-mongers in neighborhood taverns or card parties, to letter writers or telephone tattlers."<sup>48</sup>

The elements of a private facts claim are defined as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of a legitimate concern to the public.<sup>49</sup>

This definition is subject to considerable interpretation. What, for example, is "a matter concerning the private life of another"? The Restatement of Torts, a legal treatise that attempts to explain the elements and characteristics of the various kinds of tort claims, cites sexual relations, family quarrels, humiliating illnesses and some details of a person's past "that he would rather forget."<sup>50</sup>

Because the tort protects only against the publication of matters that are not "of legitimate concern to the public," the media cannot be held liable for publishing information that is newsworthy, even if it is so intimate and personal that its publication would otherwise be "highly offensive." However, newsworthiness is an amorphous concept which, like obscenity, varies from one locality to another.

One of the best known private facts cases, and one that illustrates vividly some of the obstacles facing anyone who files an inva-

45 *Renwick v. News and Observer Publ'g Co.*, 310 N.C. 312 (1984), cert. denied, 469 U.S. 858 (1984).

46 *Id.* at 323.

47 *Id.* See also *Burgess v. Busby*, 142 N.C. App. 393 (2001) ("North Carolina does not recognize a cause of action for the . . . invasion of privacy by placing a plaintiff in false light before the public").

48 *Anderson v. Fisher Broad. Co., Inc.*, 712 P.2d 803, 809 (Ore. 1986).

49 RESTATEMENT (SECOND) OF TORTS § 652D (1977).

50 *Id.* at § 652B.

sion of privacy claim of this type, is *Sipple v. Chronicle Publishing Co.*<sup>51</sup> The case arose when a woman named Sara Jane Moore tried to assassinate President Gerald Ford in San Francisco in 1975. Oliver Sipple was standing next to Ms. Moore and grabbed her arm just as she was about to shoot the president. Herb Caen, a well-known columnist for the San Francisco Chronicle, wrote about the reaction to Sipple's heroism within San Francisco's gay community, of which Sipple was a prominent member. After Caen's column appeared, other newspaper articles mentioned Sipple's involvement in San Francisco's gay community. Some of these articles apparently were read by members of Sipple's family, who lived elsewhere in the United States and were not previously aware of his homosexuality. On these facts, the California courts threw out Sipple's suit against the newspaper for publishing truthful but embarrassing private facts about him. The courts reasoned that because Sipple's sexual orientation was widely known in San Francisco, where he lived, he could not claim that his homosexuality was a private matter elsewhere.<sup>52</sup>

Because private facts claims are almost always directed against the press and because such claims can result in the recovery of damages for **truthful** publications, private facts suits raise serious First Amendment issues. In 1988, this "tension" between such claims and freedom of the press was one of the factors that caused the North Carolina Supreme Court to refuse to recognize private facts claims in *Hall v. Post*.<sup>53</sup>

*Hall v. Post* arose after The Salisbury Post published a human interest story in 1984 under the headline "Ex-Carny Seeks

Baby Abandoned 17 Years Ago." The story recounted the search by a Wisconsin couple, Lee and Aledith Gottschalk, for a daughter Ms. Gottschalk and her former husband had abandoned in Salisbury in 1967. The article described Mrs. Gottschalk's previous marriage to a carnival barker named Clarence Maxson, the birth of their daughter in 1967, their abandonment of the child at the age of four months, various events in Mrs. Gottschalk's life during the ensuing 17 years, and her return to Rowan County to look for her child. The article reported that Clarence Maxson had made arrangements in 1967 for a babysitter to keep the child for a few weeks while he and his wife moved on with the carnival. After describing Mrs. Gottschalk's futile search for her daughter, the article concluded by asking readers who had information about the daughter's whereabouts to contact the Gottschalks at a local motel.

After the Post's story appeared, several people called the motel, identified the child in the story as Susie Hall, the adopted daughter of Mary Hall, and provided the Gottschalks with the family's address and telephone number. A follow-up story published in the Post two days later reported that the Gottschalks had located Susie and her adoptive mother and had talked with them on the telephone and through an intermediary. However, Mrs. Hall had refused to permit them to visit Susie.

In 1985, both Mary Hall and Susie Hall filed suit alleging that the Post had invaded their privacy by publishing previously private information about Susie's background and adoptive status. The suit claimed that they had fled their home in order to avoid public attention resulting from the newspaper articles and that both had sought psychiatric care as a result of the unwanted publicity.

The trial court threw out the Halls' suit because the Post produced affidavits from

51 *Sipple v. Chronicle Publ'g Co.*, 154 Cal. App. 3d 1040, 201 Cal. Rptr. 665 (1984).

52 *Id.* at 669.

53 *Hall v. Post*, 323 N.C. 259 (1988). See also *Burgess v. Busby*, 142 N.C. App. 393 (2001) ("North Carolina does not recognize a cause of action for the invasion of privacy by disclosure of private facts.")



friends, neighbors and former co-workers saying that Mary Hall had voluntarily disclosed the facts about Susie's background and her adoptive status. Mary and Susie Hall appealed, and the North Carolina Court of Appeals reversed the trial court, holding that the plaintiffs had stated valid private facts claims and that they were entitled to a jury trial.<sup>54</sup>

At the request of the Post, the Supreme Court of North Carolina agreed to hear the case. In 1988 the court ruled, 5-2, that the private facts tort would not be recognized as part of the common law of North Carolina.<sup>55</sup> The court's rejection of the private facts tort, like its earlier refusal to recognize false light claims, hinged on the court's perception that the tort would duplicate or overlap existing claims for relief (especially intentional infliction of emotional distress) and that it would add to the "tension" between the First Amendment and the law of torts.<sup>56</sup>

North Carolina apparently is the only state whose highest court has specifically declined to recognize both private facts claims and false light claims. Both the results and the reasoning in *Renwick v. News and Observer Publishing Co.* and *Hall v. Post* place North Carolina outside the mainstream of American jurisprudence. Consequently, journalists and broadcasters in North Carolina have little reason to fear suits for these types of invasion of privacy.

### What constitutes intentional infliction of emotional distress?

In order to prevail in a suit claiming intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct, (2) which is intended to cause

and does cause (3) severe emotional distress to another.<sup>57</sup> A plaintiff has three years to bring an action for emotional distress, intentional or negligent.<sup>58</sup>

In a case brought against Hustler magazine by Rev. Jerry Falwell, the Supreme Court ruled that the First Amendment imposes constitutional limits on emotional distress claims asserted by public officials and public figures.<sup>59</sup> Falwell sued the magazine because it published a satirical parody of an advertisement for Campari, an aperitif made in Italy.<sup>60</sup> For years Campari had utilized a successful, sophisticated advertising campaign in which celebrities talked about their "first time," i.e., their first encounter with Campari. In Hustler's parody, however, Falwell's "first time" referred to a sexual encounter with his mother in an outhouse. The parody portrayed Falwell as a hypocrite and a drunk and his mother as a drunkard and an immoral woman.

Falwell sued Hustler for libel, appropriation of his name or likeness for commercial purposes, and intentional infliction of emotional distress. The trial court threw out Falwell's appropriation claim because the advertisement was a satire that was not intended to convey a commercial message. The trial court jury found in Hustler's favor on Falwell's libel claim because no reasonable person would believe that the statements in the parody were factual.<sup>61</sup> However, the jury found in favor of Falwell on his emotional distress claim and awarded him \$100,000 in actual damages and \$100,000 in punitive damages. The U.S. Court of Appeals for the 4th Circuit upheld the award, but the

<sup>54</sup> *Hall v. Post*, 85 N.C. App. 610 (1987).

<sup>55</sup> *Hall v. Post*, 323 N.C. 259.

<sup>56</sup> *Id.* at 265.

<sup>57</sup> *Dickens v. Puryear*, 302 N.C. 437, 452 (1981).

<sup>58</sup> *Soderlund v. Kuch*, 2001 WL 526693, \*3 (N.C. App.) (citing, N.C. GEN. STAT. § 1-52(5); *Russell v. Adams*, 125 N.C. App. 637, 640 (1997)).

<sup>59</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

<sup>60</sup> *Falwell v. Flynt*, 797 F.2d 1270, 1273 (4th Cir. 1986).

<sup>61</sup> *Id.*



Supreme Court, in a unanimous opinion written by Chief Justice William Rehnquist, reversed.<sup>62</sup>

The Supreme Court's opinion in *Falwell* acknowledged that the ad parody published by *Hustler* was gross, repugnant and offensive but held that even offensive satire directed toward public officials and public figures is protected by the First Amendment unless it includes false statements presented as fact. Even then, the Court said, the plaintiff must meet the *New York Times v. Sullivan* standard of proving that the false statements were published with knowledge that they were false or in "reckless disregard" of their truth or falsity.<sup>63</sup> The Court said the Campari ad parody was simply a particularly tasteless example of the kind of political satire that the First Amendment was intended to protect.

The Supreme Court's opinion in *Hustler v. Falwell* was particularly welcomed by editorial cartoonists and humor columnists, who frequently use biting satire to convey opinions and criticisms of public officials and public figures. The opinion has no effect, however, on claims brought by persons who are neither public officials nor public figures.

In the 1985 North Carolina case of *Briggs v. Rosenthal*, the parents of a young man who died sued John Rosenthal, a Chapel Hill writer and friend of the deceased, for publishing a poignant reminiscence in which he described some of his friend's self-destructive behavior.<sup>64</sup> The court dismissed the parents' claim, holding that the "mere publication" of distressing information does not constitute the sort of "extreme and outrageous conduct" required to support an emotional distress claim.<sup>65</sup>

In a later case, the Court of Appeals, relying on *Briggs v. Rosenthal*, reinstated an intentional infliction of emotional distress case dismissed by the trial court but affirmed the dismissal of the plaintiffs' invasion of privacy claims.<sup>66</sup>

Rowan County physician Rudy Busby was one of several physicians sued in a medical malpractice case. Although he was found not liable by the jury, Dr. Busby included the names, addresses and telephone numbers of jurors and witnesses in a letter that he placed in every physician's mailbox at Rowan Regional Medical Center. Busby referred to the jurors and witnesses as people who have "sued doctors," "found a doctor guilty" and "others of whom I am leery" but did not include any factual statements that were untrue.

Several of the individuals identified in the letter sued Dr. Busby, alleging that the letter was a warning to the entire Rowan County medical community to punish the jurors for their role in the judicial proceeding. The suit stated claims for intentional infliction of emotional distress, the tort of "outrage," tortious interference with a contractual relationship, interference with a fiduciary relationship, invasion of privacy, unfair and deceptive trade practices, and obstruction of justice.

The Court of Appeals reversed the trial court's dismissal of the claims for intentional infliction of emotional distress and obstruction of justice. Despite the offensiveness of Dr. Busby's actions, the court's decision flies in the face of protection for communication of truthful, lawfully obtained information and, in particular, the U.S. Supreme Court decision in *Hustler Magazine, Inc. v. Falwell*. A small silver lining to the case is the appeals court's refusal to recognize the tort of outrage.<sup>67</sup>

62 *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46.

63 *Falwell v. Flynt*, 797 F.2d 1270, 1273 (4th Cir. 1986).

64 *Briggs v. Rosenthal*, 73 N.C. App. 672, 677, cert. denied, 314 N.C. 114 (1985).

65 *Id.* at 677.

66 *Burgess v. Busby*, 142 N.C. App. 393 (2001).

67 *Id.* at 9.

The Court of Appeals' opinion in *Busby* relied on a 1983 case in which the defendant obtained, posted and circulated 30-year-old court documents regarding relatively minor convictions of the sitting superintendent.<sup>68</sup> In that case, *Woodruff v. Miller*, the Court of Appeals found that the publication was for the apparently vindictive purpose of humiliating and harassing the superintendent and therefore sustained the intentional infliction of mental distress claim. The court wrote:

That defendant's conduct, as recorded, was intended to cause plaintiff severe mental distress and in fact did so is so obviously inferable, it need not be discussed; and that defendant's conduct was extreme and outrageous is equally plain.<sup>69</sup>

It is noteworthy that the U.S. Supreme Court had not decided the *Falwell* case when *Woodruff* was decided, nor did the defendant in *Woodruff* offer any evidence or file a brief with the Court of Appeals.

### **What constitutes negligent infliction of emotional distress?**

As of this publication, no successful suit for negligent infliction of emotional distress has been brought against the media in North Carolina. However, in a 1990 non-media case, the N.C. Supreme Court issued an opinion that outlined what a plaintiff must prove to prevail in a negligent infliction of emotional distress case in this state. The court said a plaintiff must prove:

(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as "mental anguish"), and (3) the conduct did in fact cause the plaintiff

severe emotional distress.<sup>70</sup>

The court said that while some states require plaintiffs to prove they have suffered physical harm, that is not a requirement in North Carolina. The court also noted, however, that mere fright or temporary anxiety did not constitute severe emotional distress. Rather, severe emotional distress means "any emotional or mental disorder, such as for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so," the court explained.<sup>71</sup>

Also the court said a plaintiff could recover for his or her severe emotional distress arising out of concern for another if he or she suffered that severe emotional distress as a foreseeable result of the defendant's negligence.

Media defendants in other states generally win negligent infliction cases because plaintiffs are required to show the media owed them a duty of care and are unable to do so. The courts generally determine that the media owe no duty of care to their audiences, and imposing such a duty might violate the First Amendment. It is unclear whether proof of a duty of care will be required of plaintiffs suing the media in North Carolina. It is clear, however, that negligent infliction of emotional distress claims against the media raise serious constitutional questions because the media often publish information that is upsetting but is also newsworthy.

### **Conclusions**

As this chapter indicates, North Carolina law provides journalists with almost unparal-

<sup>68</sup> *Woodruff v. Miller*, 64 N.C. App. 364 (1983)

<sup>69</sup> *Id.* at 366.

<sup>70</sup> *Johnson v. Ruark Obstetrics*, 327 N.C. 283 *reh'g denied*, 327 N.C. 283, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990).

<sup>71</sup> *Id.*

leed freedom from the threat of suits for invasion of privacy. In this state, as in England, the line between what sort of private information may be published and what may not is drawn not by the courts but by reporters, photographers and editors. As in England, however, the dissemination of gratuitously offensive information or the incessant and tasteless prying into the most private affairs of individuals might well result in a backlash against the press and the call for the courts or the General Assembly to curb journalistic excesses. Therefore, North Carolina journalists would do well to attempt always to live up to Justice Burley Mitchell's description of them as set forth in his majority opinion in *Renwick v. News and Observer Publishing Co.*:

The conditions which led Warren and Brandeis to argue almost a century ago for a separate tort of invasion of privacy have at least to some extent subsided. Most modern journalists employed in print, television or radio journalism now receive formal training in ethics and journalism entirely unheard of during the era of "yellow journalism." As a general rule journalists simply are more responsible and professional today than history tells us they were in that era.<sup>72</sup>

<sup>72</sup> *Renwick v. News and Observer Publ'g Co.*, 310 N.C. 312 (1984), *cert. denied*, 469 U.S. 858 (1984).

# Access to Government Meetings

*Whereas the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people's business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly.<sup>1</sup>*

The N.C. General Assembly could not have made clearer its intention for North Carolina's governmental bodies to conduct the public's business in public. In case after case, our appellate courts have ruled that public access to government meetings should be liberally granted and that exemptions permitting closed sessions should be narrowly construed.<sup>2</sup> This means, in essence, that "a tie goes to the public." There are few circumstances in which a public body has an actual obligation to meet in closed session and only nine circumstances in which they *may* meet in closed session. This chapter will address the requirements public bodies have under the Open Meetings Law, G.S. § 143-318.9 et

seq., the public's rights under the statute and what remedies exist when public agencies break the law.

## Overview

North Carolina's Open Meetings Law imposes three basic obligations on public bodies. They must provide notice of meetings. The nature and timing of the notice varies depending upon the circumstances of the meeting. Public bodies must conduct meetings in open unless a motion is made and carried, under one of the nine statutory exemptions, to go into closed session. Finally, public bodies must keep a record of their meetings. The nature and detail of the record depends upon whether the meeting was held in open or closed session.

## What is a public body?

Only public bodies must comply with the Open Meetings Law, so the most fundamental issue of any inquiry is determining if a group is a public body. A public body is any elected or appointed body, committee, commission, board or other group that is composed of two or more members who are authorized to exercise legislative, policy-making, quasi-judicial, administrative or advisory functions.<sup>3</sup> What's noteworthy about this laundry list of functions is its breadth. It

1 N.C. GEN. STAT. § 143-318.9.

2 *Maready v. City of Winston-Salem*, 342 N.C. 708, 730, 467 S.E.2d 615, 629 (1996) ("Such exceptions should be strictly construed."); *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 655, 566 S.E.2d 701, 704 (2002) ("We believe exceptions to the operation of open meetings laws must be narrowly construed."); *News & Observer Publishing Co. v. Interim Bd. of Educ. for Wake County*, 29 N.C. App. 37, 47, 223 S.E.2d 580, 586 (1976) (citations omitted) ("While neither our Supreme Court nor this Court has spoken on the question of strict construction as it pertains to our open meetings law, courts of other states have held that exceptions to their open meeting statutes allowing closed meetings must be narrowly construed since they derogate the general policy of open meetings.").

3 N.C. GEN. STAT. § 143-318.10(b).

includes not only groups with power to take action but also draws within the ambit of the Open Meetings Law those groups whose sole *raison d'être* is to advise or consult. A group need have no authority whatsoever to actually *do anything* to be covered by the Open Meetings Law.

The statute explicitly provides that the governing boards of public hospitals – and the board of any public hospital that has been sold or conveyed to a nonprofit corporation<sup>4</sup> -- are subject to the Open Meetings Law. Meetings solely among the professional staff of a public body and meetings of the medical staff of a public hospital, however, are not subject to the law.<sup>5</sup>

**Committees.** Committees of public bodies are public bodies. This means that committees are *independently* subject to the requirements of the Open Meetings Law. If a county commission with nine commissioners creates a personnel committee with five commissioners, that personnel committee must comply with the notice, openness and minutes requirements every time three of the committee members meet and discuss committee business. The N.C. Court of Appeals once wrote that “we do not think a board can evade the provisions of statutes requiring its meetings to be open to the public merely by resolving itself into a committee of the whole.”<sup>6</sup>

In a lawsuit brought against the University of North Carolina at Chapel Hill, the Court of Appeals considered the status of a particular “committee” and refined the meaning of the term “appointed” in the Open Meetings Law. The *Daily Tar Heel* sought access to the proceedings of UNC-CH’s Undergraduate

Court (the Honor Court), and the University argued that the court was not a public body, because its members was not directly appointed by the UNC-CH Board of Trustees.<sup>7</sup> The members of the Undergraduate Court are appointed by the Student Body President and confirmed by the Student Congress. . . . The Student Body President and the Student Congress derive their authority to appoint and confirm Undergraduate Court members from the Chancellor, who in turn derives his authority on this matter from the UNC-CH Board of Trustees. The Chancellor and the UNC-CH Board of Trustees derive their authority from the Board of Governors of the University of North Carolina (UNC) which, in turn, derives its authority from N.C. Gen. Stat. § 116-11(2) (1994) and Article IX, Section 8 of our North Carolina Constitution.<sup>8</sup>

Given this chain of authority, the court had no problem finding that “the Undergraduate Court members are clearly appointed and confirmed by those who are authorized to do so under the laws of this State and pursuant to the policies and regulations of UNC-CH and UNC.”<sup>9</sup> Therefore, the court found, the Undergraduate Court was a public body.<sup>10</sup>

**The University of North Carolina.** While the law makes clear that “constituent institutions of the University of North Carolina” are subject to the Open Meetings Law, application of that provision has been less clear-cut than many would hope. In 1996, the North Carolina Press Association and the UNC

4 N.C. GEN. STAT. § 131E-8.

5 N.C. GEN. STAT. § 143-318.10(c).

6 News & Observer Publ'g Co. v. Interim Bd. of Educ. for Wake County, 29 N.C. App. 37, 49, 223 S.E.2d 580, 588 (1976).

7 DTH Publ'g Corp. v. Univ. of North Carolina at Chapel Hill, 128 N.C. App. 534, 496 S.E.2d 8, 10 (1998).

8 *Id.*

9 *Id.*

10 The court also found, though, that the Undergraduate Court could properly close its meetings under N.C. GEN. STAT. § 143-318.11(a)(1) and the Family Education Rights and Privacy Act (FERPA), which protect the privacy of student education records.



System became engaged in a dispute about the application of the Open Meetings Law to University committees. The NCPA considered litigation, and UNC considered seeking further exemptions from the law through legislation. Following extended negotiations, both UNC and the NCPA came to an agreement on a group of principles to govern when UNC committees would be subject to the Open Meetings Law. That agreement was not formalized by either a consent agreement or legislation but instead was embodied by a memorandum of understanding. The contours of the agreement are laid out in Administrative Memorandum 363, dated August 9, 1996. The heart of the agreement is:

Statutorily created governing boards of the University, and the committees of such boards, are “public bodies” subject to the requirements of the Open Meetings Law. In addition, “public body” shall be deemed to include an authority, board, commission, committee, council or other multi-person body of the University that satisfies all of the following criteria:

- (1) It is established by or at the direction of:
  - a. the Board of Governors;
  - b. the President;
  - c. a Vice President;
  - d. a Board of Trustees;
  - e. a Chancellor;
  - f. a Vice Chancellor; or
  - g. any combination of the foregoing.
- (2) The membership does not consist exclusively of administrative officers of the University.
- (3) Its designated function or subject-matter jurisdiction is either University-wide or Constituent Institution-wide.
- (4) It is expressly authorized or directed
  - a. to legislate, make policy, adjudicate or take

- administrative action or
- b. to make findings concerning or to recommend legislative, policy-making, quasi-judicial or administrative action.

The agreement reflects a compromise between the parties and not a strict application of the Open Meetings Law, and certainly any newspaper or member of the public who wanted to sue for the University’s non-compliance with the Open Meetings Law would be free to do so notwithstanding the agreement. In fact, at times since the 1996 understanding, the University has aggressively sought to reduce its obligations under open government laws, but the agreement remains nominally in place.

**Legislative Bodies.** Some of the requirements of the Open Meetings Law are altered application to the North Carolina General Assembly generally, including its committees, subcommittees and commissions. One variation from the standard provisions is that the General Assembly has different notice provisions.<sup>11</sup> Also, the Legislative Ethics Committee, conference committees and a caucus by members of the General Assembly are not subject to the Open Meetings Law. However, no member of the General Assembly shall participate in a caucus that is called for the purpose of evading or subverting the Open Meetings Law.<sup>12</sup>

**Nonprofit Organizations.** Generally speaking, nonprofit organizations are not covered by the Open Meetings Law unless their creation and existence is so intertwined with government agencies and government functions that they are virtual instrumentalities of the government.<sup>13</sup> In *News & Observer*

<sup>11</sup> N.C. GEN. STAT. § 143-318.14A.

<sup>12</sup> N.C. GEN. STAT. § 143-318.18.

<sup>13</sup> It’s worth remembering that even though nongovernmental bodies are not covered, the records of an official serving on a nongovernmental group by virtue of his or her governmental position



*v. Wake County Hospital System*,<sup>14</sup> the N.C. Supreme Court considered the status of Wake County Hospital System, Inc., which clearly had once been a public agency but subsequently had incorporated. The hospital argued that by becoming a private, nonprofit corporation it had “loosed the ties” of the Open Meetings and Public Records Laws. The N.C. Supreme Court in the Wake Hospital case did not give a clear, black-and-white test for public agency status but did engage in extensive analysis on the question of whether Wake Hospital was a public agency under the Public Records Law. The Court treated Wake Hospital as a public body under the Open Meetings Law but didn’t engage in any analysis of why it was.<sup>15</sup> In sum, though, the court concluded that the incorporation of the Wake Hospital Authority resulted in “little more than a change of name” and that the name of an entity – “whether it be ‘agency’ or ‘board’ or ‘bureau’ or ‘office’ or ‘department’” – is “irrelevant to assessing the power it exerts.”<sup>16</sup> The court found that the Wake Hospital System’s authority was “so intertwined” with the county “that it must be, and is, an ‘agency of North Carolina government.’”<sup>17</sup>

Two years after the Wake Hospital case, the Court of Appeals revisited the nonprofit corporations question in *Winfas, Inc. v. Region P Human Development Agency*.<sup>18</sup> Radio station WJNC sought a determination that Region P – an agency that was created in 1964 by the Onslow County Board of Commissioners and that received federal and state funds for

programs like Headstart -- was a public body subject to the Open Meetings Law. Region P argued that because it had become a nonprofit corporation, it was not a public body. The Onslow County Commissioners appointed the first Region P Board of Directors, and the court found that “[t]he later incorporation of defendant under the Nonprofit Corporation Act did not change its basic character or purpose or operation. The incorporation of defendant has not altered its existence as a public body.”<sup>19</sup> To hold otherwise, the court found, “would eviscerate the public policy of [the Open Meetings Law] by allowing public bodies to hold secret meetings due to a superficial change in their legal form.”<sup>20</sup>

In contrast to the holdings in *Wake Hospital* and *Winfas*, the N.C. Court of Appeals more recently found that Wilmington Housing Finance and Development, Inc., had become sufficiently independent from government authority to shed itself of all obligations under the Open Meetings Law. In 1982, Wilmington Housing Authority Development was formed to “augment, benefit, and enhance the function and purposes” of the Wilmington Housing Authority (WHA).<sup>21</sup> Originally, the WHA had to approve any change in the WHAD articles of incorporation, and the WHA Board annually reviewed the accounting practices and finances of WHAD. If WHAD were ever dissolved, its assets were to be transferred to the WHA.<sup>22</sup> Over time, however, significant changes took place, and control once exercised by the Wilmington Housing Authority was slowly winnowed away. The name changed to Wilmington Housing and Finance Development, Inc.; the organization moved out of city-owned office space into private rental

are subject to the Public Records Law.

14 *News & Observer Publ’g Co. v. Wake County Hosp. Sys.*, 55 N.C. App. 1, 284 S.E.2d 542 (1981), *cert. denied*, 305 N.C. 302, 291 S.E.2d 151, *appeal dismissed and cert. denied*, 459 U.S. 803, 103 S. Ct. 26, 74 L. Ed. 2d 47 (1982).

15 On the question of public agency under the Public Records Law, the court gave many criteria to be considered, including nine factors that made Wake County’s supervisory responsibilities and control over the system “manifest.” *Id.*

16 *Id.* at 12, 284 S.E.2d at 549.

17 *Id.*

18 *Winfas, Inc. v. Region P Human Dev. Agency*, 64 N.C. App. 724, 725, 308 S.E.2d 99, 100 (1983).

19 *Id.* at 726, 308 S.E.2d at 100.

20 *Id.*

21 *Chatfield v. Wilmington Hous. Fin. and Dev., Inc.*, 166 N.C. App. 703, 704, 603 S.E.2d 837, 838 (2004).

22 *Id.*

space; and the bylaws were changed.<sup>23</sup> Most importantly, WHFD board members were no longer appointed by public officials.<sup>24</sup>

In a unanimous opinion, the Court of Appeals held that “for a body to be appointed within the meaning of the Open Meetings Law ‘the person or body doing the appointing must be one authorized to do so.’”<sup>25</sup> The court found that

WHFD is not an elected body, and the record is devoid of any indication that WHFD is currently an appointed body of New Hanover County, the City of Wilmington, or the WHA. Pursuant to its current bylaws, only WHFD’s board may appoint new WHFD board members. As of August 2003, all non-vacant WHFD directorships had been filled by WHFD’s board. Thus, WHFD does not qualify as a “public body” as the term is defined in the Open Meetings Law.<sup>26</sup>

**Exempt Bodies.** A number of entities in state government are exempted, in whole or in part, from the law: the Judicial Standards Commission; the North Carolina Innocence Inquiry Commission; the Legislative Ethics Committee; conference committees of the General Assembly; legislative caucuses; law enforcement agencies; occupational licensing agencies while they are creating, administering or grading exams; certain boards of trustees of endowments; the Board of Awards;

and the court system, including juries.<sup>27</sup> Any public body subject to the State Budget Act, while exercising quasi-judicial functions, is exempt during a meeting or session held solely for the purpose of making a decision in an adjudicatory action or proceeding.<sup>28</sup> Amendment of the Open Meetings Law in 2006 exempted the Advisory Budget Commission in its entirety, effective July 1, 2007.

### What meetings are covered?

Only “official meetings” are covered by the law, but the term “official meeting” is defined quite broadly. It includes any gathering (either in person or via technology) at which a majority of members participate, for the purpose of “conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body.”<sup>29</sup> The “otherwise transacting the public business” language opens the door to almost all meetings. A public body need not be taking action or holding a hearing in order for its gathering to be an official meeting. To give any meaningful vitality to the Open Meetings Law, “deliberate” must encompass the discussion of any matter upon which foreseeable action will be taken. Other states have taken this approach to stem the use of evasive tactics. The law contains an exception for social gatherings or “other informal” gatherings “unless called or held to evade the spirit and purposes of this Article.”<sup>30</sup>

The Open Meetings Law provides that a body may hold a meeting by conference call but must provide a location and means for members of the public to listen to the meet-

23 *Id.* at 704-05, 603 S.E.2d at 838.

24 *Id.* at 705-06, 603 S.E.2d at 839.

25 *Id.* at 710, 603 S.E.2d at 841 (citing *DTH Publ’g Corp. v. University of North Carolina at Chapel Hill*, 128 N.C. App. 534, 539, 496 S.E.2d 8, 11 (1998)).

26 *Id.* In the *Chatfield* case, the court considered both Open Meetings and Public Records issues. Unlike the analysis under the Open Meetings Law, there are many factors that must be weighed and considered in determining if an organization is subject to the Public Records Law, and the court declined to consider those factors in the Open Meetings analysis. The court said, “[E]ven assuming without deciding that the *News & Observer* factors are germane, they do not counsel in favor of concluding that the Open Meetings Law applies to WHFD, as none of the nine factors are currently present in the instant case.” *Id.*

27 N.C. GEN. STAT. § 143-318.18.

28 N.C. GEN. STAT. § 143-318(7). The terminology of this exemption changes effective July 1, 2007, but its import stays the same.

29 N.C. GEN. STAT. § 143-318.10(d).

30 *Id.*

ing. The body may charge a fee of up to \$25 to each listener to defray the cost of providing the necessary location and equipment.<sup>31</sup>

### What notice must be given?

The Open Meetings Law requires public notice of all official meetings. This holds true even if the entire purpose of the meeting is to hold a closed session because the public is entitled to know that the meeting is occurring.<sup>32</sup> The regular meeting schedule for state government public bodies must be on file with the secretary of state.<sup>33</sup> The regular meeting schedule for county government public bodies must be on file with the clerk to the board of county commissioners.<sup>34</sup> The regular meeting schedule for city government public bodies must be on file with the city clerk.<sup>35</sup> For other public bodies, the regular meeting schedule must be on file with its clerk or secretary or, if the public body does not have a clerk or a secretary, with the clerk to the board of county commissioners where the public body normally meets. If the schedule is revised, the revised schedule must be filed as indicated above at least seven days before the date of the first meeting held under the revised schedule.<sup>36</sup>

The amount and nature of notice that a public body must give of a meeting is a function of whether the meeting is a regularly scheduled meeting, a special meeting or an emergency meeting. If a public body meets

according to a regular meeting schedule and that schedule is kept on file with the appropriate person, no further notice must be given of those regular meetings.<sup>37</sup> If the regular meeting schedule is changed, the new schedule must be re-posted. With limited exception, the public body may discuss anything at regular meetings and may take action on any issue.

If an emergency arises, a public body may meet with virtually no advance notice of the meeting.<sup>38</sup> (Emergency is defined as “generally unexpected circumstances that require immediate consideration by the public body.”) Though there is no specific time-frame in the statute, the public body must post notice with the clerk or secretary of the public body or with some other person designated by the public body. However, only business connected with the emergency may be considered at the meeting.<sup>39</sup> Any meeting other than a regular or emergency meeting is a “special meeting.” Public bodies must provide 48 hours notice of special meetings (posted on the body’s principal bulletin board or, if the public body has no such bulletin board, at the door of its usual meeting room), stating the time and place of the meeting and the matters to be discussed.<sup>40</sup>

If a public body meets and decides to discontinue and then reconvene the meeting at a later time, the body may do so but only after announcing in open session the time and place at which the meeting is to be continued.<sup>41</sup> When a public body does this, no further notice of the meeting is required.

Members of the public may request to be notified of special and emergency meetings and may be required to renew those requests

31 N.C. GEN. STAT. § 143-318.13(a).

32 In 2005, the University of North Carolina searched for a new president. The search committee repeatedly met in closed session without providing notice and without making a motion – in open session – to go into closed session. After questions were raised, the attorney general issued an advisory opinion outlining the requirements of the Open Meetings Law and stressing its importance. 2005 WL 3067423 (October 5, 2005, Advisory Opinion of Attorney General).

33 N.C. GEN. STAT. § 143-318.12(a)(1).

34 N.C. GEN. STAT. § 143-318.12(a)(2).

35 N.C. GEN. STAT. § 143-318.12(a)(3).

36 N.C. GEN. STAT. § 143-318.12(a)(4).

37 N.C. GEN. STAT. § 143-318.12(a).

38 N.C. GEN. STAT. § 143-318.12(b)(3).

39 *Id.*

40 N.C. GEN. STAT. § 143-318.12(b)(2).

41 N.C. GEN. STAT. § 143-318.12(b)(1).

annually.<sup>42</sup>

The Open Meetings Law contains no requirement that bodies have an agenda for regular meetings. However, if an agenda is created or materials are distributed to members of the public body in advance of the meeting, those materials are public records under the Public Records Law.<sup>43</sup> The notice for special meetings must state the purpose of the meeting, though that requirement has never been interpreted in court.<sup>44</sup>

### When can public bodies meet in closed session?

It does not matter whether they are called meetings, working sessions, retreats or anything else, meetings of public bodies “shall be open to the public, and any person is entitled to attend such a meeting” unless the meeting falls within a statutory exemption.<sup>45</sup> The Open Meetings Law identifies eight specific circumstances in which public bodies can go into closed session and has one “catch-all” provision.

**Exemptions.** The Open Meetings Law permits a closed session “only when a closed session is required” in these nine circumstances:

*(1) To prevent the disclosure of information that is privileged or confidential pursuant to the law of this State or of the United States, or not considered a public record within the meaning of Chapter 132 of the General Statutes.*

This exemption allows closed-session discussion of issues made confidential elsewhere in the law. For example, a board of education would meet in closed session to consider a student’s expulsion. The state and federal laws requiring confidentiality of student records justify the closed session under this provision. When a public body goes into closed session under this provision, the motion to go into closed session must state the statutory provision creating confidentiality that must be preserved.<sup>46</sup>

*(2) To prevent the premature disclosure of an honorary degree, scholarship, prize, or similar award.*

This provision is rarely used and fairly self-explanatory, and there are no reported cases directly interpreting this provision.

*(3) To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after*

<sup>42</sup> N.C. GEN. STAT. § 143-318.12(b).

<sup>43</sup> N.C. GEN. STAT. § 132-1.

<sup>44</sup> N.C. GEN. STAT. § 143-318.12(b)(2).

<sup>45</sup> N.C. GEN. STAT. § 143-318.10(a). An attorney general opinion makes plain that “[p]ublic bodies may, **but are not required to**, go into a closed session for limited purposes.” October 5, 2005, Opinion.

<sup>46</sup> N.C. GEN. STAT. § 143-318.11(c).



*the settlement is concluded.*

This “attorney-client” exemption has been the source of much debate and litigation since its refinement in 1994. The attorney-client privilege under both the Open Meetings Law and the Public Records Law is narrower than the privilege in the private arena. Our courts have recognized that is necessary; otherwise the benefits of open government laws can be lost or compromised, and their purposes evaded, by cloaking discussions or communications in an “attorney-client” disguise.<sup>47</sup>

In an early case construing the attorney-client exemption, the Court of Appeals held that a discussion between school officials and the school board attorney regarding the termination of a contract was not privileged and did not justify going into closed session. “Clearly, the Board’s order to terminate the contract does not fall under the protective umbrella of the attorney-client privilege as it must be divulged to, at a minimum, [the plaintiff],” the court stated.<sup>48</sup>

In a case that wound through North Carolina’s trial and appellate courts over years, the Court of Appeals twice wrestled with the attorney-client privilege in the context of the Open Meetings Law.<sup>49</sup> The alternate arguments put forth in that case were that public bodies could only discuss pending litigation in closed session (urged by the newspaper) versus the proposition that almost all discussions with legal counsel justified meeting in closed session (urged by the public bodies).

Writing for a unanimous court, Judge Lewis quoted Walt Whitman: “I think heroic deeds were all conceiv’d in the open air.” The court noted that the statute only permits closed session discussions when the government body attorney was actually present. This represented a change from the old version of this exemption, which permitted “legal discussions” in closed session without an attorney present.<sup>50</sup> Next, the court repeated the principle that “the attorney-client exception is to be construed and applied narrowly” and that “this is so notwithstanding the countervailing policy favoring confidentiality between attorneys and clients.”<sup>51</sup> The court went on to say that “equally as important, the burden is on the government body to demonstrate that the attorney-client exception applies. . . . After all, ‘the incantation of a[n] [attorney-client] rationale is not an abracadabra to which this Court must defer judgment.’”<sup>52</sup>

Despite colorful and powerful rhetoric, though, the *Multimedia* case didn’t go far in defining anything in black-and-white or drawing any absolute rules of construction. What’s clear after that case is that the privilege lies somewhere in the middle. That is, litigation is not necessary to justify a closed session, but some real need for attorney-client confidentiality is required in order for a closed session to be proper.<sup>53</sup> Most recently, the Court of Appeals confirmed the propriety of a closed session called for an attorney to consult with

47 *Multimedia Publ’g of North Carolina, Inc. v. Henderson County*, 136 N.C. App. 567, 525 S.E.2d 786, disc. rev. denied, 351 N.C. 474, 543 S.E.2d 492 (2000).

48 *H.B.S. Contractors, Inc. v. Cumberland County Bd. of Educ.*, 122 N.C. App. 49, 53, 468 S.E.2d 517, 520 (1996).

49 *Multimedia Publ’g of North Carolina, Inc. v. Henderson County*, 136 N.C. App. 567, 568, 525 S.E.2d 786, 788 (2000), (“*Multimedia I*”) after remand, *Multimedia Publ’g of North Carolina, Inc. v. Henderson County*, 145 N.C. App. 365, 372, 550 S.E.2d 846, 851 (2001) (“*Multimedia II*”).

50 *Id.* at 575, 525 S.E.2d at 791.

51 *Id.*

52 *Id.* at 575-76, 525 S.E.2d at 791-92.

53 In a case decided in the time between the two appeals in the *Multimedia* case, the Court of Appeals considered a contractor’s objection to the actions of a school board voting in open session to terminate its contract when the bases for the termination were not deliberated in open session. After review of the minutes, the trial court found that the public body “did in fact receive legal advice” from its attorneys, that there was no general discussion and that, indeed, there was “no discussion of any matter which was *not* subject to the attorney-client privilege.” *Sigma Construction Co., Inc. v. Guilford County Bd. of Educ.*, 144 N.C. App. 376, 379-80, 547 S.E.2d 178, 180 (2001). The Court of Appeals noted that minutes were included in the record on appeal and that therefore the appellate court had no basis to contest the findings of the trial court.

the Housing Appeals Board of the City of Charlotte to discuss “constitutional and legal challenges which might result from actions being taken or considered by a board.”<sup>54</sup>

Ordinarily, the presence of a third party destroys that privileged “atmosphere.” Even David Lawrence, a professor with UNC’s School of Government who often takes positions at odds with the media in North Carolina, agrees and warns of the serious ramifications of allowing “outsiders” into closed sessions called under the attorney-client privilege. “The presence of an outsider – even someone such as a consultant to the governmental entity – might destroy the attorney-client privilege at the meeting and thus make the closed session invalid.”<sup>55</sup> He has also written that “[i]f outside parties are present, the conversation is per se not confidential, and a closed session may not be held.”<sup>56</sup>

*(4) To discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body, including agreement on a tentative list of economic development incentives that may be offered by the public body in negotiations. The action approving the signing of an economic development contract or commitment, or the action authorizing the payment of economic development expenditures, shall be taken in an open session.*

Though the issue of economic development and publicly funded incentives is of great significance and a topic of much cur-

rent debate, there have been no appellate decisions construing the current version of this exemption. In the mid-1990s, when the incentive issue was beginning to become important, William Maready sued the City of Winston-Salem and Forsyth County, alleging not only that the incentives they approved were illegal under the N.C. Constitution but also that the procedure employed to approve them was illegal under the Open Meetings Law.<sup>57</sup> The public bodies met and reached consensus about economic incentives in closed session and “indicate[d] their informal approval regarding certain economic development incentives.”<sup>58</sup> No actions authorizing any contracts were taken, but following the meetings, the public agencies communicated directly with the private corporations at issue. All corporations were informed that “final approval at a public meeting would be required before any contract could be signed or any funds expended.”<sup>59</sup>

The Court of Appeals concluded that the Open Meetings Law as it was written then did not preclude such closed-door discussions. Following the *Maready* case, though, the General Assembly modified the language of the exemption to make it clear that final action committing public funds to economic development incentives could only be taken in open session.<sup>60</sup> No case has interpreted this exemption since it was amended after the *Maready* decision.

*(5) To establish, or to instruct the public body’s staff or negotiating agents concerning the position to be taken by or on behalf of the public body in negotiating (i) the price and other material terms of*

54 *Carolina Holdings, Inc. v. Hous. Appeals Bd. of City of Charlotte*, 149 N.C. App. 579, 585-86, 561 S.E.2d 541, 545 (2002) (“The record shows that the closed sessions during the 12 October 1999 and 11 April 2000 hearings were for the purpose of the Board consulting with its attorney on matters within the scope of the attorney-client privilege.”).

55 DAVID M. LAWRENCE, OPEN MEETINGS AND LOCAL GOVERNMENTS IN NORTH CAROLINA (6th Ed. 2002).

56 DAVID M. LAWRENCE, CLOSED SESSION UNDER THE ATTORNEY-CLIENT PRIVILEGE, LOCAL GOV’T LAW BULLETIN (April 2002).

57 *Maready v. City of Winston-Salem*, 342 N.C. 708, 730, 467 S.E.2d 615, 629 (1996).

58 *Id.* at 732, 467 S.E.2d at 630.

59 *Id.*

60 The more significant post-*Maready* legislation was a change to the requirements of a general accounting of closed sessions, discussed below.



*a contract or proposed contract for the acquisition of real property by purchase, option, exchange, or lease; or (ii) the amount of compensation and other material terms of an employment contract or proposed employment contract.*

Like the attorney-client exemption, this is a frequent exemption used by public bodies, especially counties and municipalities. However, there has only been one appellate case construing the language of this provision.<sup>61</sup> Until the 2002 decision by the North Carolina Court of Appeals in the *Boney v. Burlington* case, local government entities involved in land transactions frequently invoked this exemption and refused to disclose key elements of a proposed transaction. By the time the City of Burlington forced the issue by refusing to tell the *Alamance News* the identity of the party from whom the City would buy property and the property's location, the Court of Appeals had seen enough. In a unanimous opinion authored by Chief Judge John Martin, the Court of Appeals held that where important terms of a real estate transaction, other than price, are not being negotiated, the public body cannot hide the terms from the public and press.<sup>62</sup> "[T]he only material terms subject to discussion during the closed session were the offering price for the property and whether the seller would be seeking to structure the conveyance to gain tax advantages. ... The language of G.S. § 143-318.11(a)(5) does not permit a public body to deny the public access to information which is not a material term subject to negotiation regarding the acquisition of real property."<sup>63</sup> And in one of the strongest interpretations

of the Open Meetings Law to date, the Court read into the law an affirmative obligation on the government to announce the identity of the parties to the transaction and the location of the property upon demand and prior to the government's going into closed session to instruct the government's agent on negotiating the price of the property.

*(6) To consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of an individual public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge, or grievance by or against an individual public officer or employee. General personnel policy issues may not be considered in a closed session. A public body may not consider the qualifications, competence, performance, character, fitness, appointment, or removal of a member of the public body or another body and may not consider or fill a vacancy among its own membership except in an open meeting. Final action making an appointment or discharge or removal by a public body having final authority for the appointment or discharge or removal shall be taken in an open meeting.*

This so-called "personnel exemption" is possibly the most frequently used exemption in the Open Meetings Law. Again, there are not many cases interpreting or applying it, but it has many facets that must be considered. First, it only applies to **employees**. Independent contractors are not covered, nor are public officials serving on boards and commissions. An Institute of Government Q&A handbook contains David M. Lawrence's clear distinction between employees and independent contractors.

61 In *Davis v. Durham Mental Health/Development Disabilities/Substance Abuse Area Author*, 165 N.C. App. 100, 107, 598 S.E.2d 237, 242 (2004), the court nominally applied this provision but in a strictly cursory way, affirming the trial court's judgment on the pleadings that there had been no violation of the Open Meetings Law and dismissing plaintiff's complaint for failure to state a claim.

62 *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 566 S.E.2d 701 (2002).

63 *Id.* at 656, 566 S.E.2d at 705.

*Q: Does an “employment contract” include contracts with the public body’s retained attorney or with other independent professionals? No. It only includes contracts with employees, and a retained attorney is not an employee of the unit but, rather, an independent contractor. Independent contractors are not employees of the entity with which they contract.*<sup>64</sup>

Second, general issues may not be discussed in closed session. So, even if an issue under discussion will have an **impact** on employees, it still may not be a proper topic for closed session discussion. Only when the discussion is about a **particular** employee should a public body go into closed session. Third, even when there has been discussion in closed session, final action must be taken in open session. This has raised some interpretational questions. For example, is a decision not to renew a contract a final action? There are strong arguments that it is, and, perhaps even more clearly, there is no provision of the Open Meetings Law that would permit that decision to be made in closed session.<sup>65</sup> There is little question that the actual interviews with candidates for public employment may be conducted in closed session, though an advisory opinion of the attorney general makes plain that even when that is the sole purpose of an official meeting, the public body must comply with all the provisions of the Open Meetings Law.<sup>66</sup> Public

bodies must provide notice of the date, time and location of the meeting; they must begin the meeting in an open session and vote to go into closed session; they must conclude the meeting in open session; and they must keep minutes of all their actions. Any action taken to hire someone must be taken in open session.<sup>67</sup>

*(7) To plan, conduct, or hear reports concerning investigations of alleged criminal misconduct.*

There are no reported cases interpreting this provision.

*(8) To formulate plans by a local board of education relating to emergency response to incidents of school violence.*

There are no reported cases interpreting this provision, which was added in 2001.

*(9) To discuss and take action regarding plans to protect public safety as it relates to existing or potential terrorist activity and to receive briefings by staff members, legal counsel, or law enforcement or emergency service officials concerning actions taken or to be taken to respond to such activity.*

There are no reported cases interpreting this provision, which was added in 2003.

## How do public bodies close a meeting?

When a public body is entitled to go into closed session, there is a specific protocol that must be followed. A member of the public body must – **in open session** -- make a motion to go into closed session, citing the basis for

64 DAVID M. LAWRENCE, OPEN MEETINGS AND LOCAL GOVERNMENTS IN NORTH CAROLINA -- SOME QUESTIONS AND ANSWERS (2002).

65 There is an odd case that applies this provision without offering much interpretation. In *Gaster v. Stanly County Bd. of Educ.*, 165 N.C. App. 705, 601 S.E.2d 331 (2004), the Court of Appeals considered the claims of two high school coaches who complained that their duties (and correspondingly their pay) had been cut without action in an open session. The court found that “no final action was required to be taken in adjusting plaintiffs’ duties and pay relating to their coaching status.” Moreover, the court found that, indirectly, final action had been taken in an open session – the budget session. *Id.*

66 2005 WL 3067423, 1 (October 5, 2005).

67 N.C. GEN. STAT. § 143-318.11(a)(6).

the closed session.<sup>68</sup> If the closed session is to preserve statutorily protected, confidential information, the motion must identify the statute requiring confidentiality.<sup>69</sup> If the closed session is to discuss pending litigation, the motion must identify the parties to the litigation.<sup>70</sup>

### What record must be kept of official meetings?

Public bodies must keep “full and accurate minutes” of both open and closed sessions. A sound or video recording of the meeting satisfies the requirement, but issues have arisen about what, short of a verbatim recording, satisfies the statute.<sup>71</sup> The N.C. Supreme Court cited Robert’s *Rules of Order* for the proposition that minutes “‘should contain mainly a record of what was done at the meeting, not what was said by the members.’ . . . Their purpose is to reflect matters such as motions made, the movant, points of order, and appeals – not to show discussion or absence of action.”<sup>72</sup> The Court of Appeals has adopted the principle that minutes are sufficient if they “provide a record of the actions taken by a board and evidence that the actions were taken according to proper procedures.”<sup>73</sup>

The record-keeping requirements for closed session are more rigorous. The statute itself states that public bodies must “keep a

general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired.”<sup>74</sup> One Court of Appeals opinion borrowed language from Professor David M. Lawrence that “[t]he purpose of a general account, on the other hand, is to provide some sort of record of the discussion that took place in the closed session, whether action was taken or not.”<sup>75</sup>

Minutes and general accounts are public records, but the law says records from closed sessions “may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session.”<sup>76</sup> This means that minutes of some closed sessions should be made public fairly soon after the closed session is over, while minutes from some closed sessions will never be released. For example, minutes from a closed session held to discuss the purchase of real property should be released after the land transaction has occurred. By contrast, some personnel discussions will remain confidential forever.

The Court of Appeals also has held that only minutes of properly closed sessions may be withheld from the public. It said, “The plain language of G.S. § 143-138.10 requires that a closed session be conducted in compliance with G.S. § 143-318.11 in order for the minutes of such session to be withheld from public inspection.”<sup>77</sup> If a meeting is improperly closed, one partial remedy is for the public body to provide immediate access to the record of the meeting. One trial court judge went a step further and ordered members of a public body participating in an illegal closed session to produce copies of their personal notes from the meeting.<sup>78</sup>

68 N.C. GEN. STAT. § 143-318.11(c). 2005 WL 3067423, 1 (October 5, 2005) (“A public body can only enter into a closed session while it is meeting in public.”); 1999 WL 33265589, 3 (February 9, 1999) (“It is noted that G.S. § 143-318.11(c) mandates certain procedural requirements for calling a closed session of a public body.”).

69 *Id.*

70 *Id.*

71 N.C. GEN. STAT. § 143-318.10(e).

72 *Maready v. City of Winston-Salem*, 342 N.C. 708, 733, 467 S.E.2d 615, 631 (1996) (quoting HENRY M. ROBERT, ROBERT’S RULES OF ORDER NEWLY REVISED § 47, at 458 (9th ed. 1990)).

73 *Multimedia Publ’g of North Carolina, Inc. v. Henderson County*, 145 N.C. App. 365, 372-74, 550 S.E.2d 846, 851-52 (2001) (quoting DAVID M. LAWRENCE, OPEN MEETINGS AND LOCAL GOVERNMENTS IN NORTH CAROLINA: SOME QUESTIONS AND ANSWERS (5th ed. 1998)).

74 N.C. GEN. STAT. § 143-318.10(e).

75 *Multimedia Publ’g of North Carolina, Inc. v. Henderson County*, 145 N.C. App. 365, 372, 550 S.E.2d 846, 851 (2001).

76 N.C. GEN. STAT. §§ 143-318.10(e).

77 *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 659, 566 S.E.2d 701, 706 (2002).

78 *Piedmont Publ’g Co., Inc. v. Surry County Bd. of Comm’rs*, 24

## Additional Requirements

The Open Meetings Law contains a handful of additional provisions relating to the conduct of meetings and public access. Public bodies can meet by conference call but must provide some means for the public to listen to the meeting.<sup>79</sup> Public bodies cannot vote by secret ballot, and all written ballots must be signed and available for public inspection.<sup>80</sup> Public bodies cannot “deliberate, vote, or otherwise take action” on a matter in a secret way “with the intention of making it impossible for persons attending a meeting of the public body to understand what is being deliberated, voted, or acted upon.”<sup>81</sup> Public meetings may be freely recorded and broadcast.<sup>82</sup>

### What happens if a public body violates the open meetings law?

**Who May Sue?** The Open Meetings Law provides that “any person” may bring an action seeking an injunction<sup>83</sup> or seeking a declaration that an action was taken, considered or deliberated in closed session in violation of the law.<sup>84</sup> In 2002, the City of Burlington attempted to turn the tables on a local newspaper. The Burlington City Council met in closed session, after which *The Alamance News* repeatedly challenged the propriety of the closed session. Taking a pre-emptive strike, the city filed a lawsuit seeking a declaration that its actions in going into closed session were proper. The trial court permitted the lawsuit to go forward, but the N.C. Court of Appeals held:

Allowing a governmental agency to bring a declaratory judgment action against someone who has not initiated litigation will have a chilling effect on the public, in essence eliminating the protection offered them under the statute by requiring them “to defend civil actions they otherwise might not have commenced, . . . thus frustrating the Legislature’s purpose of furthering the fundamental right of every person . . . to have prompt access to information in the possession of public agencies.”<sup>85</sup>

**What are the remedies?** Although many states long ago criminalized their open government laws, North Carolina has yet to do so. Therefore, violations of the Open Meetings Law subject the offender neither to criminal penalties nor any other automatic sanction. Unless a member of the public sues to enforce the law, nothing will happen to the violators. There are, however, several remedies available to a plaintiff who chooses to sue and prevails. A court can make a determination that a public body’s actions in the past violated the Open Meetings Law.<sup>86</sup> A court can enter an injunction to stop future or repeated violations of the law.<sup>87</sup> A court can “undo” any actions taken at an illegal meeting, but in doing so, the court must consider several factors.<sup>88</sup> A party seeking to have ac-

Media L. Rep. (BNA) 1371 (N.C. Super. Ct. 1995).

79 N.C. GEN. STAT. § 143-318.13(a). A public body may charge a fee of up to \$25 per listener to defray the cost of providing the necessary location and equipment.

80 N.C. GEN. STAT. § 143-318.13(b).

81 N.C. GEN. STAT. § 143-318.13(c).

82 N.C. GEN. STAT. § 143-318.14.

83 N.C. GEN. STAT. § 143-318.16(a).

84 N.C. GEN. STAT. § 143-318.16A(a).

85 City of Burlington v. Boney Publishers, Inc., 166 N.C. App. 186, 193, 600 S.E.2d 872, 877 (2004) (quoting McCormick v. Hanson Aggregates Southeast, Inc., 164 N.C. App. 459, 463, 596 S.E.2d 431, 434 (2004)).

86 N.C. GEN. STAT. § 143-318.16A.

87 N.C. GEN. STAT. § 143-318.16.

88 The factors the court must consider are: (1) The extent to which the violation affected the substance of the challenged action; (2) The extent to which the violation thwarted or impaired access to meetings or proceedings that the public had a right to attend; (3) The extent to which the violation prevented or impaired public knowledge or understanding of the people’s business; (4) Whether the violation was an isolated occurrence, or was a part of a continuing pattern of violations of this Article by the public body; (5) The extent to which persons relied upon the validity of the challenged action, and the effect on such persons of declaring the challenged action void; (6) Whether the violation was committed in bad faith for the purpose of evading or subverting the public policy embodied in this Article. N.C. GEN. STAT. § 143-318.16A(c).

tions voided must bring suit “within 45 days following the initial disclosure of the action that the suit seeks to have declared null and void.”<sup>89</sup> If a member of the public sues under the Open Meetings Law, the statute provides that the case “shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.”<sup>90</sup>

If a party brings suit under the Open Meetings Law and wins, the court can order the losing party to pay the attorney’s fees of the prevailing party.<sup>91</sup> The court *can* order individual public officials to pay those fees personally, unless the official received and followed the advice of counsel in his actions.<sup>92</sup> There is, though, no reported case in which a judge has ordered an individual public official to pay the fees individually. The provisions relating to fee awards are not mandatory, and there are many reported cases in which plaintiffs bringing suit prevailed on all (or a substantial portion) of their claims, but nonetheless, the court awarded little or no fees.

<sup>89</sup> N.C. GEN. STAT. § 143-318.16A(c).

<sup>90</sup> N.C. GEN. STAT. § 143-318.16C.

<sup>91</sup> N.C. GEN. STAT. § 143-318.16B.

<sup>92</sup> *Id.*



## N.C. Open Meetings Law

### G.S. § 143-318.9. Public policy

Whereas the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people's business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly.

### G.S. § 143-318.10. All official meetings of public bodies open to the public

(a) Except as provided in G.S. 143-318.11, 143-318.14A, 143-318.15, and 143-318.18, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.

(b) As used in this Article, "public body" means any elected or appointed authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, constituent institutions of The University of North Carolina, or other political subdivisions or public corporations in the State that (i) is composed of two or more members and (ii) exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function. In addition, "public body" means the governing board of a "public hospital" as defined in G.S. 159-39 and the governing board of any nonprofit corporation to which a hospital facility has been sold or conveyed pursuant to G.S. 131E-8, any subsidiary of such nonprofit corporation, and any nonprofit corporation owning the corporation to which the hospital facility has been sold or conveyed.

(c) "Public body" does not include (1) a

meeting solely among the professional staff of a public body, or (2) the medical staff of a public hospital or the medical staff of a hospital that has been sold or conveyed pursuant to G.S. 131E-8.

(d) "Official meeting" means a meeting, assembly, or gathering together at any time or place or the simultaneous communication by conference telephone or other electronic means of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body. However, a social meeting or other informal assembly or gathering together of the members of a public body does not constitute an official meeting unless called or held to evade the spirit and purposes of this Article.

(e) Every public body shall keep full and accurate minutes of all official meetings, including any closed sessions held pursuant to G.S. 143-318.11. Such minutes may be in written form or, at the option of the public body, may be in the form of sound or video and sound recordings. When a public body meets in closed session, it shall keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired. Such accounts may be a written narrative, or video or audio recordings. Such minutes and accounts shall be public records within the meaning of the Public Records Law, G.S. 132-1 et seq.; provided, however, that minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session.

### G.S. § 143-318.11. Closed sessions

(a) Permitted Purposes. --It is the policy of



this State that closed sessions shall be held only when required to permit a public body to act in the public interest as permitted in this section. A public body may hold a closed session and exclude the public only when a closed session is required:

- (1) To prevent the disclosure of information that is privileged or confidential pursuant to the law of this State or of the United States, or not considered a public record within the meaning of Chapter 132 of the General Statutes.
- (2) To prevent the premature disclosure of an honorary degree, scholarship, prize, or similar award.
- (3) To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after

the settlement is concluded.

- (4) To discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body, including agreement on a tentative list of economic development incentives that may be offered by the public body in negotiations. The action approving the signing of an economic development contract or commitment, or the action authorizing the payment of economic development expenditures, shall be taken in an open session.
- (5) To establish, or to instruct the public body's staff or negotiating agents concerning the position to be taken by or on behalf of the public body in negotiating (i) the price and other material terms of a contract or proposed contract for the acquisition of real property by purchase, option, exchange, or lease; or (ii) the amount of compensation and other material terms of an employment contract or proposed employment contract.
- (6) To consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of an individual public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge, or grievance by or against an individual public officer or employee. General personnel policy issues may not be considered in a closed session. A public body may not consider the qualifications, competence, performance, character, fitness, appointment, or removal of a member of the public body or another

body and may not consider or fill a vacancy among its own membership except in an open meeting. Final action making an appointment or discharge or removal by a public body having final authority for the appointment or discharge or removal shall be taken in an open meeting.

(7) To plan, conduct, or hear reports concerning investigations of alleged criminal misconduct.

(8) To formulate plans by a local board of education relating to emergency response to incidents of school violence.

(9) To discuss and take action regarding plans to protect public safety as it relates to existing or potential terrorist activity and to receive briefings by staff members, legal counsel, or law enforcement or emergency service officials concerning actions taken or to be taken to respond to such activity.

(b) Repealed by Laws 1991, c. 694, § 4.

(c) Calling a Closed Session.--A public body may hold a closed session only upon a motion duly made and adopted at an open meeting. Every motion to close a meeting shall cite one or more of the permissible purposes listed in subsection (a) of this section. A motion based on subdivision (a)(1) of this section shall also state the name or citation of the law that renders the information to be discussed privileged or confidential. A motion based on subdivision (a)(3) of this section shall identify the parties in each existing lawsuit concerning which the public body expects to receive advice during the closed session.

(d) Repealed by Laws 1993, c. 570, § 2, eff. Oct. 1, 1994.

### **G.S. § 143-318.12. Public notice of official meetings**

(a) If a public body has established, by ordinance, resolution, or otherwise, a schedule of regular meetings, it shall cause a current copy of that schedule, showing the time and place of regular meetings, to be kept on file as follows:

(1) For public bodies that are part of State government, with the Secretary of State;

(2) For the governing board and each other public body that is part of a county government, with the clerk to the board of county commissioners;

(3) For the governing board and each other public body that is part of a city government, with the city clerk;

(4) For each other public body, with its clerk or secretary, or, if the public body does not have a clerk or secretary, with the clerk to the board of county commissioners in the county in which the public body normally holds its meetings.

If a public body changes its schedule of regular meetings, it shall cause the revised schedule to be filed as provided in subdivisions (1) through (4) of this subsection at least seven calendar days before the day of the first meeting held pursuant to the revised schedule.

(b) If a public body holds an official meeting at any time or place other than a time or place shown on the schedule filed pursuant to subsection (a) of this section, it shall give public notice of the time and place of that

meeting as provided in this subsection.

(1) If a public body recesses a regular, special, or emergency meeting held pursuant to public notice given in compliance with this subsection, and the time and place at which the meeting is to be continued is announced in open session, no further notice shall be required.

(2) For any other meeting, except an emergency meeting, the public body shall cause written notice of the meeting stating its purpose (i) to be posted on the principal bulletin board of the public body or, if the public body has no such bulletin board, at the door of its usual meeting room, and (ii) to be mailed or delivered to each newspaper, wire service, radio station, and television station, which has filed a written request for notice with the clerk or secretary of the public body or with some other person designated by the public body. The public body shall also cause notice to be mailed or delivered to any person, in addition to the representatives of the media listed above, who has filed a written request with the clerk, secretary, or other person designated by the public body. This notice shall be posted and mailed or delivered at least 48 hours before the time of the meeting. The public body may require each newspaper, wire service, radio station, and television station submitting a written request for notice to renew the request annually. The public body shall charge a fee to persons other than the media, who request notice, of ten dollars (\$10.00) per calendar year, and may require them to renew their requests quarterly.

(3) For an emergency meeting, the public body shall cause notice of the meeting to be given to each local newspaper, local wire service, local radio station, and local television station that has filed a written request, which includes the newspaper's, wire service's, or station's telephone number, for emergency notice with the clerk or secretary of the public body or with some other person designated by the public body. This notice shall be given either by telephone or by the same method used to notify the members of the public body and shall be given immediately after notice has been given to those members. This notice shall be given at the expense of the party notified. An "emergency meeting" is one called because of generally unexpected circumstances that require immediate consideration by the public body. Only business connected with the emergency may be considered at a meeting to which notice is given pursuant to this paragraph.

(c) Repealed by Laws 1991, c. 694, § 6.

**G.S. § 143-318.13. Electronic meetings; written ballots; acting by reference**

(a) Electronic Meetings.--If a public body holds an official meeting by use of conference telephone or other electronic means, it shall provide a location and means whereby members of the public may listen to the meeting and the notice of the meeting required by this Article shall specify that location. A fee of up to twenty-five dollars (\$25.00) may be charged each such listener to defray in part the cost of providing the necessary location and equipment.

(b) Written Ballots.--Except as provided in this subsection or by joint resolution of the General Assembly, a public body may not vote by secret or written ballot. If a public body decides to vote by written ballot, each member of the body so voting shall sign his or her ballot; and the minutes of the public body shall show the vote of each member voting. The ballots shall be available for public inspection in the office of the clerk or secretary to the public body immediately following the meeting at which the vote took place and until the minutes of that meeting are approved, at which time the ballots may be destroyed.

(c) Acting by Reference.--The members of a public body shall not deliberate, vote, or otherwise take action upon any matter by reference to a letter, number or other designation, or other secret device or method, with the intention of making it impossible for persons attending a meeting of the public body to understand what is being deliberated, voted, or acted upon. However, this subsection does not prohibit a public body from deliberating, voting, or otherwise taking action by reference to an agenda, if copies of the agenda, sufficiently worded to enable the public to understand what is being deliberated, voted, or acted upon, are available for public inspection at the meeting.

#### **G.S. § 143-318.14. Broadcasting or recording meetings**

(a) Except as herein below provided, any radio or television station is entitled to broadcast all or any part of a meeting required to be open. Any person may photograph, film, tape-record, or otherwise reproduce any part of a meeting required to be open.

(b) A public body may regulate the placement and use of equipment necessary for broadcasting, photographing, filming, or

recording a meeting, so as to prevent undue interference with the meeting. However, the public body must allow such equipment to be placed within the meeting room in such a way as to permit its intended use, and the ordinary use of such equipment shall not be declared to constitute undue interference; provided, however, that if the public body, in good faith, should determine that the size of the meeting room is such that all the members of the public body, members of the public present, and the equipment and personnel necessary for broadcasting, photographing, filming, and tape-recording the meeting cannot be accommodated in the meeting room without unduly interfering with the meeting and an adequate alternative meeting room is not readily available, then the public body, acting in good faith and consistent with the purposes of this Article, may require the pooling of such equipment and the personnel operating it; and provided further, if the news media, in order to facilitate news coverage, request an alternate site for the meeting, and the public body grants the request, then the news media making such request shall pay any costs incurred by the public body in securing an alternate meeting site.

#### **G.S. § 143-318.14A. Legislative commissions, committees, and standing subcommittees**

(a) Except as provided in subsection (e) below, all official meetings of commissions, committees, and standing subcommittees of the General Assembly (including, without limitation, joint committees and study committees), shall be held in open session. For the purpose of this section, the following also shall be considered to be "commissions, committees, and standing subcommittees of the General Assembly":

(1) The Legislative Research

Commission;  
 (2) The Legislative Services  
 Commission;

<Text of subd. (3) eff. until July 1,  
 2007.>

(3) The Advisory Budget  
 Commission;

<Text of subd. (3) eff. July 1, 2007.>

(3) Repealed by S.L. 2006-203, § 93,  
 eff. July 1, 2007.

(4) The Joint Legislative Utility  
 Review Committee;

(5) The Joint Legislative Commission  
 on Governmental Operations;

(6) The Joint Legislative Commission  
 on Municipal Incorporations;

(7) Deleted by S.L. 1997-443, § 12.30,  
 eff. August 28, 1997.

(8) The Joint Select Committee on  
 Low-Level Radioactive Waste;

(9) The Environmental Review  
 Commission;

(10) The Joint Legislative  
 Transportation Oversight Committee;

(11) The Joint Legislative Education  
 Oversight Committee;

(12) The Joint Legislative Commission  
 on Future Strategies for North  
 Carolina;

(13) The Commission on Children  
 with Special Needs;

(14) The Legislative Committee on  
 New Licensing Boards;

(15) The Agriculture and Forestry  
 Awareness Study Commission;

(16) The North Carolina Study  
 Commission on Aging; and

(17) The standing Committees on  
 Pensions and Retirement.

(b) Reasonable public notice of all meetings  
 of commissions, committees, and standing  
 subcommittees of the General Assembly shall  
 be given. For purposes of this subsection,  
 “reasonable public notice” includes, but is not  
 limited to:

(1) Notice given openly at a session of  
 the Senate or of the House; or

(2) Notice mailed or sent by  
 electronic mail to those who  
 have requested notice, and to the  
 Legislative Services Office, which  
 shall post the notice on the General  
 Assembly web site.

G.S. 143-318.12 shall not apply to meetings  
 of commissions, committees, and standing  
 subcommittees of the General Assembly.

(c) A commission, committee, or standing  
 subcommittee of the General Assembly may  
 take final action only in an open meeting.

(d) A violation of this section by members of  
 the General Assembly shall be punishable as  
 prescribed by the rules of the House or the  
 Senate.

(e) The following sections shall apply to  
 meetings of commissions, committees, and  
 standing subcommittees of the General  
 Assembly: G.S. 143-318.10(e) and G.S. 143-



318.11, G.S. 143-318.13 and G.S. 143-318.14, G.S. 143- 318.16 through G.S. 143-318.17.

**G.S. § 143-318.15. Advisory Budget Commission and appropriation committees of General Assembly; application of Article**

(a) The provisions of this Article shall not apply to meetings of the Advisory Budget Commission held for the purpose of actually preparing the budget required by the provisions of the Executive Budget Act (Article 1, Chapter 143, General Statutes of North Carolina), but nothing in this Article shall be construed to amend, repeal or supersede the provisions of G.S. 143-10 (or any similar statutes hereafter enacted) requiring public hearings to secure information on any and all estimates to be included in the budget and providing for other procedures and practices incident to the preparation and adoption of the budget required by the State Budget Act.

(b) This Article does not amend, repeal or supersede the provisions of G.S. 143-14, relating to the meetings of the appropriations committees and subcommittees of the General Assembly.

<Text of section is repealed eff. July 1, 2007, pursuant to S.L. 2006-203, § 94.>

**G.S. § 143-318.16. Injunctive relief against violations of Article**

(a) The General Court of Justice has jurisdiction to enter mandatory or prohibitory injunctions to enjoin (i) threatened violations of this Article, (ii) the recurrence of past violations of this Article, or (iii) continuing violations of this Article. Any person may bring an action in the appropriate division of the General Court of Justice seeking such an injunction; and the plaintiff need not allege or prove special

damage different from that suffered by the public at large. It is not a defense to such an action that there is an adequate remedy at law.

(b) Any injunction entered pursuant to this section shall describe the acts enjoined with reference to the violations of this Article that have been proved in the action.

(c) Repealed by Laws 1985 (Reg. Sess., 1986), c. 932, § 3, eff. Oct. 1, 1986.

**G.S. § 143-318.16A. Additional remedies for violations of Article**

(a) Any person may institute a suit in the superior court requesting the entry of a judgment declaring that any action of a public body was taken, considered, discussed, or deliberated in violation of this Article. Upon such a finding, the court may declare any such action null and void. Any person may seek such a declaratory judgment, and the plaintiff need not allege or prove special damage different from that suffered by the public at large. The public body whose action the suit seeks to set aside shall be made a party. The court may order other persons be made parties if they have or claim any right, title, or interest that would be directly affected by a declaratory judgment voiding the action that the suit seeks to set aside.

(b) A suit seeking declaratory relief under this section must be commenced within 45 days following the initial disclosure of the action that the suit seeks to have declared null and void; provided, however, that any suit for declaratory judgment brought pursuant to this section that seeks to set aside a bond order or bond referendum shall be commenced within the limitation periods prescribed by G.S. 159-59 and G.S. 159-62. If the challenged action is recorded in the minutes of the public body, its initial disclosure shall be deemed



to have occurred on the date the minutes are first available for public inspection. If the challenged action is not recorded in the minutes of the public body, the date of its initial disclosure shall be determined by the court based on a finding as to when the plaintiff knew or should have known that the challenged action had been taken.

(c) In making the determination whether to declare the challenged action null and void, the court shall consider the following and any other relevant factors:

- (1) The extent to which the violation affected the substance of the challenged action;
- (2) The extent to which the violation thwarted or impaired access to meetings or proceedings that the public had a right to attend;
- (3) The extent to which the violation prevented or impaired public knowledge or understanding of the people's business;
- (4) Whether the violation was an isolated occurrence, or was a part of a continuing pattern of violations of this Article by the public body;
- (5) The extent to which persons relied upon the validity of the challenged action, and the effect on such persons of declaring the challenged action void;
- (6) Whether the violation was committed in bad faith for the purpose of evading or subverting the public policy embodied in this Article.

(d) A declaratory judgment pursuant to this section may be entered as an alternative to, or in combination with, an injunction entered

pursuant to G.S. 143-318.16.

(e) The validity of any enacted law or joint resolution or passed simple resolution of either house of the General Assembly is not affected by this Article.

#### **G.S. § 143-318.16B. Assessments and awards of attorneys' fees**

When an action is brought pursuant to G.S. 143-318.16 or G.S. 143-318.16A, the court may make written findings specifying the prevailing party or parties, and may award the prevailing party or parties a reasonable attorney's fee, to be taxed against the losing party or parties as part of the costs. The court may order that all or any portion of any fee as assessed be paid personally by any individual member or members of the public body found by the court to have knowingly or intentionally committed the violation; provided, that no order against any individual member shall issue in any case where the public body or that individual member seeks the advice of an attorney, and such advice is followed.

#### **G.S. § 13-318.16C. Accelerated hearing; priority**

Actions brought pursuant to G.S. 143-318.16 or G.S. 143-318.16A shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

#### **G.S. § 143-318.16D. Local acts**

Any reference in any city charter or local act to an "executive session" is amended to read "closed session".

#### **G.S. § 143-318.17. Disruptions of official meetings**

A person who willfully interrupts, disturbs,

or disrupts an official meeting and who, upon being directed to leave the meeting by the presiding officer, willfully refuses to leave the meeting is guilty of a Class 2 misdemeanor.

### **G.S. § 143-318.18. Exceptions**

This Article does not apply to:

- (1) Grand and petit juries.
- (2) Any public body that is specifically authorized or directed by law to meet in executive or confidential session, to the extent of the authorization or direction.
- (3) The Judicial Standards Commission.
- (3a) The North Carolina Innocence Inquiry Commission.
- (4) Repealed by Laws 1991, c. 694, § 9.
- (4a) The Legislative Ethics Committee.
- (4b) A conference committee of the General Assembly.
- (4c) A caucus by members of the General Assembly; however, no member of the General Assembly shall participate in a caucus which is called for the purpose of evading or subverting this Article.
- (5) Law enforcement agencies.
- (6) A public body authorized to investigate, examine, or determine the character and other qualifications of applicants for professional or occupational licenses or certificates

or to take disciplinary actions against persons holding such licenses or certificates, (i) while preparing, approving, administering, or grading examinations or (ii) while meeting with respect to an individual applicant for or holder of such a license or certificate. This exception does not amend, repeal, or supersede any other statute that requires a public hearing or other practice and procedure in a proceeding before such a public body.

<Text of subd. (7) eff. until July 1, 2007.>

(7) Any public body subject to the Executive Budget Act (G.S. 143-1 et seq.) and exercising quasi-judicial functions, during a meeting or session held solely for the purpose of making a decision in an adjudicatory action or proceeding.

<Text of subd. (7) eff. July 1, 2007.>

(7) Any public body subject to the State Budget Act, Chapter 143C of the General Statutes and exercising quasi-judicial functions, during a meeting or session held solely for the purpose of making a decision in an adjudicatory action or proceeding.

(8) The boards of trustees of endowment funds authorized by G.S. 116-36 or G.S. 116-238.

(9) Repealed by Laws 1991, c. 694, § 9.

(10) The Board of Awards.

(11) The General Court of Justice.

# Access to State and Local Government Documents

North Carolina's Public Records Law, Chapter 132 of the General Statutes, clearly states that the public and the media have a right of access to most documents made or received by state and local governments. A 1995 amendment to the law says public records "are the property of the people,"<sup>1</sup> and the state's courts have repeatedly declared that the state's public records law must be construed liberally in favor of disclosure<sup>2</sup> and the exceptions construed narrowly.<sup>3</sup> This chapter will address access to records of the legislative and executive branches of state and local governments in North Carolina. Access to court records is addressed in the chapter of this book on access to the judicial process.

Public records laws vary from state to state. To obtain access to records of a state or local government outside North Carolina, you should familiarize yourself with that state's law.

Many government records — in North Carolina and elsewhere — are available for the asking. Minutes of city council meetings, arrest reports and comprehensive zoning plans, for example, are routinely available to the press and public. However, the wide variety of records made or received by the government sometimes makes it difficult to generalize about them, so there are frequent

disagreements between government officials and the press about whether particular records are public. This confusion is complicated by the facts that few appellate court decisions have been written interpreting the North Carolina law and that there are dozens of additional state statutes and some federal statutes that either grant or deny public access to specific government information. However, the Public Records Law makes this one thing clear: *Disclosure of public records is the rule, and withholding them from the public and the press is the exception.*

## What is a public record?

Public records are defined in the North Carolina law as "documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material."<sup>4</sup> No records are excluded because of their physical form.

Public records are further defined as the records of an agency of North Carolina government or its subdivisions, which means the records of every "public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdi-

<sup>1</sup> N.C. GEN STAT. §132-1(b).

<sup>2</sup> See, e.g., *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999).

<sup>3</sup> See, e.g., *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 655-56, 566 S.E.2d 701, 704 (2002).

<sup>4</sup> N.C. GEN STAT. §132-1(a).

vision of government.”<sup>5</sup> That means all levels of government from state government down. It includes advisory boards and commissions.

The definition of public records includes all records “made or received pursuant to law or ordinance in connection with the transaction of public business.”<sup>6</sup> The Court of Appeals has said this means all records specifically required to be kept by law as well as others that are in fact kept by a public official or agency in carrying out the agency’s lawful duties.<sup>7</sup> In addition, the state’s attorney general has said that “it has always been the view of this office that the statutory phrase ‘in pursuance of law’ is not to be narrowly construed so as to limit the chapter to only documents specifically prescribed by law to be made or received. In the opinion of this office, the phrase is more properly interpreted to mean or describe an act done in one’s public employment capacity as opposed to a private act.”<sup>8</sup> For example, all letters sent or received by a public official in his or her official capacity are public records, but a personal letter mailed to his government address is not.

The definition of public records as records “made or received pursuant to law or ordinance in connection with the transaction of public business” also suggests that the law covers records relating to multi-state or regional bodies if North Carolina public officials are members.

## What is a public agency?

The Public Records Law covers records relating to public business transacted by any

agency of the state or its subdivisions. In 1981 the Court of Appeals relied on federal case law to define a public agency as “any administrative unit with substantial independent authority in the exercise of specific functions. Administrative entities that perform neither rule-making nor adjudicative duties also may be agencies. ‘The important consideration is whether [the administrative entity] has any authority in law to make decisions.’”<sup>9</sup> The court applied that definition to Wake County Hospital, which was established by Wake County to provide medical care to the general public, including the poor, and found the hospital to be a public agency whose documents are public records. The court acknowledged that the hospital was organized as a private, non-profit corporation, but concluded that it was so intertwined financially and administratively with the county government as to be a public agency. The county owned the hospital building and leased it to the hospital corporation for \$1 per year, reviewed and approved the hospital’s annual budget, financed the hospital through county bond orders and approved the members of the hospital’s board of directors.

In 1999 the Court of Appeals ruled in another case that hinged in part on whether a corporation was a private entity or a public agency under the law. The court clearly ruled that a public utility – in this case a telephone company – was private under the law, not a public agency.<sup>10</sup> The court explained that a telephone company’s independent authority was not overshadowed by the Utilities Commission’s control of the company. The

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *News & Observer Publ’g Co. v. Wake County Hosp. Sys.*, 55 N.C. App. 1, 13, 284 S.E.2d 542, 549 (1981), *cert. denied*, 305 N.C. 302, 291 S.E.2d 151, *cert. denied*, 459 U.S. 803, 103 S.Ct. 26 (1982).

<sup>8</sup> *Public Records; North Carolina State University at Raleigh; Text-book Lists; Right of Inspection*, 41 Op. N.C. Att’y Gen. 199 (1971).

<sup>9</sup> *News & Observer Publ’g Co. v. Wake County Hosp. Sys.*, 55 N.C. App. 1, 8, 284 S.E.2d 542, 547 (1981), *cert. denied*, 305 N.C. 302, 291 S.E.2d 151, *cert. denied*, 459 U.S. 803 (1982) (quoting *Washington Research Project, Inc. v. Dep’t of Health, Educ. & Welfare*, 504 F.2d 238, 248 (D.C.Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1951 (1975)). *See also* *Wilmington Star News v. New Hanover Reg’l Med. Ctr.*, 125 N.C.App. 174, 480 S.E.2d 53, *appeal dismissed*, 346 N.C. 557, 488 S.E.2d 826 (1997).

<sup>10</sup> *Utilities Comm’n v. MCI Telecomms. Corp.*, 132 N.C. App. 625, 514 S.E.2d 276 (1999).

Utilities Commission's control of the company was material but not comprehensive, the court said.

While "agency" is defined broadly, it does not automatically include nongovernmental organizations that receive public funds or benefits. A 1992 lawsuit over whether MCNC (formerly the Microelectronics Center of North Carolina) was a public agency for purposes of the state Public Records Law was settled with a consent judgment. In the consent judgment, MCNC agreed to comply voluntarily with most of the provisions of the Public Records Law, but it did not admit being an agency of government legally bound by the Public Records Law.<sup>11</sup> A non-profit organization created by state government in 1980 to foster the state's growing microelectronics industry, MCNC received more than \$240 million from the state. The North Carolina media also have argued – unsuccessfully – for access to the financial records of North Carolina Amateur Sports, a non-profit organization that receives state funds to sponsor amateur sporting events.

### Who is entitled to access?

Everyone is entitled to access to public records, according to the Public Records Law. It doesn't matter who you are or what use you plan to make of the record. The Court of Appeals has specifically stated that a news media organization is a "person" entitled to access under the Public Records Law.<sup>12</sup> Also, the Public Records Law stipulates, "No person requesting to inspect and examine public records, or to obtain copies thereof, shall be required to disclose the purpose or motive

for the request."<sup>13</sup>

In 2004 the Court of Appeals ruled that government agencies may not use the Public Records Law to sue private citizens for a declaratory judgment to resolve public records disputes. To allow such lawsuits, the court reasoned, would discourage citizens from seeking access to records and pervert the purpose of the public records statute.<sup>14</sup>

### What constitutes access?

The Public Records Law says, "Every custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law."<sup>15</sup> No more specific response time is mandated by state law.

This section of the law was the subject of litigation in Buncombe County Superior Court in 1999. At issue was a provision of the county's "Multiple Information Requests Policy" that required citizens seeking public records from the county to submit written requests to the county manager. The court declared that portion of the policy void. It explained that the law does not permit government to impose a "gatehouse" or "overseer" between members of the public who desire access to records and the custodians of those records. The custodian, the court said, is the person who in fact possesses the records. The court said, however, that the county was entitled to develop reasonable rules govern-

11 *Microelectronics Ctr. of North Carolina v. North Carolina* (N.C. Super. Ct. Sept. 21, 1992).

12 *Advance Publ'ns, Inc. v. City of Elizabeth City*, 53 N.C. App. 504, 281 S.E.2d 69 (1981).

13 N.C. GEN. STAT. §132-6(b).

14 *McCormick v. Hanson Aggregates Southeast, Inc.*, 164 N.C. App. 459, 596 S.E.2d 431, *cert. denied and appeal dismissed*, 359 N.C. 69, 603 S.E.2d 131 (2004).

15 N.C. GEN. STAT. §132-6(a).



ing its production of public records. The county can require citizens having requests for voluminous copies to make their requests in writing (see the sample request letter at the end of this chapter), to pay in advance and to wait a reasonable length of time.<sup>16</sup>

The Public Records Law says that access to public records must be granted by “[e]very custodian of public records. . . .”<sup>17</sup> Thus requests can be, and are, addressed to virtually any public employee. However, the law also clarifies that the “custodian” who is legally bound to grant access does not include “an agency that holds the public records of other agencies solely for purposes of storage or safekeeping or solely to provide data processing.”<sup>18</sup>

With two exceptions, requests for records need not be in writing. The two exceptions are requests for copies of computer databases<sup>19</sup> and requests for copies of a geographical information system.<sup>20</sup> The latter may require an agreement in writing that the requester will not use the record for commercial purposes.

A public agency is not obliged to respond to requests for copies of public records outside of its usual business hours.<sup>21</sup> Neither is it required to respond to a request for public records “by creating or compiling a record that does not exist” or by putting records into an electronic database.<sup>22</sup>

## What fees can be charged?

No fees can be charged merely to exam-

ine a public record, and many government agencies do not charge for copies of public records. However, you can be required to pay for a copy of a record. The state Public Records Law says that “it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, ‘minimal cost’ shall mean the actual cost of reproducing the public record or public information.”<sup>23</sup>

The law further states that “actual cost” is limited to “direct, chargeable costs related to the reproduction of a public record as determined by generally accepted accounting principles and does not include costs that would have been incurred by the public agency if a request to reproduce a public record had not been made.”<sup>24</sup> An exception to that rule would be a request that required more extensive use of information technology resources or of supervisory or clerical assistance than an agency had available to assign to this task. In that case, the agency may levy a special service charge in addition to the actual cost. The service charge “shall be based on the actual cost incurred for such extensive use of information technology resources or the labor costs of the personnel providing the services . . . .”<sup>25</sup> Also, if an agency agrees to create or compile a new record as a courtesy to a requester, the agency may negotiate with the requester a reasonable charge for that service.<sup>26</sup>

Several statutes fix fees for copies of specific types of records. For example, a copy of a driver’s license record costs \$8.<sup>27</sup> Copies obtained from clerks of court cost \$2 for

16 *Dawes v. Buncombe County Bd. of Comm’rs*, No. 99 CVS 03497 (N.C. Super. Ct. Sept. 1, 1999).

17 N.C. GEN. STAT. §132-6(a).

18 N.C. GEN. STAT. §132-6(a).

19 N.C. GEN. STAT. §132-6.2(c).

20 N.C. GEN. STAT. §132-10.

21 N.C. GEN. STAT. §132-6.2(d).

22 *Id.*

23 N.C. GEN. STAT. §132-1(b).

24 N.C. GEN. STAT. §132-6.2(b).

25 *Id.*

26 N.C. GEN. STAT. §132-6.2(e).

27 N.C. GEN. STAT. §20-26(c).

the first page and 25 cents for each additional page.<sup>28</sup> Department of Insurance copies cost 50 cents per page.<sup>29</sup>

If you feel the fee is unfair or unreasonable, you can ask the Information Resource Management Commission in Raleigh to mediate the dispute.<sup>30</sup> A commission staff member will contact the agency from which you are seeking the record and inquire about how the fee was set. If the staff member concludes the fee is reasonable, the staff member will explain that to you. Otherwise, the staff member will negotiate with the agency to have the fee lowered.

### **Are there special rules for computerized records?**

In 1995 the General Assembly amended the Public Records Law to facilitate public access to computerized records. First, the General Assembly said that persons requesting copies of public records may obtain them “in any and all media in which the public agency is capable of providing them. No request for copies of public records in a particular medium shall be denied on the grounds that the custodian has made or prefers to make the public records available in another medium.”<sup>31</sup>

A public agency is not required to convert paper records to computer databases.<sup>32</sup> However, if an agency agrees to create an electronic record, it may negotiate a “reasonable charge” for the service.<sup>33</sup>

You may legally be required to make a written request for copies of computer databases. (See the sample request letter at the

end of this chapter.) Custodians of public records then must respond “as promptly as possible,” according to the Public Records Law. If the request is granted, the copies should be provided “as soon as reasonably possible.” If your request is denied, an explanation must be given, and it must be given in writing, if you so request.<sup>34</sup>

Also according to the Public Records Law, no public agency may use a computerized record-keeping system that impedes public access to its records. The law says no public agency may “purchase, lease, create, or otherwise acquire any electronic data-processing system for the storage, manipulation, or retrieval of public records unless it first determines that the system will not impair or impede the agency’s ability to permit the public inspection and examination, and to provide electronic copies of such records.”<sup>35</sup>

Furthermore, each public agency must create an index of the computer databases it has compiled or created. The indexes are public records and must include at least the following information: “a list of the data fields, a description of the format or record layout, information as to the frequency with which the database is updated, a list of any data fields to which public access is restricted, a description of each form in which the database can be copied or reproduced using the agency’s computer facilities, and a schedule of fees for the production of copies in each available form.”<sup>36</sup>

The Public Records Law states that a public agency is not required to disclose its software security measures, including its passwords.<sup>37</sup>

28 N.C. GEN. STAT. §7A-308(a)(12).

29 N.C. GEN. STAT. §58-6-5(3).

30 N.C. GEN. STAT. §132-6.2(b).

31 N.C. GEN. STAT. §132-6.2(a).

32 N.C. GEN. STAT. §132-6.2(e).

33 N.C. GEN. STAT. §132-6.2(e).

34 N.C. GEN. STAT. §132-6.2(c).

35 N.C. GEN. STAT. §132-6.1(a). *See also* News & Observer Publ’g Co. v. Johnston County, No. 95-CVS-1671 (N.C. Super. Ct. 1997).

36 N.C. GEN. STAT. §132-6.1(b).

37 N.C. GEN. STAT. §132-6.1(c).

## What happens when confidential and nonconfidential information are mingled?

The Public Records Law says, “No request to inspect, examine, or obtain copies of public records shall be denied on the grounds that confidential information is commingled with the requested nonconfidential information.”<sup>38</sup> The law further stipulates that the public agency must bear the cost of separating the information in order to permit access to public records.<sup>39</sup>

## Can public officials destroy their records?

The state Public Records Law prohibits public officials from destroying or otherwise disposing of public records except in accordance with law or with the consent of the Department of Cultural Resources. Anyone who unlawfully removes, destroys, alters or mutilates public records is guilty of a misdemeanor punishable by a fine of \$10 to \$500.<sup>40</sup> The Department of Cultural Resources is assigned to assist public officials in preparing inventories of records and to devise retention and disposal schedules.<sup>41</sup>

## Which records are public records and which are not?

The Public Records Law makes access to records the rule and denial of access the exception. Furthermore, the Supreme Court has ruled that public agency records are public unless there is a specific statutory exception.<sup>42</sup>

The following is a list of types of records that we are relatively certain are either public or not public. The Public Records Law includes some specific exceptions to its mandate for access. Court decisions and attorney general opinions have interpreted the Public Records Law. And many state statutes, in addition to the Public Records Law, make specific information either public or not public. Many of those state statutes make certain government information confidential and make it a misdemeanor for a government employee to release it.

Records not included in the list below are public if they fit the description of public records detailed above.

**Adoption records.** The decree of adoption and the entry in the special proceedings index in the office of the clerk of court are public records. However, all other records created or filed in connection with an adoption on file with the court, with any other government agency, an attorney or other provider of professional services are not public records.<sup>43</sup> The criminal histories of prospective adoptive parents of minors in the care of county departments of social services are not public records either.<sup>44</sup>

**Adult care home records.** According to state statute, the Department of Health and Human Services must protect the confidentiality of all persons who file complaints about adult care home facilities. Furthermore, the records of residents of such facilities used by the department to investigate complaints are not public records.<sup>45</sup>

**Advisory board records.** These are public records under the broad protection of the Public Records Law.

38 N.C. GEN. STAT. §132-6(c).

39 *Id.*

40 N.C. GEN. STAT. §132-3.

41 N.C. GEN. STAT. §132-8.

42 *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992).

43 N.C. GEN. STAT. §48-9-102(a).

44 N.C. GEN. STAT. §48-3-309(f).

45 N.C. GEN. STAT. §131D-27.

***Agriculture records.***

*Animal health records.* The Department of Agriculture and Consumer Services collects information from individual farm operators for its animal health programs. That information may be disclosed by the state veterinarian to assist in the implementation of these programs. However, animal disease diagnostic tests that identify the owner of an animal cannot be disclosed to the public without the permission of the owner unless the state veterinarian determines that disclosure is necessary to prevent the spread of an animal disease or to protect the public health.<sup>46</sup>

*Commercial feed formulas.* Formulas for commercial feed must be filed with the Department of Agriculture and Consumer Services but are not public records; they are trade secrets. A government employee who discloses this information to anyone except an authorized person is guilty of a misdemeanor.<sup>47</sup> (See also Trade secrets.)

*Dairy farm records.* Information furnished to or acquired by the Southern Dairy Compact Commission, a regional board that works to insure consumers have an adequate, local supply of pure and wholesome milk, is not public record. However, state statute allows the commission to issue general statements that do not identify individuals who supplied information and to release the name of any person violating a commission regulation, together with a statement of the particular provisions violated by that person.<sup>48</sup>

*Fertilizer records.* Anyone selling commercial fertilizer in the state must furnish the state commissioner of agriculture a written statement of the tonnage of each grade of

fertilizer sold. This information is not public record.<sup>49</sup>

*Forest product processing records.* The Department of Revenue reviews the production records of companies that process forest products in the state in order to collect assessments. Those production records are not public records, and it is a misdemeanor for a state employee to disclose them.<sup>50</sup>

*Porcine animal (hog) data.* A buyer of porcine animals must keep records of the number of animals purchased and the dates they are purchased as part of the process of collecting funds to help promote the pork production industry in the state. That purchase information is reported to the Department of Agriculture and Consumer Services and the N.C. Pork Producers Association, but it is not public record. State law mandates that the department and the association keep confidential all information or records regarding purchases of porcine animals by individual buyers.<sup>51</sup>

*Statistical data.* The Department of Agriculture and Consumer Services is required to compile statistical data about agriculture. However, the department is prohibited from releasing data that identify information received from individual farm operators.<sup>52</sup>

*Amusement records.* The state's Amusement Device Safety Act requires the commissioner of labor to inspect and certify the safety of carnival rides and similar amusements. Any information reported to the commissioner in connection with these duties that reveals a trade secret is confidential and not a public record.<sup>53</sup> (See also Trade secrets.)

<sup>46</sup> N.C. GEN. STAT. §106-24.1.

<sup>47</sup> N.C. GEN. STAT. §106-284.44(f).

<sup>48</sup> N.C. GEN. STAT. §106-810, art. VI, §15(b).

<sup>49</sup> N.C. GEN. STAT. §106-677.

<sup>50</sup> N.C. GEN. STAT. §113A-195(f).

<sup>51</sup> N.C. GEN. STAT. §106-794(d).

<sup>52</sup> N.C. GEN. STAT. §106-24.1.

<sup>53</sup> N.C. GEN. STAT. §95-111.17.

**Animal research records.** In 1991 the Court of Appeals ruled that a UNC-CH committee's documents relating to the use and care of animals in scientific research are public records.<sup>54</sup> The documents in question were forms filed by researchers with the university's Institutional Animal Care and Use Committee. The committee was created in accordance with federal law to inspect facilities where animals are housed and studied at the university and to review proposed procedures for the care and use of the animals in experiments.

The court ruled that the records did not contain trade secrets that could be withheld from public scrutiny. It also said the First Amendment does not create an academic freedom exception to disclosure of documents. However, the court said that public policy requires that the following information is not public and can be deleted from the records before they are released to the public: the names of researchers and their staff members, their telephone numbers and addresses, their experience and the names of their departments. It also said that applications submitted to a university committee that decides whether proposed experiments would appropriately minimize pain and distress for animals used in research need not be made public if the applications are not approved. (See also Trade secrets.)

**Antifreeze records.** When the Department of Labor receives an application for a license or permit to sell antifreeze in this state, the commissioner may require the applicant to furnish a statement of the contents of the antifreeze. That information is a trade secret and not a public record.<sup>55</sup> (See also Trade secrets.)

**Archaeological records.** The state collects information on the location and nature of archaeological resources, such as rock carvings and Native American burial grounds. Under state statute, that information is public record unless the secretary of cultural resources decides "that the disclosures would create a risk of harm to such resources or to the site at which such resources are located."<sup>56</sup>

**Athletic booster club and educational foundation audits.** It is the policy of the University of North Carolina system that the annual audits of all foundations linked to constituent institutions of the university are public records. UNC-CH and North Carolina State University each have more than a dozen such foundations.

**Attorney-client privilege.** North Carolina's Public Records Law says an attorney-client privilege shields some government documents from public inspection. Written communications from an attorney serving a public body to that public body "made within the scope of the attorney-client privilege" are not public records if those statements concern "any claim against or on behalf of the governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected."<sup>57</sup> Such records become public three years from the date they are received by the government.<sup>58</sup>

In 1992 the Supreme Court ruled that while state law exempts from public disclosure records of communications from a public body's attorney to that public body, it does not exempt written communications

54 S.E.T.A. v. Huffines, 101 N.C. App. 292, 399 S.E.2d 340 (1991).

55 N.C. GEN. STAT. §106-579.11.

56 N.C. GEN. STAT. §70-18.

57 N.C. GEN. STAT. §132-1.1(a).

58 *Id.*



that travel in the opposite direction, that is, from a public body to its attorney.<sup>59</sup>

Also, in early 2007, the N.C. Court of Appeals determined that professional reports held by a private law firm serving as a town's attorney were public records. The reports were generated by engineers, appraisers, surveyors and other professionals in connection with the town's condemnation of oceanfront property. In denying access to the documents, the town's attorney argued that these items were not public records because the town never possessed the reports, despite paying for them, and because the "attorney" was a private law firm that contracted to serve as the town's legal counsel. The Court of Appeals dismissed the town's argument, saying that to permit the exception to access would invite every governmental agency to contract with independent lawyers to skirt their public-records-disclosure requirements. The court said that the reports belonged to the town and that the private law firm serving as the town's attorney was obligated to produce the reports pursuant to a public records request.<sup>60</sup>

The Public Records Law says that a government records custodian can deny access to a public record that is also trial-preparation material.<sup>61</sup> State law defines trial-preparation material as "documents and tangible things . . . prepared in anticipation of litigation or for trial"<sup>62</sup> in civil proceedings in state or federal court or in local, state or federal administrative or quasi-judicial proceedings.<sup>63</sup> If the denial of access is based on an assertion that the public record is trial-preparation material

that was prepared in anticipation of a legal proceeding that has not commenced, the custodian must, upon request, provide a written justification to that effect.<sup>64</sup> Both before and during legal proceedings, you can petition the court for a determination as to whether the public record is indeed trial-preparation material.<sup>65</sup> At the conclusion of a legal proceeding, after all appeals and post-judgment proceedings, or in cases where no legal proceeding has been commenced and all applicable statutes of limitations have expired, the trial-preparation material must be made available for public inspection and copying.<sup>66</sup>

**Audit records.** Audit reports issued by the state auditor are public records,<sup>67</sup> but the underlying work papers are not.<sup>68</sup> Similarly, audit reports of the Department of Health and Human Services are public records, but the related work papers are not.<sup>69</sup>

**Autopsy reports and photographs.** According to the Public Records Law, "[T]he text of an official autopsy report, including any findings and interpretations," is a public record.<sup>70</sup> Also, photographs or video or audio recordings of official autopsies are available for public inspection, but they generally cannot be copied by members of the media or the public.<sup>71</sup> An official autopsy is one ordered by a medical examiner, judge or district attorney. (The circumstances in which these officials may or must order an autopsy performed are spelled out in Chapter 130A of the General Statutes.) Except in cases where the cause of death is suspicious, reports of autopsies requested by the deceased person's next-of-kin are considered individual medi-

59 News & Observer Publ'g Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

60 Womack Newspapers, Inc., d/b/a The Outer Banks Sentinel v. Town of Kitty Hawk, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_, 2007 WL 3428 (2007).

61 N.C. GEN. STAT. §132-1.9(b).

62 Rules Civ. Proc., N.C. GEN. STAT. §1A-1, RULE 26(B)(3).

63 N.C. GEN. STAT. §132-1.9(h)(1).

64 N.C. GEN. STAT. §132-1.9(b).

65 N.C. GEN. STAT. §132-1.9(c).

66 N.C. GEN. STAT. §132-1.9(e).

67 N.C. GEN. STAT. §147-64.6(c)(14).

68 N.C. GEN. STAT. §147-64.6(d).

69 N.C. GEN. STAT. §143B-216.51(d).

70 N.C. GEN. STAT. §132-1.8.

71 N.C. GEN. STAT. §130A-389.1(a).

cal records and are not public records.<sup>72</sup>

Anyone denied a copy of autopsy photographs or recordings may initiate a special judicial proceeding to show good cause why a copy should be made available. Considerations in determining good cause include “whether the disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family’s right to privacy and whether the disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form.”<sup>73</sup>

Some North Carolina counties have coroners. In those counties, the coroner is required by law to file reports of inquests and investigations with the county medical examiner and the district attorney.<sup>74</sup> Therefore the rules above apply to coroners’ reports, too.

#### ***Bail bondsmen and runners records.***

When an insurer terminates the appointment of a bondsman who had been appointed by the insurer to write bail bonds on the insurer’s behalf, the insurer must furnish the commissioner of insurance with a written notice of the termination stating the reasons, if any, for the termination. These notices are not public record.<sup>75</sup> Bail bondsmen who hire licensed runners must file similar notices when they terminate the appointment of a runner. Those notices are not public records either.<sup>76</sup>

***Bank, savings and loan, and credit union records.*** Virtually all of these records are closed under a variety of state statutes.

For example, the commissioner of banks

is required by state law to keep confidential the following types of information related to savings banks:

(1) Information obtained or compiled in connection with an examination, audit, or investigation of any savings bank;

(2) Information reflecting the specific collateral given by a borrower, the amount of stock owned by a stockholder, stockholder lists and deposit accounts held by a named customer;

(3) Information obtained, prepared, or compiled in connection with examination, audit, or investigation of any savings bank by a federal agency, if the records would be confidential under federal law;

(4) Other information and reports submitted by savings banks to federal regulatory agencies, if the records or information would be confidential under federal law;

(5) Information and records regarding complaints from the public that concern savings banks when the complaint would or could result in an investigation.<sup>77</sup>

However, the records of the Banking Commission’s “official acts, rulings, and transactions” are public records.<sup>78</sup>

All records compiled by credit unions, including records of audits and examinations, records that disclose the names of borrowers and records of credit union members who lodge complaints with the state administrator of credit unions, are confidential.<sup>79</sup> Only the information contained in an application for a new credit union is a public record.<sup>80</sup>

The same is true of the records of savings and loan associations.<sup>81</sup> Nothing is public

<sup>72</sup> N.C. GEN. STAT. §130A-389(d).

<sup>73</sup> N.C. GEN. STAT. §130A-389.1(d).

<sup>74</sup> N.C. GEN. STAT. §152-7.

<sup>75</sup> N.C. GEN. STAT. §58-71-115.

<sup>76</sup> N.C. GEN. STAT. §58-71-125.

<sup>77</sup> N.C. GEN. STAT. §54C-60.

<sup>78</sup> N.C. GEN. STAT. §53-99(a).

<sup>79</sup> N.C. GEN. STAT. §54-109.105.

<sup>80</sup> N.C. GEN. STAT. §54-109.105(c).

<sup>81</sup> N.C. GEN. STAT. §54B-63(a).

record except the information in an application to establish a savings and loan association. Even then, the financial statements of the incorporators and any other information deemed by the administrator to be confidential are not public records.<sup>82</sup> Also, compliance review documents in the custody of a savings and loan association or a government regulatory agency are confidential, not public records.<sup>83</sup>

**Bids for government contracts.** The state's competitive bidding statute, which sets out the procedures to be followed in awarding state contracts, provides that all bids shall be open for public inspection following the award of a contract. However, "trade secrets, test data and similar proprietary information" submitted in connection with the bid may remain confidential.<sup>84</sup> (See also Operating records and contracts.)

**Community college records.** All records of the State Board of Community Colleges, the Community Colleges System office and the local boards of trustees are public records by statute.<sup>85</sup> This does not include student education records, however. (See also Education records.)

**Competitive health care information.** Information concerning the competitive health care activities of public health authorities<sup>86</sup> and public hospitals<sup>87</sup> is confidential and not a public record. However, any contract entered into by or on behalf of a public health authority or public hospital is a public record unless exempted by statute.<sup>88</sup> One state statute says a public hospital or public hospital authority requested to disclose a contract

may redact the portions believed to constitute competitive health care information or, if the entire contract constitutes competitive health care information, refuse to disclose the entire contract.<sup>89</sup> Also, the financial terms and other competitive health care information directly related to the financial terms of a health services contract between a hospital or a medical school and a managed care organization, insurance company, employer or other payer are not public record.<sup>90</sup>

In 2006 the Court of Appeals ruled that a hospital's written agreement to purchase a private medical practice was a public record, not confidential competitive health care information.<sup>91</sup> The court said state law allows a contract entered into by a public hospital to be exempt from the public records law only if the contract contains competitive health care information. The court said: "[T]he contract here is a contract with a public hospital to purchase a medical practice. There is nothing in the record to suggest that other hospitals or entities were competing for [the] medical practice, and therefore nothing to suggest this contract contained 'financial terms' or health care information directly related to financial terms such that this contract should be kept confidential. . . . We do not think the legislature intended such business dealings – which do not involve trade secret information nor competitive price lists – to be kept confidential."<sup>92</sup> (See also Trade secrets.)

**Controlled substance reporting system records.** The Public Records Law exempts from public disclosure information maintained in the state's controlled substance reporting system.<sup>93</sup> The system tracks the sale of prescription drugs.

82 N.C. GEN. STAT. §54B-63(c).

83 N.C. GEN. STAT. §54B-63.1(b).

84 N.C. GEN. STAT. §143-52.

85 N.C. GEN. STAT. §115D-78.

86 N.C. GEN. STAT. §130A-45.11.

87 N.C. GEN. STAT. §131E-97.3(a).

88 N.C. GEN. STAT. §§130A-45.11, 131E-97.3(a).

89 N.C. GEN. STAT. §131E-97.3(b).

90 N.C. GEN. STAT. §131E-99.

91 Carter-Hubbard Publ'g Co. v. WRMC Hosp. Operating Corp., \_\_\_ N.C. App. \_\_\_, 633 S.E.2d 682 (2006).

92 *Id.* at 686.

93 N.C. GEN. STAT. §132-1.1(e).

**Controlled substance research subject records.** The Department of Health and Human Services may authorize the withholding of the names and identifying characteristics of persons who are research subjects for studies of the use and effects of controlled substances.<sup>94</sup>

**Controller compliance review records.** The state controller may review a state agency's compliance with state accounting system standards. Work papers and other supportive material created as a result of a compliance review conducted by the state controller are not public. However, any report resulting from a compliance review is a public record.<sup>95</sup>

**Corporate information disclosed through interrogatories.** The N.C. Business Corporation Act, the Non-Profit Corporation Act and the Limited Liability Company Act, all of which regulate businesses operating in the state, authorize the secretary of state to offer interrogatories to any corporation to determine whether it is subject to one of these acts. Neither the interrogatories nor the answers are public records.<sup>96</sup>

**DNA records.** DNA profiles and samples submitted to the SBI DNA Database and Databank are not public records.<sup>97</sup> (See also Law enforcement records.)

**Economic development records.** The Public Records Law states explicitly that government documents relating to general economic development policies or activities are public records. However, the law also says that records related to "the proposed expansion or location of specific business or industrial projects may be withheld so long as their inspection, examination or copying

would frustrate the purpose for which such public records were created."<sup>98</sup> The burden is on the custodian of the document "to show that disclosure would frustrate the purpose of attracting that particular business or industrial project."<sup>99</sup>

In 2005 the law was amended to provide the public an opportunity to respond to the specifics of an incentives-based deal before the General Assembly approves the deal. The law now states, "Once the State, a local government, or the specific business has announced a commitment by the business to expand or locate a specific project in this State or a final decision not to do so and the business has communicated that commitment or decision to the State or local government agency involved with the project, the provisions of this subsection allowing public records to be withheld by the agency no longer apply."<sup>100</sup> The government then must disclose as soon as practicable – and in any event within 25 business days – all requested public records for the announced project that are not otherwise made confidential by law.

An announcement that a business or industrial project has committed to expand or locate in the state does not require disclosure of local government records relating to the project if the business has not selected a specific location for the project. Once a specific location for the project has been determined, local government records must be disclosed. Local government records include records maintained by the state that relate to a local government's efforts to attract the project.<sup>101</sup>

The Public Records Law further stipulates that "whenever a public agency or its subdivision performs a cost-benefit analysis or

94 N.C. GEN. STAT. §90-113.3(e).

95 N.C. GEN. STAT. §143B-426.39B.

96 N.C. GEN. STAT. §§55-1-33, 55A-1-33, 57-1-33.

97 N.C. GEN. STAT. §15A-266.12.

98 N.C. GEN. STAT. §132-6(d).

99 N.C. GEN. STAT. §132-9(b).

100 N.C. GEN. STAT. §132-6(d).

101 *Id.*

similar assessment with respect to economic development incentives offered to a specific business or industrial project, the agency . . . must describe in detail the assumptions and methodologies used in completing the analysis. . . .”<sup>102</sup> That information becomes public record at the same time as other records related to the offering of economic development incentives.

Another state statute also has been amended to require the Department of Revenue to report by May 1 of each year the amount of tax credit dollars claimed by companies as part of their incentives deals, the number of jobs created though those incentives and the percentage of those jobs filled by local residents.<sup>103</sup>

**Education records.** State law clearly says that unless there is a statutory exception, the state’s Public Records Law applies to the records of the state’s elementary and secondary public school systems.<sup>104</sup> One clear exception is individual student education records, which are permanently retained and permanently kept confidential under state<sup>105</sup> and federal law.<sup>106</sup> The federal law is the Family Educational and Privacy Rights Act of 1974. Often called the Buckley Amendment or FERPA, the law prohibits the disclosure of personal information about students to anyone except a student’s parent or a student over 18 years of age without the consent of a parent or the adult student. The law applies to all schools that receive federal funds.

**Test scores.** Also confidential under state law are the identifiable scores of any student on any test taken pursuant to state law, except as permitted under FERPA.<sup>107</sup>

**Textbook lists.** The textbook lists for state universities are public, according to an opinion of the state attorney general. The attorney general rejected NCSU’s argument that confidential textbook lists were needed to create a monopoly book store business in order to earn profits to be used for scholarships.<sup>108</sup>

**University honor court records.** The student newspaper at the University of North Carolina at Chapel Hill went to court to seek access to the proceedings and records of the university’s undergraduate court, commonly known as the honor court. The newspaper wanted to hear the case being brought against two students who allegedly stole approximately 1,500 copies of a student magazine from campus magazine racks in 1996. The Court of Appeals ruled that the student court was not a true court and therefore was not constitutionally obligated to conduct its business in the open. Instead, the court ruled the honor court was a public body normally obligated to meet in public in compliance with the Open Meetings Law. However, the court ruled that FERPA mandated closure of the honor court proceedings – and consequently denial of access to the records of those proceedings – to protect the privacy of student education records.<sup>109</sup>

(Access to school employee records is discussed under Government employee records. Access to campus crime reports is discussed under Law enforcement records.)

### **Election records.**

**Absentee ballot registry.** Each county’s registry of absentee ballot applications, bal-

102 N.C. GEN. STAT. §132-1.11(a).

103 N.C. GEN. STAT. §105-129.6(b).

104 N.C. GEN. STAT. §115C-3.

105 N.C. GEN. STAT. §115C-402(a), (e).

106 20 U.S.C. §1232g.

107 N.C. GEN. STAT. §115C-174.13 (citing 20 U.S.C. §1232g).

108 Public Records; North Carolina State University at Raleigh; Textbook Lists; Right of Inspection, 41 Op. N.C. Att’y Gen. 199 (1971).

109 DTH Publ’g Co. v. Univ. of North Carolina at Chapel Hill, 128 N.C. App. 534, 496 S.E.2d 8, rev. denied, 348 N.C. 496, 510 S.E.2d 381 (1998).



lots issued and identities of people who actually voted by absentee ballot is a public record and must be open to inspection by any registered voter of the county at any time within 50 days before and 30 days after an election in which absentee ballots were authorized, or at any other time when there is good and sufficient reason for its inspection.<sup>110</sup> Also, the chairman of each county board of elections must compile a list of executed absentee ballots, one copy of which must be available for public inspection in the board office, and the chief election judge of each precinct is required to “post one copy of the list immediately in a conspicuous location in the voting place.”<sup>111</sup> These lists must be retained by the county board of elections for a period of 22 months; then they may be destroyed.<sup>112</sup>

*Campaign finance reports.* All candidates in political campaigns must file campaign finance reports with the State Board of Elections, and they are public records.<sup>113</sup>

*Voter registration records.* Voter registration rolls are public records and are available from the State Board of Elections or from county elections boards. A state statute says that each “county board of elections shall provide to any person a list of the registered voters of the county or of any precinct or precincts in the county.”<sup>114</sup> County boards also may furnish selective lists according to “party affiliation, gender, race, date of registration, precinct name, precinct identification code, congressional district, senate district, representative district, and, where applicable, county commissioner district, city governing board district, fire district, soil and water conservation district, and voter history including primary, general, and special districts, or any other reasonable category.”<sup>115</sup>

County elections boards must make this information available in an “electronic or magnetic medium.”<sup>116</sup>

Upon written request, the State Board of Elections may sell a statewide computerized voter registration database or selective lists of registered voters according to county, congressional or legislative district, party affiliation, gender or age but not date of birth, race or date of registration.<sup>117</sup> Electronically captured images of the signatures of voters, full or partial Social Security numbers, dates of birth and drivers’ license numbers that are generated in the voter registration process by either the State Board of Elections or a county board of elections are not public records.<sup>118</sup>

If you are provided a selective list, you must reimburse an elections board for the actual cost of preparing it. Actual cost cannot include the cost of any equipment or overhead expenses. In addition, a county elections board may impose a service charge up to \$25 for a magnetic copy of a voter registration list.<sup>119</sup>

*Elevator inspection records.* Information obtained by the commissioner of labor in connection with elevator inspections is not a public record if that information contains a trade secret.<sup>120</sup> (See also Trade secrets.)

*Email.* No state statute explicitly addresses whether government employees’ email is a public record. However, email clearly falls within the Public Record Law’s definition of public records: “documents, papers, letters . . . regardless of physical form or characteristics, made or received . . . in connection with the transaction of public business.”<sup>121</sup>

110 N.C. GEN. STAT. §163-228.

111 *Id.*

112 N.C. GEN. STAT. §163-232.

113 N.C. GEN. STAT. §§163-278.9, 163-278.22(4).

114 N.C. GEN. STAT. §163-82.10(b).

115 *Id.*

116 N.C. GEN. STAT. §163-82.10(b)(1).

117 N.C. GEN. STAT. §163-82.13(b).

118 N.C. GEN. STAT. §§132-1.1(4), 163-82.10(a).

119 N.C. GEN. STAT. §163-82.10(b).

120 N.C. GEN. STAT. §95-110.14.

121 N.C. GEN. STAT. §132-1(a).

**Emergency response plans.** Emergency response plans adopted by a constituent institution of the University of North Carolina, a community college or a public hospital and the records related to the development of those plans are not public records.<sup>122</sup>

**Employment Security Commission records.** A state statute says records obtained from an individual or a company by the Employment Security Commission are not public records.<sup>123</sup> Also, the agency's records of the employment status of current and former participants in state job training, education and placement programs are not public records.<sup>124</sup> However, the agency issues statistical reports that are public records.<sup>125</sup>

**Energy records.** The Department of Administration has the authority to obtain petroleum supply data for North Carolina from suppliers of petroleum products. Individually identifiable energy information – defined as “any individual record or portion of a record or aggregated data containing energy information about a person or persons obtained from any source, the disclosure of which could reasonably be expected to reveal information about a specific person” – is not a public record.<sup>126</sup>

**Escheated and abandoned property records.** The state treasurer has authority to examine the records of insurers, banks and other holders of escheated and abandoned property. (Escheated property is property that has reverted to the state upon the death of an owner who had neither a will nor any legal heirs.) Documents and working papers obtained or compiled by the treasurer in the course of such an examination are not public records.<sup>127</sup>

Also, each year the state treasurer must provide each clerk of court a list of escheated and abandoned property. The supporting data and the identities of apparent owners of escheated and abandoned property may be kept confidential for six months after the information is given to the clerks of court. The one exception is that the information may be provided to persons requesting information about their own property.<sup>128</sup>

**Ethics Commission records.** Some of the records of the new state Ethics Commission, which is charged with ensuring that elected and appointed state agency officials avoid conflicts of interest, are not public records. Specifically, “[c]omplaints and responses filed with the Commission and reports and other investigative documents and records of the Commission connected to an inquiry” are confidential prior to the imposition of public sanctions except when the person being investigated requests in writing that the records and findings be made public.<sup>129</sup> If and when public sanctions are imposed, the complaint, response and commission's report to the employing agency become public records.<sup>130</sup>

Also, requests for advisory opinions and advisory opinions issued by the Ethics Commission are not public records.<sup>131</sup>

**Fire investigation records.** Fire incident reports compiled by local fire chiefs and fire marshals are public records.<sup>132</sup> However, fire investigation records are not. For example, fire insurance companies are required by law to report suspicious fires to fire chiefs, fire marshals or the SBI. Government officials then are obligated by law to keep that information confidential.<sup>133</sup> Another state statute

122 N.C. GEN. STAT. §132-1.6.

123 N.C. GEN. STAT. §96-4(t).

124 N.C. GEN. STAT. §96-32(a).

125 N.C. GEN. STAT. §96-4(t)(2).

126 N.C. GEN. STAT. §143-345.14(f).

127 N.C. GEN. STAT. §116B-72(d).

128 N.C. GEN. STAT. §116B-62(f).

129 N.C. GEN. STAT. §138A-12(n).

130 *Id.*

131 N.C. GEN. STAT. §138A-13(e).

132 N.C. GEN. STAT. §58-79-45(c).

133 N.C. GEN. STAT. §58-79-40(d).

says the fire investigation records of the Office of the Insurance Commissioner are not public records.<sup>134</sup>

**Fishing industry records.** Because the state's fishing industry comprises private businesses, its records generally are not subject to public disclosure under the Public Records Law. Some records can become public, however, when they are submitted to the government.

The Division of Marine Fisheries in the Department of Environment and Natural Resources may require licensed fisheries to keep records of their operations to help the department develop conservation policy. Generally the law holds that those records cannot be disclosed to the public or the media. Also confidential are all records compiled by the department from reports of licensees or from investigations and inspections. The law specifically states that confidential records include those "containing data and information concerning the business and operations of licensees reflecting their assets, liabilities, inventories, revenues, and profits; the number, capacity, capability, and type of fishing vessels owned and operated; the type and quantity of fishing gear used; the catch of fish or other seafood by species in numbers, size, weight, quality, and value; the areas in which fishing was engaged in; the location of catch; the time of fishing, number of hauls, and the disposition of the fish and other seafood."<sup>135</sup> Statistical reports that do not identify licensees are public records, however.<sup>136</sup>

The Fishery Resource Grant Program (part of the University of North Carolina's Sea Grant Program) works to protect and enhance the state's coastal fishery resources through grants to persons involved in fish-

ing-related industries. Those grants can be used to purchase new equipment, to study water quality or for similar purposes. A state statute stipulates that grant applications are not public records until after the closing date for the submission of applications. The same law says the criteria adopted by the program to rank proposals are public.<sup>137</sup>

**Funeral contracts.** A state statute dictates that the names and addresses of the purchasers and beneficiaries of pre-need funeral contracts filed with the North Carolina Board of Funeral Service are not public records.<sup>138</sup>

**General Assembly records.** The state's Public Records Law applies to the General Assembly, although there are these exceptions:

(1) Legislators' requests for legislative employees to draft legislation are confidential by statute. Neither the identity of the legislator making the request nor the existence of the request may be revealed without the consent of the legislator.<sup>139</sup>

(2) An information request made to a legislative employee by a legislator is similarly confidential. Neither the identity of the legislator making the request nor the existence of the request may be revealed without the consent of the legislator. However, the periodic publication by the Fiscal Research Division of the Legislative Services Office of a list of information requests is not prohibited, if the identity of the legislator making the request is not revealed.<sup>140</sup>

(3) Supporting documents submitted or caused to be submitted to a legislative employee by a legislator in connection with a drafting or information request are confidential. Neither the document nor

134 N.C. GEN. STAT. §58-2-100.

135 N.C. GEN. STAT. §113-170.3(c).

136 *Id.*

137 N.C. GEN. STAT. §113-200(e).

138 N.C. GEN. STAT. §90-210.73.

139 N.C. GEN. STAT. §120-130(a).

140 N.C. GEN. STAT. §120-130(b).

copies of it, nor the identity of the person, firm or association producing it, may be provided to any person who is not a legislative employee without the consent of the legislator.<sup>141</sup>

(4) Any document prepared by legislative employees at the request of a legislator is confidential.<sup>142</sup> Such a document becomes available to the press and the public only when a.) it is a bill or resolution that has been introduced; or b.) it is a proposed amendment or committee substitute for a bill or resolution and it has been offered at a committee meeting or on the floor of a house; or c.) it is a proposed conference committee report and it has been offered at a joint meeting of the conference committees; or d.) it is a bill, resolution, memorandum, written analysis, letter or other document resulting from a drafting or information request and it has been distributed at a public meeting of a legislative commission, a standing committee or a subcommittee or on the floor of a house.<sup>143</sup>

(5) A request to a state agency employee made by an employee of the General Assembly's Fiscal Research Division for assistance in the preparation of a fiscal note is confidential. All documents prepared by the employee in response to the request also are confidential until the Fiscal Research Division releases a fiscal note based on the documents.<sup>144</sup>

Pursuant to a separate state statute, all documents concerning redistricting the General Assembly or the state's congressional districts are public records once the redistricting plan is ratified. Those records include all drafting and information requests to legislative employees and documents prepared by

legislative employees.<sup>145</sup>

The records of the joint Legislative Ethics Committee are public by statute.<sup>146</sup> However, if the committee decides to dismiss a complaint against a legislator or issues a "private admonishment," it must keep those records confidential unless the legislator in question requests the records be made public. If the same legislator is later found guilty of unethical conduct similar to that which resulted in a private admonition, the ethics committee can make the records regarding the initial incident available to the media and the public.<sup>147</sup>

The attorney general has opined that correspondence sent to legislators by their constituents is public.<sup>148</sup>

#### ***Geographical information systems.***

These complex mapping systems developed by counties are electronically stored. The Public Records Law states that these databases are public. The law also stipulates that a public agency may require that the information not be resold or used for trade or commercial purposes, but those purposes do not include publication by the news media. Also, the government may charge a "reasonable cost" for providing the data.<sup>149</sup>

***Governor's records.*** Records of the governor and other executive branch officials are covered by the Public Records Law, and there appear to be no statutes or court decisions that confer any special "executive privilege." However, governors have asserted that some of their records, such as those compiled in connection with the exercise of their clemency power, are beyond the reach of the Public Records Law because of the separation

141 N.C. GEN. STAT. §120-130(c).

142 N.C. GEN. STAT. §120-131(a).

143 N.C. GEN. STAT. §120-131(b).

144 N.C. GEN. STAT. §120-131.1.

145 N.C. GEN. STAT. §120-133.

146 N.C. GEN. STAT. §120-102(3).

147 N.C. GEN. STAT. §120-103(d1)(3).

148 Public Access to Legislator's Redistricting Communications; Custodians of Records, Op. N.C. Att'y Gen. No. 529 (2002).

149 N.C. GEN. STAT. §132-10.

of powers doctrine. To date, the courts have not resolved this issue.

**Gun permits.** Sheriffs are required by state statute to keep records of all gun permits they issue, including the name, date, place of residence, age, former place of residence, etc., of each permit holder.<sup>150</sup> Those records are public under the Public Records Law because there is no statute that dictates otherwise.

**Health care facility and service inspection records.** Many records related to inspections of government-regulated health care facilities and services are exempt from the Public Records Law. Such facilities and services include mental health facilities,<sup>151</sup> adult care homes,<sup>152</sup> hospitals,<sup>153</sup> nursing homes,<sup>154</sup> home care agencies,<sup>155</sup> ambulatory surgical facilities,<sup>156</sup> cardiac rehabilitation programs<sup>157</sup> and local confinement facilities (jails or similar detention centers).<sup>158</sup> Typically records concerning individual clients and records identifying individuals who have complained about a facility licensed by the state are not public.<sup>159</sup>

**Homeland security records.** In 2002 the General Assembly added this language to the Public Records Law to prevent the release of information that might compromise public security: “(a) Public records . . . shall not include information containing specific details of public security plans and arrangements or the detailed plans and drawings of public buildings and infrastructure facilities. (b) Public records . . . do not include plans to prevent or respond to terrorist activity, to

the extent such records set forth vulnerability and risk assessments, potential targets, specific tactics, or specific security or emergency procedures, the disclosure of which would jeopardize the safety of governmental personnel or the general public or the security of any governmental facility, building, structure, or information storage system. (c) Information relating to the general adoption of public security plans and arrangements, and budgetary information concerning the authorization or expenditure of public funds to implement public security plans and arrangements, or for the construction, renovation, or repair of public buildings and infrastructure facilities shall be public records.”<sup>160</sup> (See also Emergency response plans.)

**Hospital administrative records.** If a hospital is a “public agency of North Carolina government or its subdivisions,” the hospital’s business and administrative records are public records. Owing to the varied and complex organizational structures of certain hospitals, numerous questions have arisen in recent years as to whether they are “public agencies” within the meaning of the Public Records Law. In some cases, the governing bodies of hospitals concede that the hospital itself is a “public agency” but assert that affiliated operations and businesses — such as subsidiaries that own and operate medical office buildings — are not “public agencies.” These questions have become further complicated since the passage in 1983 of a comprehensive re-codification of the state statutes governing public hospitals.<sup>161</sup> Among other things, this chapter authorizes local governments to lease, sell or convey public hospitals to non-profit corporations, provided the corporations agree to operate the hospital for the benefit of the public and provided that the conveyance includes reversionary rights in

150 N.C. GEN. STAT. §14-405.h

151 N.C. GEN. STAT. §122C-25(b).

152 N.C. GEN. STAT. §131D-2.

153 N.C. GEN. STAT. §§131E-80(d)-(e).

154 N.C. GEN. STAT. §131E-105(b).

155 N.C. GEN. STAT. §131E-141(b).

156 N.C. GEN. STAT. §131E-150(b).

157 N.C. GEN. STAT. §131E-170(b).

158 N.C. GEN. STAT. §153A-222.

159 See, e.g., N.C. GEN. STAT. §131E-124(c).

160 N.C. GEN. STAT. §132-1.7.

161 N.C. GEN. STAT. §131E.



the event that the non-profit corporation fails to meet its obligations.<sup>162</sup>

The Court of Appeals has provided some guidance by applying the public records law to a hospital that claimed that it was not a “public agency” within the meaning of the Public Records Law. In 1981 in *News & Observer Publishing Co. v. Wake County Hospital System*,<sup>163</sup> the Court of Appeals defined a public agency as “any administrative unit with substantial independent authority in the exercise of specific functions. Administrative entities that perform neither rule-making nor adjudicative duties also may be agencies. ‘The important consideration is whether [the administrative entity] has any authority in law to make decisions.’”<sup>164</sup> The court applied that definition to the Wake County Hospital System, Inc., which was established by Wake County to provide medical care to the general public, including the poor, and found the hospital to be a public agency whose documents are public records. The court acknowledged that the hospital was organized as a private, non-profit corporation and was an independent contractor, but concluded that it was so intertwined financially and administratively with the county government as to be a public agency. The county owned the hospital building and leased it to the hospital corporation for \$1 per year, reviewed and approved the hospital’s annual budget, financed the hospital through county bonds, approved the members of the hospital’s board of directors, audited its books and was to receive the hospital’s assets if the hospital was dissolved. Also, the hospital system was not authorized to alter its corporate existence or amend its

articles of incorporation without the county’s written consent.

The Wake County hospital case indicates that North Carolina’s courts, in assessing whether a particular hospital is a “public agency” within the meaning of the Public Records Law, will closely scrutinize the details of the hospital’s corporate structure, operating agreements and funding in order to evaluate the ties between the hospital and government. The Court of Appeals said that “a corporate entity may be considered an agency of government” if its ties to the government are sufficient to make it an arm of the government. In other words, a public agency cannot divest itself of its public character merely by choosing the corporate form of organization.<sup>165</sup>

*Certificate of advantage records.* Also, state law permits the state Department of Health and Human Services to issue certificates of advantage to physicians and hospitals who enter into cooperative work agreements. The certificates exempt those agreements from state and federal anti-trust law in the interest of improved health care. If the state attorney general initiates judicial action to cancel a certificate of advantage because he believes that the advantages of the agreement are outweighed by the disadvantages of reduced competition in the health care field, the attorney general’s records related to the case are not public records.<sup>166</sup>

(See also Competitive health care information and Medical records.)

*Illegitimate children, information concerning.* No district attorney, assistant district attorney, attorney appointed to assist a district attorney or agent or employee of

<sup>162</sup> N.C. GEN. STAT. §131E-13(a).

<sup>163</sup> *News & Observer Publ’g Co. v. Wake County Hosp. Sys.*, 55 N.C. App. 1, 284 S.E.2d 542 (1981), rev. denied, 305 N.C. 302, 291 S.E.2d 151, appeal dismissed and cert. denied, 459 U.S. 803, 103 S. Ct. 26 (1982).

<sup>164</sup> 55 N.C. App. at 8, 284 S.E.2d at 547 (quoting *Washington Research Project, Inc. v. Dep’t of Health, Educ. and Welfare*, 504 F.2d 238 (D.C.Cir. 1974), cert. denied, 421 U.S. 963, 95 S.Ct. 1951 (1975)).

<sup>165</sup> 55 N.C. App. at 11, 284 S.E.2d at 547.

<sup>166</sup> N.C. GEN. STAT. § 90-21.33(d).

a district attorney's office may disclose any information connected with an illegitimate child or the child's parents except in the performance of the district attorney's duties.<sup>167</sup>

**Industrial Commission records.** The records of the N.C. Industrial Commission, which adjudicates worker compensation claims, are confidential if they refer to accidents, injuries or settlements. The notable exceptions are that the records of awards to workers and records of any commission review of those awards are public records.<sup>168</sup>

**Innocence Inquiry Commission records.** In 2006 the Public Records Law was amended to exempt records of investigations conducted by the Innocence Inquiry Commission from the law's general mandate for public access.<sup>169</sup>

**Insurance Commissioner's records.** A state law says the insurance commissioner's records are public except for those records compiled as part of an investigation of arson, unlawful burning or fraud.<sup>170</sup> However, more than a dozen other state statutes address the status of the commissioner's records and remove many of them from the public realm.

For example, one statute says that patients' medical records are confidential. Patient medical records include personal information that relates to an individual's physical or mental condition, medical history or medical treatment that has been obtained from the individual patient, a health care provider, or from the patient's spouse, parent or legal guardian.<sup>171</sup>

Also, information related to the creden-

tialing of medical professionals that is in the possession of the commissioner's office is confidential and not a public record.<sup>172</sup>

Another statute states that when medical malpractice insurance companies must report claims to the insurance commissioner's office, the reports are public — except for the identities of the claimant and the health care provider or medical center against whom the claim has been made, and the dollar amount of the claim.<sup>173</sup>

Also, reports concerning the solvency of companies seeking to do insurance business in North Carolina are not public records.<sup>174</sup>

(See also Medical records and Investigative (non-law enforcement) records and University of North Carolina liability insurance records.)

**Investigative (non-law enforcement) records.** Whether government agencies can legally withhold some or all of the information they collect during an investigation often is explicitly dictated by state statute. For example, a state statute prohibits the Utilities Commission staff from revealing any information gathered in the course of an examination or inspection except as directed by the commission or a court.<sup>175</sup>

Another statute provides for the public disclosure of any report of the Department of Insurance's examination of an insurance company once the company has been given 30 days to respond to the report.<sup>176</sup> However, working papers, recorded information and other documents used by the commission to prepare its report are not public.<sup>177</sup>

167 N.C. GEN. STAT. §15-155-3.

168 N.C. GEN. STAT. §97-92(b).

169 N.C. GEN. STAT. §132-1.4(a).

170 N.C. GEN. STAT. §58-2-100.

171 N.C. GEN. STAT. §58-2-105(a).

172 N.C. GEN. STAT. §58-2-105(c).

173 N.C. GEN. STAT. §§58-2-170(a), 58-2-170(c).

174 N.C. GEN. STAT. §58-62-56(c).

175 N.C. GEN. STAT. §62-316.

176 N.C. GEN. STAT. §58-2-132(e).

177 N.C. GEN. STAT. §58-2-132(f).

N.C. Department of Labor records regarding investigations and enforcement proceedings conducted pursuant to the state Wage and Hour Act are not public while the investigations and proceedings are pending.<sup>178</sup>

(See also Bank, savings and loan, and credit union records.)

**Law enforcement records.** The Public Records Law clearly states that the following law enforcement agency information is public:

(1) The time, date, location, and nature of a violation or apparent violation of the law reported to a public law enforcement agency.

(2) The name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted.

(3) The circumstances surrounding an arrest, including the time and place of the arrest, whether the arrest involved resistance, possession or use of weapons, or pursuit, and a description of any items seized in connection with the arrest.

(4) The contents of “911” and other emergency telephone calls received by or on behalf of public law enforcement agencies, except for such contents that reveal the name, address, telephone number, or other information that may identify the caller, victim, or witness. [The law says that law enforcement agencies are not required to keep tape recordings of “911” or other communications for more than 30 days unless ordered to do so by the court.<sup>179</sup>]

(5) The contents of communications between or among employees of public law enforcement agencies that are broadcast over the public airways.

(6) The name, sex, age, and address of a complaining witness.<sup>180</sup>

The law says that to withhold the information listed above, a law enforcement agency must obtain a court order. The agency bears the burden of demonstrating to the court “by a preponderance of the evidence” that disclosure “will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation. . . .”<sup>181</sup>

*Attorney general’s pre-prosecution investigative files.* The Court of Appeals has ruled that the state attorney general’s pre-prosecution investigative files can be withheld from the public to protect the privacy of individuals mentioned in the files.<sup>182</sup> The attorney general has the power to investigate corporations and individuals that may be doing business in North Carolina in violation of the law. During the 1970s, the attorney general investigated the possible misuse of corporate funds by Southern Bell. Southern Bell went to court and obtained a protective order to prohibit the attorney general from releasing his investigative files to the press and the public. The company argued that information in the files that was based on hearsay and other evidence inadmissible in a judicial proceeding might unfairly implicate company employees and invade the privacy of its employees. The Court of Appeals upheld the order.<sup>183</sup>

*Campus crime records.* For many years, some college and university police departments withheld the names of students involved in crimes, claiming that releasing such information would invade students’ privacy and thereby violate the federal Family Educational and Privacy Rights Act of 1974 (FER-

178 N.C. GEN. STAT. §95-25.20.

179 N.C. GEN. STAT. §132-1.4(i).

180 N.C. GEN. STAT. §132-1.4(c).

181 N.C. GEN. STAT. §132-1.4(e).

182 *In re Southern Bell Tel. & Tel. Co.*, 30 N.C.App. 585, 227 S.E.2d 645 (1976).

183 *Id.*

PA or the Buckley Amendment).<sup>184</sup> FERPA says that educational institutions that release students' "education records" without the permission of a student's parent or of a student over the age of 18 may lose their federal funds. However, Congress has amended the law to make clear that "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement" are not education records.<sup>185</sup> Therefore such records are not exempt from disclosure under North Carolina's Public Records Law.

Moreover, the Public Records Law defines "public law enforcement agencies" as all law enforcement agencies commissioned by the state attorney general.<sup>186</sup> Thus the law covers police departments at private colleges and universities as well as those at state colleges and universities. This means that all such law enforcement agencies must make available all the information mandated by the Public Records Law, as described at the beginning of this section.

FERPA also make it clear that the law does not prohibit a college or university from disclosing the final results of any disciplinary proceeding in which a student is found to have violated a university rule or policy in connection with the commission a violent crime or a nonforcible sex offense.<sup>187</sup> The university may release the name of the student, the violation committed and the punishment imposed. The university may release the name of any other student, such as a victim or witness, only with the written consent of that other student.<sup>188</sup>

In 1990 Congress adopted the Crime Awareness and Campus Security Act, which requires public and private colleges and universities that receive federal funds to compile, publish and distribute each September a report on serious crimes that have occurred on their campuses.<sup>189</sup> Subsequently the U.S. Department of Education adopted rules to clarify the requirements of the federal law.<sup>190</sup> Colleges and universities must report statistics on reports of the following crimes: murder, sex offenses, robbery, aggravated assault, burglary, motor vehicle theft, manslaughter and arson. They also must report statistics on arrests for liquor law violations, drug-related violations and weapons possession and statistics on crimes involving bodily injury that manifest evidence of prejudice based on the race, gender, religion, sexual orientation, ethnicity or disability of the victim. These annual reports must include crimes reported to local police as well as to campus police and those that occur in university-controlled property off-campus as well as on campus.

*Criminal histories.* Criminal histories as reflected in the records held by various clerks of courts are public record because the law says records maintained by clerks of court are public records.<sup>191</sup> However, criminal history records stored in the computerized Police Information Network (PIN) are not open to public inspection.<sup>192</sup> Also, the annual checks of the criminal histories of all foster parents and individuals 18 years old or older who reside in foster homes to determine their fitness to host foster children are confidential by state statute.<sup>193</sup>

*Investigatory and intelligence records.* Records of criminal investigations conducted

184 20 U.S.C. §1232g.

185 20 U.S.C. §1232g(a)(4)(B)(ii).

186 N.C. GEN. STAT. §132-1.4(b)(3).

187 20 U.S.C. §1232g(b)(6)(B).

188 20 U.S.C. §1232g(b)(6)(C).

189 20 U.S.C. §1092(f).

190 34 C.F.R. Part 668.

191 N.C. GEN. STAT. §7A-109(a).

192 N.C. GEN. STAT. §114-10(2).

193 N.C. GEN. STAT. §131D-10.3A(g).

by law enforcement agencies or records of criminal intelligence information compiled by these agencies are not public records, according to the Public Records Law.<sup>194</sup> Criminal investigation records are defined as “all records or any information that pertains to a person or group of persons that is compiled by public law enforcement agencies for the purpose of attempting to prevent or solve violations of the law, including information derived from witnesses, laboratory tests, surveillance, investigators, confidential informants, photographs, and measurements.”<sup>195</sup> Criminal intelligence information is defined as “records or any information that pertains to a person or group of persons that is compiled . . . in an effort to anticipate, prevent, or monitor possible violations of the law.”<sup>196</sup> Denying public access to such records, the Supreme Court has said, is designed to encourage police to enter information in their reports freely, to avoid tipping off the subjects of investigations and to protect confidential investigative techniques.<sup>197</sup>

On the other hand, the Public Records Law says that the use of a public record in connection with a criminal investigation does not alter its status as a public record and that a law enforcement agency cannot prevent another agency from disclosing a public record.<sup>198</sup>

*Juvenile records.* Neither law enforcement records in juvenile cases<sup>199</sup> nor records of juveniles under the protective custody of a department of social services are public records.<sup>200</sup> State law does, however, mandate the public disclosure of some state agency

information involving the fatality or near fatality of a juvenile under the protective custody of a social service department due to suspected abuse, neglect or maltreatment.<sup>201</sup> Once a person is criminally charged in such a case, a county department of social services that had been notified that the child might be in need of protection must disclose a written statement of the dates, outcomes and results of any actions taken or services rendered by the agency.

*SBI records.* Until 1993, State Bureau of Investigation records were kept confidential by state statute. That statute has since been repealed. Now the Public Records Law applies to SBI records the same way it applies to all other law enforcement records.

*Search warrants.* The Public Records Law says the following are public records absent a court order sealing them: “arrest and search warrants that have been returned by law enforcement agencies, indictments, criminal summons, and nontestimonial identification orders.”<sup>202</sup>

*Sexual offender and predator registries.* North Carolina’s Sex Offender and Public Protection Registration Program and its Sexually Violent Predator Registration Program require those convicted of sexual offenses or of certain other offenses against minors, such as kidnapping, to register with local law enforcement agencies, and most of that registration information is public record.<sup>203</sup> State law specifically says that the following information about sexual offenders is public records: name, sex, address, physical description, picture, conviction date, offense for which registration was required, the sentence imposed as a result of the conviction and

194 N.C. GEN. STAT. §132-1.4.

195 N.C. GEN. STAT. §132-1.4(b)(1).

196 N.C. GEN. STAT. §132-1.4(b)(2).

197 *News & Observer Publ’g Co. v. Starling*, 312 N.C. 276, 322 S.E.2d 133 (1984).

198 N.C. GEN. STAT. §132-1.4(f).

199 N.C. GEN. STAT. §7B-3001(b).

200 N.C. GEN. STAT. §7B-2901(b).

201 N.C. GEN. STAT. §7B-2902.

202 N.C. GEN. STAT. §132-1.4(k). *See also* *State v. Underwood*, No. 95 CRS 4689 (N.C. Super. Ct. Sept. 26, 1996).

203 N.C. GEN. STAT. §14-208.6A.



registration status.<sup>204</sup> Information regarding the offender's medical records or treatment for the offender's mental abnormality or personality disorder is not part of the public record.<sup>205</sup> The law also says, "The sheriff shall release any other relevant information that is necessary to protect the public concerning a specific person, but shall not release the identity of the victim of the offense that required registration. . . ."<sup>206</sup>

Any person may obtain a copy of an individual sexual offender's registration form or all or part of the county's sexual offender registry by submitting a written request to the sheriff. Victims' identities are not part of the public record, however.<sup>207</sup>

Certain juvenile sexual offenders may be required to register, but their registration information is not public record.<sup>208</sup>

*Victims' identities.* The names of crime victims and complaining witnesses that appear in arrest documents, charges, indictments, applications for search warrants and similar documents are public record.<sup>209</sup> However, the Public Records Law also says, "A public law enforcement agency shall temporarily withhold the name or address of a complaining witness if release of the information is reasonably likely to pose a threat to the mental health, physical health, or personal safety of the complaining witness or materially compromise a continuing or future criminal investigation or criminal intelligence operation."<sup>210</sup> Such information is to become public "as soon as the circumstances that justify withholding it cease to

exist."<sup>211</sup> Some confusion has arisen from the phrase "shall temporarily withhold." Many law enforcement agencies have interpreted this to mean either they must withhold the names of complaining witnesses or they must let the complaining witness decide whether his or her name is made public.

In late 1993 then-Attorney General Mike Easley wrote a memorandum to the state's city and county attorneys and police and sheriffs' attorneys to clarify the meaning of that provision of the law.<sup>212</sup> First, he said that whether the name and address of a complaining witness are public information is a decision to be made by the law enforcement agency, not the complaining witness. He also said, "While the exceptions [to disclosure of the information] are broadly stated, the agency should be prepared to justify its decision to release or temporarily withhold the information."<sup>213</sup> He explained, "In a case where the alleged perpetrator has not been apprehended, the agency might conclude that the complaining witness could be in danger and initially withhold the name and address of the witness. However, the agency may also conclude that disclosing details of the crime might bring forward other witnesses, and so the time, date, and location and nature of the violation is released immediately."<sup>214</sup> The attorney general further said that decisions about disclosure should be made by weighing the information requester's evidence that there is no danger to the witness against law enforcement's evidence that disclosure would jeopardize the right of the defendant or the state to receive a fair trial or would compromise an ongoing investigation. If a law enforcement agency makes a reasoned decision to disclose a name, the attorney general said,

204 N.C. GEN. STAT. §14-208.10(a).

205 *Id.*

206 *Id.*

207 N.C. GEN. STAT. §14-208.10(b).

208 N.C. GEN. STAT. §14-208.29.

209 N.C. GEN. STAT. §132-1.4(c)(6).

210 N.C. GEN. STAT. §132-1.4(d).

211 *Id.*

212 Memorandum from N.C. Att'y Gen. to City and County Attorneys and Police and Sheriffs' Attorneys re Criminal Investigative Records Law (1993).

213 *Id.*

214 *Id.*

the agency is not liable for harm to the individual that might result from that decision. The attorney general's memorandum does not have the force of law, and law enforcement agencies continue to vary in how they interpret the law.

Also, state statutes protect crime victims this way:

- Law enforcement officials may redact from 911 tapes information that reveals the identity of the caller, victim or witness.<sup>215</sup>
- A victim's request under the Crime Victims' Rights Act to be notified when matters arise relating to an incarcerated individual is not a matter of public record.<sup>216</sup>
- Medical information about the mental, physical or emotional condition of a victim, law enforcement information about a victim and any juvenile records held by the Victims Compensation Commission and its director are confidential.<sup>217</sup> Other records of the commission are public.
- The Public Records Law itself exempts from disclosure the addresses and telephone numbers of persons enrolled in a state program to protect the confidentiality of a relocated victim of domestic violence.<sup>218</sup>

*911 databases.* Automatic number identification and automatic location identification information that consists of the names, addresses and telephone numbers of telephone subscribers and is contained in a county 911 database is confidential and is not a public record if that information is required to be confidential by the agreement with the telephone company by which the information

was obtained.<sup>219</sup>

(See also Motor vehicle, accident and traffic violation records.)

**Lawsuit settlements.** The Public Records Law stipulates that when an agent or agency of state or local government settles a lawsuit, administrative proceeding or arbitration, that settlement is a public record.<sup>220</sup> The law applies when a case against a government agency in connection with an agency's official duties is settled. This portion of the Public Records Law prohibits state or local governments or their counsel, insurance company or other representative from entering into any settlement if the settlement provides that its terms are confidential. It further says that a court may seal such a settlement only if the presumption of openness is overcome by an overriding interest and that overriding interest cannot be protected by any means short of sealing the settlement. The court order sealing the settlement must articulate the overriding interest and include the findings of fact.

Settlement documents are defined as including but not limited to correspondence, settlement agreements, consent orders, checks and bank drafts.<sup>221</sup>

The Open Meetings Law also has a provision addressing public agency settlements. The law provides that once a public body has approved or considered a lawsuit settlement in closed session, the terms of the settlement must be entered into its minutes "as soon as possible within a reasonable time after the settlement is concluded."<sup>222</sup>

One exception to this law is clearly stated.

215 N.C. GEN. STAT. §132-1.4(c)(4).

216 N.C. GEN. STAT. §15A-832(a).

217 N.C. GEN. STAT. §15B-8.1.

218 N.C. GEN. STAT. §132-1.1(d).

219 N.C. GEN. STAT. §132-1.5.

220 N.C. GEN. STAT. §132-1.3.

221 N.C. GEN. STAT. §132-1.3(c).

222 N.C. GEN. STAT. §143-318.11(a)(3).

Settlements of medical malpractice lawsuits against hospitals are not public records.<sup>223</sup>

**Library records.** All library user records — including whether an individual requested or obtained a book or other material or services — are confidential.<sup>224</sup>

**Lobbyist records.** Lobbyists working at the General Assembly must file expense reports with the secretary of state, and those reports are public records.<sup>225</sup> The reports detail the date and amount of each expenditure, to whom it was paid and the name of the legislators who benefited from each expenditure. Expenditures that must be reported include payments for transportation, lodging, entertainment, food and direct or indirect financial contributions. Expenditures of less than \$25 need not be reported. State law also requires a lobbyist's employer to file expense reports with the secretary of state. Those reports, which must include payments to lobbyists, also are public records.<sup>226</sup>

**Medical Database Commission records.** Databases compiled by the N.C. Medical Database Commission are public records.<sup>227</sup> However, the individual patient information supplied to the commission by hospitals and other medical service providers is not public record.<sup>228</sup>

**Medical records.** Individual patient records clearly are not public records — not even when they are in the hands of a government agency. This denial of access is dictated by federal law,<sup>229</sup> as well as the state

law described here. Nor are communications between a physician and a patient public records.<sup>230</sup> Individual patient information may be released with the consent of the patient, however.

**Agency records.** Dozens of state statutes protect the confidentiality of individual patient records that are in the possession of government agencies, hospitals, other health facilities, doctors and pharmacies. For example, state law says all patient records in the possession of the Department of Health and Human Services or a local health department<sup>231</sup> are not public under the Public Records Law. Other statutes protect the confidentiality of individual patient records held by the Center for Health Statistics;<sup>232</sup> the N.C. Department of Insurance;<sup>233</sup> health maintenance organizations;<sup>234</sup> local agencies that treat mental health, developmental disabilities and substance abuse;<sup>235</sup> and public health authorities.<sup>236</sup> In addition to health information, the confidential records generally include charges, accounts, credit histories and other personal financial records compiled in connection with the admission, treatment and discharge of individual patients.<sup>237</sup>

**Communicable disease records.** Health care providers — physicians, hospital administrators and laboratory directors — are required by state law to report cases of some communicable diseases to the state or local government. For example, cases of venereal disease must

223 N.C. GEN. STAT. §132-1.3(a).

224 N.C. GEN. STAT. §125-19.

225 N.C. GEN. STAT. §120-47.6(c).

226 N.C. GEN. STAT. §120-47.7(c).

227 N.C. GEN. STAT. §131E-214.3(b).

228 N.C. GEN. STAT. §131E-214.3(a).

229 The Health Insurance Portability and Accountability Act (HIPPA), Pub. L. No. 104-191 (104<sup>th</sup> Cong., 2<sup>nd</sup> Sess.) (codified as amended in scattered sections of 18 U.S.C.; 26 U.S.C.; 29 U.S.C.; 42 U.S.C.), was enacted by Congress in 1996 to ensure and improve the

continuity of health insurance coverage for U.S. workers changing jobs. In response to the legislation, the U.S. Department of Health and Human Services adopted standards that regulate how health care providers, health care plans and health care clearinghouses manage individual health care information to protect individual privacy. This Privacy Rule, 45 C.F.R. Parts 160, 162 and 164, went into effect in 2003.

230 N.C. GEN. STAT. §8-53.

231 N.C. GEN. STAT. §§130A-12, 143B-139.6.

232 N.C. GEN. STAT. §130A-374(a).

233 N.C. GEN. STAT. §58-2-105(a).

234 N.C. GEN. STAT. §58-67-180.

235 N.C. GEN. STAT. §122C-52.

236 N.C. GEN. STAT. §130A-45.8(a).

237 See e.g., N.C. GEN. STAT. §§130A-45.8(b), 131E-97(b).

be reported to the local health director. However, that information is confidential. Only statistical information based on those reports is public record.<sup>238</sup> A similar statute prohibits the state from disseminating individual patient information it has obtained in the process of collecting information about cancer.<sup>239</sup>

*Government employee records.* Health care records of teachers and other state employees in the possession of the executive administrator and the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan or its claims processor under the Teachers' and State Employees' Comprehensive Major Medical Plan are not public records.<sup>240</sup> This applies to all information concerning individuals, including the fact of coverage or noncoverage, whether a claim has been filed, medical information, whether a claim has been paid, and any other information or materials concerning a plan participant.<sup>241</sup>

*Health maintenance organization records.* Information pertaining to the diagnosis, treatment or health of any enrollee in or applicant to an HMO must be kept confidential except when disclosure is required by law or is authorized by the enrollee or applicant.<sup>242</sup>

*Hospice patient records.* State law says that although the Department of Human Resources may review the treatment of hospice patients, it may not disclose confidential information about patients or the name of anyone who has furnished information concerning a hospice without that person's consent.<sup>243</sup>

*Peer review committee records.* Personal

privacy concerns also arise in connection with the records of medical peer review committees that hear complaints against medical professionals and medical facilities. These records generally are not open to the public — an exception to the Public Records Law designed to improve the quality of health care by encouraging candor in peer review committee proceedings. State statutes provide that the records of hospital,<sup>244</sup> medical society<sup>245</sup> and dental peer review committees<sup>246</sup> are confidential. The statute governing dental peer review committees does, however, make public all records concerning the investigation and consideration of Medicare and Medicaid charges or payments.

*Prescription records.* All prescription orders on file at pharmacies are confidential records.<sup>247</sup>

(See also Health care facility and service inspections records, Health maintenance organization records, Competitive health care information, Medical Database Commission records and the discussion of hospital peer review evaluations and the case of *Virmani v. Presbyterian Health Services Corp.* in the chapter on access to the judicial process.)

*Military records.* All National Guard records in the Department of Crime Control and Public Safety are confidential.<sup>248</sup> N.C. Division of Veterans Affairs records also are confidential.<sup>249</sup>

*Minutes of government meetings.* The state's Open Meetings Law requires public bodies to keep accurate minutes of both public and closed meetings and to make those

238 N.C. GEN. STAT. §130A-143. See also *Act-Up Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 483 S.E.2d 388 (1997).

239 N.C. GEN. STAT. §130A-212.

240 N.C. GEN. STAT. §135-37.

241 *Id.*

242 N.C. GEN. STAT. §58-67-180.

243 N.C. GEN. STAT. §131E-207(b)-(c).

244 N.C. GEN. STAT. §131E-95(b).

245 N.C. GEN. STAT. §90-21.22A(c).

246 N.C. GEN. STAT. §90-48.10.

247 N.C. GEN. STAT. §90-85.36(a).

248 N.C. GEN. STAT. §127A-17.1.

249 N.C. GEN. STAT. §165-11.1.

minutes available to the public.<sup>250</sup> Furthermore, the Open Meetings Law says, “When a public body meets in closed session, it shall keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired. Such accounts may be a written narrative, or video or audio recordings. Such minutes and accounts shall be public records . . . provided, however, that minutes or an account of a closed session . . . may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session.”<sup>251</sup>

The Court of Appeals ruled in 2000 that whether disclosure of the minutes of a closed meeting would frustrate the purpose of that meeting should be determined by the trial court after reviewing the minutes *in camera* (out of public view). The court should consider “time and content factors” and “ensure that the exception to the disclosure requirement should extend no further than necessary. . . .”<sup>252</sup>

In a 1995 Superior Court case, a judge ruled that the minutes of a meeting need not be approved by the public body to be public records. He said draft minutes are public records. In that case, in which the *Winston-Salem Journal* sought access to minutes of a Surry County Board of Commissioners meeting that had been closed to discuss real property acquisition, the judge ruled that any notes taken by anyone in attendance at the closed meeting were public records.<sup>253</sup>

**Motor vehicle, accident and traffic violation records.** As mandated by the federal

Driver’s Privacy Protection Act (DPPA),<sup>254</sup> North Carolina has enacted a law that prohibits the release of personal information regarding driver’s licenses and motor vehicle registrations without the written consent of the individual.<sup>255</sup> Separate state statutes say that Social Security numbers provided to the state to obtain driver’s licenses and motor vehicle registrations are not public records.<sup>256</sup>

The DPPA restricts the ability of state motor vehicle departments (DMVs) to sell or disclose personal, identifying information without an individual’s consent. There are exceptions for law enforcement, pollution control and other limited purposes – but not for journalistic newsgathering. The law was designed to prevent tragedies like the murder of actress Rebecca Schaeffer by a stalker. The stalker hired a private investigator who obtained Schaeffer’s home address from department of motor vehicle records. One result of the law has been to deny journalists access to many records that traditionally had been public. Previously, all driver license records for the previous five years were public under North Carolina law.

Neither federal nor state law prohibits the release of information on vehicular accidents, driving violations and driver’s status, however. These are public records routinely available from the Division of Motor Vehicles.<sup>257</sup> Also, it is important to note that current North Carolina law, as revised in response to the DPPA, only prohibits disclosures by the DMV, not local police departments and sheriff’s departments.<sup>258</sup>

There are several other driving records that the state attorney general has said are not

250 N.C. GEN. STAT. §143-318.10(e).

251 *Id.*

252 *Multimedia Publ’g of North Carolina v. Henderson County*, 136 N.C. App. 567, 525 S.E.2d 786 (2000), *rev. denied*, 351 N.C. 474, 543 S.E.2d 492 (2000) (quoting *News & Observer Publ’g Co. v. Poole*, 330 N.C. 465, 480, 412 S.E.2d 7,16 (1992)).

253 *Piedmont Publ’g Co. v. Surry County Bd. of Comm’rs*, 24 Media L. Rep. (BNA) 1371 (N.C. Super. Ct. Aug. 4, 1995).

254 18 U.S.C. §§2721-2725.

255 N.C. GEN. STAT. §20-43.1.

256 N.C. GEN. STAT. §§20-7(b2), 20-52(a).

257 N.C. GEN. STAT. §20-166.1(i).

258 N.C. GEN. STAT. §20-43.1.



public.<sup>259</sup> They are:

- (1) The form maintained by an arresting officer that is completed when a person refuses to take a blood alcohol test.
- (2) The form maintained by an arresting officer that lists the rights of a person requested to take a chemical test to determine the alcohol content of blood.
- (3) The alcohol influence report maintained by the arresting officer and the copy maintained at state patrol headquarters.
- (4) The departmental copy of the uniform traffic ticket and complaint while it is maintained at the patrol district headquarters before it is transmitted to the Traffic Record Section of the Division of Motor Vehicles.
- (5) The copy of the uniform traffic ticket and complaint that is maintained by the officer issuing the complaint and includes his or her notes and other evidence prior to the trial of the offense.
- (6) The chemical test operator's log while in possession of the chemical test operator.
- (7) The breathalyzer operational checklist that is completed and maintained by the breathalyzer operator.

Warning tickets issued by law enforcement are not public records.<sup>260</sup>

Railroad, bus and other public utility accident reports are public records and are available from the N.C. Utilities Commission.<sup>261</sup>

**Operating records and contracts.** Government records and papers, such as budgets, bank statements, tax levies, utility accounts

and contracts, are public records. Over the years, a significant number of court decisions and state attorney general opinions have reiterated and clarified that point.

For example, in 1981 the Court of Appeals ruled that letters to the city manager from a consulting engineer hired by the city to inspect construction work on additions and modifications to its water treatment plant are public records.<sup>262</sup>

In 1982 the state attorney general advised that a public hospital's contracts with independent contractors for pathology services, anesthesia services and the like were public records. He said state law dictated that the contractors had to be hired in an open meeting and therefore the terms of the contracts must be revealed.<sup>263</sup>

In 1989 a state trial court judge ruled that contracts for football and basketball coaches and athletic directors at schools in the UNC system are public records. State officials had argued that the contracts were not public records because they were part of confidential personnel files.<sup>264</sup> In 2003 the state attorney general also expressed the opinion that contracts between UNC institutions and "certain vendors or suppliers" that involve or concern the coaches also are public records.<sup>265</sup>

In 1993 the Court of Appeals held that records created and maintained solely by an independent contractor with a governmental agency are not subject to the provisions of the Public Records Law until they are transferred to the public agency.<sup>266</sup>

<sup>259</sup> Public Records; North Carolina Uniform Traffic Ticket and Complaint; Right of Public Inspection, 48 Op. N.C. Att'y Gen. 63 (1978).

<sup>260</sup> N.C. GEN. STAT. §20-183(b).

<sup>261</sup> N.C. GEN. STAT. §62-41.

<sup>262</sup> Advance Publ'ns v. City of Elizabeth City, 53 N.C. App. 504, 281 S.E.2d 69 (1981).

<sup>263</sup> Meetings of Public Bodies; Public Records, 51 Op. N.C. Att'y Gen. 79 (1982).

<sup>264</sup> Associated Press v. Poulton, 16 Media L. Rep. (BNA) 2393 (N.C. Super. Ct. July 28, 1989).

<sup>265</sup> Public Records Request; Coaches' Contracts; G.S. 132-1 *et seq.*, 2003 WL 1154488 (N.C.A.G.).

<sup>266</sup> Durham Herald Co. v. Low-Level Radioactive Waste Auth., 110

Furthermore, various state statutes dictate that agency records and contracts are public records – and create a few exceptions to that general rule. One statute says diaries kept in connection with construction or repair contracts are public records once the final bills have been paid.<sup>267</sup> However, analyses generated by the Department of Transportation's Bid Analysis and Management System, including working papers, bid analyses and other documents, are confidential.<sup>268</sup> Records related to discussions of a proposed or existing contract for the construction, ownership or operation of electrical power facilities or the purchase or sale of electric power also are not public unless a government entity is a party to the contract.<sup>269</sup>

(See also Bids for government contracts and Minutes of government meetings.)

**Personnel records.** There are 10 separate state personnel statutes, including those dealing with the personnel files of municipal,<sup>270</sup> county<sup>271</sup> and state employees,<sup>272</sup> employees of local school boards<sup>273</sup> and employees of public hospitals.<sup>274</sup> All the statutes make it clear that the following information about those employees is a matter of public record: “name, age, date of original employment or appointment to the State service, current position, title, current salary, date and amount of most recent increase or decrease in salary, date of most recent promotion, demotion, transfer, suspension, separation, or other change in position classification, and the office or station to which the employee is currently assigned.”<sup>275</sup>

Other information properly included in an employee's personnel file is confidential by law. This includes information “gathered by the government” relating to the individual's application, selection or non-selection, promotions, demotions, transfers, leave, salary, suspension, performance, disciplinary actions and termination of employment, wherever those documents are located and in whatever form.

In 1989 a state trial court judge ruled that merely placing information in a personnel file does not automatically exempt it from public disclosure.<sup>276</sup> To be confidential, the information must have been “gathered” by the employing agency. The judge ruled that the employment contracts of football and basketball coaches and athletic directors in the UNC system were “legal instruments entered into by mutual consent by the parties” — not information gathered by the agency. He said the contracts also were public records because they related to the expenditure of state funds.

In 1992 the Supreme Court reaffirmed that only employee information gathered by the employing agency is exempt from public disclosure under the state personnel records privacy statute.<sup>277</sup> The court ruled that information about state employees gathered by the SBI and a special government commission appointed to investigate improprieties relating to the men's basketball team at NCSU was not exempt from the Public Records Law because it had not been gathered by the agency for which the employee worked.

Also, the statutes governing municipal and county employees explicitly state that an

N.C. App. 607, 430 S.E.2d 441 (1993).

267 N.C. Gen. Stat. §136-28.5(a).

268 N.C. GEN. STAT. §136-28.5(b).

269 N.C. GEN. STAT. §159B-38.

270 N.C. GEN. STAT. §160A-168.

271 N.C. GEN. STAT. §153A-98.

272 N.C. GEN. STAT. §§126-22 to -24.

273 N.C. GEN. STAT. §§115C-319 to -321.

274 N.C. GEN. STAT. §131E-257.2.

275 See, e.g., N.C. GEN. STAT. §126-23.

276 Associated Press v. Poulton, 16 Media L. Rep. (BNA) 2393 (N.C. Super. Ct. July 28, 1989). See also Public Records Request; Coaches' Contracts; G.S. 132-1 *et seq.*, 2003 WL 1154488 (N.C.A.G.).

277 News & Observer Publ'g Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

employee may sign a written release authorizing the disclosure of his personnel file to anyone.

*Criminal background check records.* State statutes deny public or media access to the criminal records checks of public school personnel conducted by the state Department of Justice or the State Board of Education.<sup>278</sup>

*Disciplinary records.* While the various state personnel statutes make an employee's "demotion, transfer, suspension, separation or other change in position classification" a matter of public record, the reasons for such action generally are not public record. However, each personnel statute says that an appropriate supervisor of the employee (a county manager, department head or school superintendent, for example) *may* disclose that information if he determines in writing that the disclosure is "essential to maintaining the integrity" of the agency or to maintaining "public confidence" in the government. Such authority is seldom exercised. However, in 2004 Chief Justice I. Beverly Lake of the Supreme Court used such a statutory provision to release a memorandum disclosing his reasons for requesting the resignation of John Kennedy as director of the Administrative Office of the Courts. He released a memo describing the circumstances surrounding Kennedy's resignation and a memo explaining why it was important to make that information public.

*Former employees' records.* The personnel files of former employees who have not been employed by the state for 10 or more years may be opened for public inspection, except for documents relating to demotions and to disciplinary actions that resulted in the employee's dismissal.<sup>279</sup>

*Job applications.* The various personnel acts that apply to state, municipal, county and other government workers exempt job applications from disclosure under the Public Records Law. Also, twice in the early 1990s, the Supreme Court ruled that applications for government jobs are not public records.<sup>280</sup> In one case, the court said the names of the applicants also were not public record.<sup>281</sup> In both cases the court reasoned that the information was part of the applicant's confidential personnel file.

*Retirement records.* Information provided by public employees to city, county and state retirement systems is confidential and not a matter of public record. This includes an employee's Social Security number and current name and address.<sup>282</sup>

*Salary information.* State statutes clearly state that a public employee's "current salary" and the "date and amount of the most recent increase or decrease in salary" are public records, as discussed above. In 2005 the Court of Appeals interpreted "salary" narrowly, holding that it does not include other forms of compensation, such as bonuses, lump-sum payments and benefits.<sup>283</sup>

*Precious metal dealer records.* Local law enforcement agency records that contain copies of sales record book entries from precious metal dealers are not public records.<sup>284</sup>

*Preliminary reports and work papers.* Drafts, preliminary reports and work papers are public records, and a public agency in North Carolina does not have the right to

280 *Elkin Tribune, Inc. v. Yadkin County Bd. of Comm'rs*, 331 N.C. 735, 417 S.E.2d 465 (1992); *Durham Herald Co. v. Durham County*, 334 N.C. 677, 435 S.E.2d 317 (1993).

281 *Elkin Tribune, Inc. v. Yadkin County Bd. of Comm'rs*, 331 N.C. 735, 417 S.E.2d 465 (1992).

282 N.C. GEN. STAT. §128-28(q), 135-6(p).

283 *Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C.App. 486, 616 S.E.2d 602 (2005).

284 N.C. GEN. STAT. §66-169.

278 N.C. GEN. STAT. §§114-19.2(c1), 115C-332(f).

279 N.C. GEN. STAT. §126-22.

embargo a document until its release is more beneficial to or convenient for the agency. The one major exception is for the work papers of the state auditor.<sup>285</sup>

In 1987 the Court of Appeals granted the North Carolina Press Association access to written reports and recommendations concerning intercollegiate athletics prepared by the chancellors of the various UNC campuses and delivered to UNC President C.D. Spangler Jr. The court rejected the University's argument that the reports the campus chancellors submitted to the president were preliminary studies and internal and interagency memoranda — working papers — and thus exempt from the law.<sup>286</sup>

In 1992 the North Carolina Supreme Court explicitly ruled that there is no “preliminary draft” exception to the Public Records Law. The court held that draft reports prepared by individual members of the Poole Commission, set up to investigate the men's basketball program at NCSU, were public records.<sup>287</sup>

In 1994 a Superior Court judge in Durham County declared that a public school student assignment plan report that was incomplete and had not yet been given to the school board by the school administrator was a public record that could be inspected by the public.<sup>288</sup>

In 1995, a Surry County Superior Court judge held that draft minutes of a public meeting were public records, even though they had not been transcribed or approved. Furthermore, the court ordered disclosure of

the public officials' personal notes from the meeting.<sup>289</sup>

### ***Prison, parole and probation records.***

Several North Carolina statutes stipulate that internal prison records — those related to matters such as prisoner behavior, discipline and consideration for work release — are not public records.<sup>290</sup> The Court of Appeals has interpreted that to mean such information is available only to law enforcement agencies, courts, and other officials and agencies requiring information about crimes and criminals.<sup>291</sup>

Likewise, records compiled in connection with prison grievance proceedings are confidential. Prisoner grievances are handled by the Grievance Resolution Board, and according to a state statute, “All reports, investigations, and like supporting documents prepared by the Department [of Correction] for purposes of responding to the prisoner's request for an administrative remedy shall be deemed to be confidential.”<sup>292</sup> Such records are available to the complaining prisoner, however.

All records obtained by a probation officer in connection with his or her official duties also are confidential.<sup>293</sup>

Prison records dealing with matters like the length of a prisoner's sentence, the beginning and ending date of the sentence and any transfers are public records. For example, a state statute says 30 days before a prison inmate is transferred to a prison in another state the secretary of correction must notify those involved in the case, including the vic-

285 N.C. GEN. STAT. §147-64.6(d).

286 N.C. Press Ass'n v. Spangler, 87 N.C. App. 169, 360 S.E.2d 138 (1987).

287 News & Observer Publ'g Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

288 Durham Public Schools Bd. of Educ. v. Bussian, No. 94 CVS 484 (N.C. Super. Ct. Feb. 18, 1994).

289 Piedmont Publ'g Co. v. Surry County Bd. of Comm'rs, 24 Media L. Rep. (BNA) 1371 (N.C. Super. Ct. Aug. 4, 1995).

290 N.C. GEN. STAT. §§148-74 to -76.

291 Goble v. Bounds, 13 N.C. App. 579, 186 S.E.2d 638 (1971), *aff'd*, 281 N.C. 307, 188 S.E.2d 347 (1972).

292 N.C. GEN. STAT. §148-118.5.

293 N.C. GEN. STAT. §15-207.

tim and any other person who has requested notification, and post a notice of the transfer at the local courthouse.<sup>294</sup> All subsequent written comments regarding the planned transfer are public records unless the secretary of correction determines that making the information public would jeopardize the safety of persons or property.<sup>295</sup>

***Professional licensing board records.***

Many types of professionals must be licensed in order to work in this state. The extent to which the records of their various licensing agencies are public varies from agency to agency.

*Attorneys.* The State Bar licenses attorneys to practice law in North Carolina. The records of its Board of Law Examiners, the body that actually examines and licenses attorneys, are not public. The relevant statute says, “Records, papers, and other documents containing information collected and compiled by the Board or its members or employees as a result of investigations, inquiries, or interviews conducted in connection with examinations or licensing matters, are not public records. . . .”<sup>296</sup> Similarly, State Bar records related to the application of a foreign attorney seeking permission to work in North Carolina are not public.<sup>297</sup>

*Certified public accountants.* A North Carolina statute forbids disclosure of many of the records of the Board of Certified Public Accountant Examiners. The records that may not be disclosed include, for example, those collected in connection with complaints and examinations. However, any notice of a hearing or statement of charges against a certified accountant or applicant is public record, “even though it may contain informa-

tion collected and compiled as a result of a complaint, investigation, inquiry, or interview conducted by the Board.”<sup>298</sup> The law further states, “If any record, paper, or other document containing information collected and compiled by the Board is admitted into evidence in a hearing held by the Board, it shall then be a public record. . . .”<sup>299</sup>

*Dentists.* The State Board of Dental Examiners’ investigative records related to licensing or disciplinary actions are not public records.<sup>300</sup> However, any notice or statement of charges against any licensee or any notice to any licensee of a hearing is a public record, and if any record containing information collected by the board is admitted into evidence in any board hearing, it becomes a public record.<sup>301</sup>

*Geologists.* A state statute says the records of the proceedings of the Geologists Licensing Board and a register of all applications for licensing – including the full identification of the applicant, the applicant’s qualifications and the board’s action on the application – are public records.<sup>302</sup> Individual test scores, applications and related materials including letters of reference are not public records.<sup>303</sup>

*Pastoral counselors.* A state statute controls public access to the records of the State Board of Examiners of Fee-Based Practicing Pastoral Counselors.<sup>304</sup> The law says the board of examiners shall, in its records and proceedings, “endeavor to withhold from public disclosure the identity of any counselees or clients who have not consented to the public disclosure of treatment by the certified fee-based pastoral counselor or

294 N.C. GEN. STAT. §148-121(a).

295 N.C. GEN. STAT. §§148-121(b)-(c).

296 N.C. GEN. STAT. §84-24.

297 N.C. GEN. STAT. §84A-2(f).

298 N.C. GEN. STAT. §93-12.2.

299 *Id.*

300 N.C. GEN. STAT. §90-41(g).

301 *Id.*

302 N.C. GEN. STAT. §89E-14(a)-(b).

303 N.C. GEN. STAT. §89E-14(c).

304 N.C. GEN. STAT. § 90-14(c).



certified fee-based pastoral counseling associate.”<sup>305</sup> The statute authorizes the board to close its hearings to the public to receive evidence concerning the delivery of pastoral counseling services to a person who has not consented to public disclosure of that service, and “[a]ll records, papers, and documents containing information collected and compiled by or on behalf of the Board as a result of investigations, inquiries, or interviews conducted in connection with certification or disciplinary matters are not public records. . . .”<sup>306</sup> However, statements of charges, notices of hearings, decisions of the board, and documents collected and compiled by the board and entered into evidence at a hearing are public records except for the identities of clients, which may be deleted.

*Physicians.* State Board of Medical Examiners records containing information gathered by the board or its staff in connection with a physician licensing or disciplinary matter are not public records until they are admitted into evidence at a board hearing. Also, the board can withhold from the public the identity of any patient who has not consented to disclosure of his or her treatment by an accused physician. However, statements of charges against a licensed physician and notices of hearings are public records.<sup>307</sup> (See also Medical records/Peer review committee records.)

*Psychologists.* The N.C. Psychology Board licenses psychologists. Board records containing information gathered by the board or its staff in connection with a licensing or disciplinary matter are not public records until they are admitted into evidence at a board hearing. Also, the board can withhold from the public the identity of any patient who has not consented to disclosure of his or her

treatment. However, statements of charges against a licensed psychologist and notices of hearings are public records.<sup>308</sup>

*Refrigeration contractors.* A state statute denies public and media access to the licensing and disciplinary records of the State Board of Refrigeration Examiners.<sup>309</sup>

*Speech and language pathologists and audiologists.* License applications filed with the state by speech and language pathologists and audiologists are public records, according to an opinion of the state attorney general.<sup>310</sup>

*Public assistance records.* State law prohibits the government from revealing the names or other information about people applying for or receiving social services or public assistance.<sup>311</sup> However, the same law also requires each county auditor to make available for public inspection a monthly register of the names of all recipients of Work First Family Assistance and State-County Special Assistance for Adults, their addresses and the amount of money they received.<sup>312</sup> The law further states that the information may not be used “for any commercial or political purpose.”<sup>313</sup>

*Public enterprise billing information.* The Public Records Law itself exempts “public enterprise billing information” from disclosure.<sup>314</sup> Public enterprise billing information comprises records compiled and maintained with respect to individual customers by a municipality or other public entity that provides utility services such as electricity, water and gas services; public

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> N.C. GEN. STAT. §90-16.

<sup>308</sup> N.C. Gen. Stat. §90-270.15(e).

<sup>309</sup> N.C. GEN. STAT. §87-59(e).

<sup>310</sup> Public Records; Application for Licensure Received by the Board of Examiners for Speech and Language Pathologists and Audiologists, 45 Op. N.C. Att’y Gen. 188 (1976).

<sup>311</sup> N.C. GEN. STAT. §§108A-80(a), 108A-73, 108A-11.

<sup>312</sup> N.C. GEN. STAT. §108A-80(b).

<sup>313</sup> *Id.*

<sup>314</sup> N.C. GEN. STAT. §132-1.1(c).

transportation except for airports; parking facilities; and cable television.<sup>315</sup> Disclosure is allowed, however, when “necessary to assist the city, county, State, or public enterprise to maintain the integrity and quality of services it provides. . . .”<sup>316</sup> (See also Public utility records.)

**Public utility records.** The business records of public utility companies such as power companies, natural gas distribution companies and telephone companies are not open to public inspection. Most public utilities are organized as private corporations; as such, their books and records enjoy the same degree of confidentiality as those of other private businesses. In 1999 the Court of Appeals clearly ruled that a public utility – in this case a telephone company – was a private person under the law, not a public agency.<sup>317</sup> The court explained that a telephone company’s private status was not invalidated by the Utilities Commission’s authority to regulate the company. The Utilities Commission’s oversight of the company was material but not comprehensive, the court said. It added that the Public Records Law makes no distinction between regulated and unregulated industries, so generally it applies to neither.

The Public Records Law does apply to the Utilities Commission, however. For example, public utilities operating in this state must file annual reports concerning their operations, and those reports are public records. State law also gives the Utilities Commission and its staff authority to inspect the books and records of public utilities, and information gleaned from such inspections frequently is introduced into evidence at commission hearings, whereupon it becomes a matter of public record. State law further provides that

the Utilities Commission must maintain a record of its official acts, rulings, orders, decisions and transactions, all of which are public by law.<sup>318</sup>

However, in the telephone company case discussed above, the court ruled that some telephone company reports filed with the Utilities Commission were exempt from disclosure under the Public Records Law because they were trade secrets that were the property of a private person. (See also Trade secrets.) Also, a state statute prohibits Utilities Commission employees from revealing information obtained during the course of any examination or inspection made as part of their official duties.<sup>319</sup>

**Railroad records.** Records relating to the business activities of the state-owned railroad are public records with these two exceptions set out in a state statute: “[I]nformation related to a proposed specific business transaction where inspection, examination, or copying of the records would frustrate the purpose for which the records were created” and “information that is subject to confidentiality obligations of a railroad company.”<sup>320</sup>

**Real estate appraisals, negotiations.** Documents related to the acquisition or disposition of public property are public records with one exception. The Open Meetings Law allows a public body to meet in closed session to discuss “the price and other material terms of a contract or proposed contract for the acquisition of real property by purchase, option, exchange, or lease.”<sup>321</sup> When that happens, the minutes and other records related to that discussion are public records, but they may be withheld from the public “so long as public inspection would frustrate the purpose

315 N.C. GEN. STAT. §160A-311, 132-1.1(c).

316 N.C. GEN. STAT. §132-1.1(c)(2).

317 Utilities Comm’n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999).

318 N.C. GEN. STAT. §62-19(a).

319 N.C. GEN. STAT. §62-316.

320 N.C. GEN. STAT. §124-3(c).

321 N.C. GEN. STAT. §143-318.11(a)(5).

of the closed session.”<sup>322</sup> Nothing in state law allows a similar withholding of records related to the disposition of public property.

**Retirement system records.** A state statute stipulates that records of the proceedings of the board of trustees of the Retirement System for Teachers and State Employees are public records.<sup>323</sup> Furthermore, the board must prepare a public annual report on the system’s fiscal transactions for the previous year, the amount of accumulated cash and securities and the last balance sheet showing the financial status of the system. The requirements are the same for county retirement systems.<sup>324</sup>

**Software.** The state attorney general’s office has expressed the opinion that computer software developed by the state is not a record and therefore is not a public record. The attorney general’s office said the Public Records law distinguishes between software and the records it generates.<sup>325</sup>

**Tax records.** The Public Records Law says state and local tax information, including local tax records that contain information about a taxpayer’s income or receipts, may not be disclosed.<sup>326</sup> Another state statute clarifies that state employees may not disclose the following information about a taxpayer:

- a. Information contained on a tax return, a tax report, or an application for a license for which a tax is imposed.
- b. Information obtained through an audit of a taxpayer or by correspondence with a taxpayer.
- c. Information on whether a taxpayer has filed a tax return or a tax report.
- d. A list or other compilation of the

names, addresses, social security numbers, or similar information concerning taxpayers.<sup>327</sup>

That statute says statistical reports that do not reveal tax information about specific individuals are public records.<sup>328</sup>

Property tax records revealing inventories, statements of assets and liabilities and other information secured by the county assessor to appraise property are not public records.<sup>329</sup> However, the assessed and appraised values of property are available for public inspection. Statistical information that does not identify individual taxpayers also may be released.

City<sup>330</sup> and county<sup>331</sup> room occupancy tax returns filed with local governments monthly are not public records.

The state’s Setoff Debt Collection Act authorizes the secretary of revenue to setoff against any tax refund any debt owed to the state by the refund recipient. Information exchanged by the Revenue Department, the claimant agency and the taxpayer related to the setoff is not public record.<sup>332</sup>

**Toxic substances.** Hazardous substance lists filed with fire chiefs by businesses that store hazardous waste are confidential and can only be released to those government agencies planning emergency response activities.<sup>333</sup> The emergency response plans filed with local fire chiefs also are confidential.<sup>334</sup> However, in 1985 the General Assembly passed the Hazardous Chemicals Right to Know Act, which grants citizens the right to

322 N.C. GEN. STAT. §143-318.10(e).

323 N.C. GEN. STAT. §135-6(i).

324 N.C. GEN. STAT. §128-28(j).

325 Status of State Owned Computer Software Under G.S. 132-1, 1998 WL 459785 (N.C.A.G.).

326 N.C. GEN. STAT. §132-1.1(b).

327 N.C. GEN. STAT. §105-259(a)(2).

328 N.C. GEN. STAT. §105-259(a).

329 N.C. GEN. STAT. §105-296(h).

330 N.C. GEN. STAT. §160A-215(d).

331 N.C. GEN. STAT. §153A-155(d).

332 N.C. GEN. STAT. §105-259.

333 N.C. GEN. STAT. §95-194(f).

334 *Id.*

obtain some information about the hazardous chemicals being used by North Carolina businesses.<sup>335</sup> The act says that you can write to a business and request a list of chemicals used or stored at a facility. You must give your name, address and reason for the request. Then the business has 10 business days within which to provide a list of at least all the chemicals that are on the state's Hazardous Substance List and information about those chemicals. If your request is denied, you can appeal that denial to the commissioner of labor.<sup>336</sup>

The N.C. Radiation Protection Act directs the Department of Environment and Natural Resources to collect information about sources of radiation in the state and to register those who possess them. The law says the department may refuse to make public information relating to sources of radiation within this state when the department determines that "the disclosure of such information will contravene the stated policy and purposes of this [law] and such disclosure would be against the health, welfare and safety of the public."<sup>337</sup>

**Trade secrets.** The state's Public Records Law provides that a public agency cannot disclose information that is (1) a trade secret that is (2) the property of a private person and (3) that is disclosed to the public agency "in connection with the owner's performance of a public contract or in connection with a bid, application, proposal, industrial development project" or in compliance with the law and (4) is "designated . . . as 'confidential' or as a 'trade secret' at the time of its initial disclosure to the public agency."<sup>338</sup> Note that all four criteria must be met for a document to be withheld lawfully.

Trade secrets are defined in state law as business or technical information "including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process" that derives its commercial value from not being generally known or ascertainable and that is the subject of efforts to maintain its secrecy.<sup>339</sup>

In 1997 the Court of Appeals elaborated on the definition of trade secrets in a case in which the *Wilmington Morning Star* sought access to a price list that was part of a contract between a hospital and a managed health care organization (HMO).<sup>340</sup> The price list specified the costs and reimbursement rates at which certain hospital services would be provided to participating HMO customers. To help determine whether the price list was a trade secret, the court considered a list of factors it said have been applied in other jurisdictions. Those factors are:

- (1) The extent to which information is known outside the business;
- (2) the extent to which it is known to employees and others involved in the business;
- (3) the extent of measures taken to guard secrecy of the information;
- (4) the value of information to business and its competitors;
- (5) the amount of effort or money expended in developing the information; and
- (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

In the Wilmington hospital case, the court considered the legal definition of a trade secret and the factors listed above and concluded that the price list was a public record. The court reasoned that although the

335 N.C. GEN. STAT. §95-208(a).

336 N.C. GEN. STAT. §95-208(b).

337 N.C. GEN. STAT. §104E-9(a)(4).

338 N.C. GEN. STAT. §132-1.2.

339 N.C. GEN. STAT. §66-152(3).

340 *Wilmington Star-News, Inc. v. New Hanover Reg'l Med. Ctr.*, 125 N.C.App. 174, 480 S.E.2d 53 (1997).

price list was a trade secret, it was not the property of a private person as required by law for it to be exempt from disclosure under the Public Records Law. The HMO was a private person as defined by state statute,<sup>341</sup> but it shared ownership of the price list with the hospital, which was clearly a public agency. (The year following the *Wilmington Morning Star* case, the General Assembly passed a law that provided “information relating to competitive health care activities by or on behalf of [public] hospitals shall be confidential and not a public record. . . .”<sup>342</sup> The law made clear that the contracts themselves, “entered into by or on behalf of a public hospital . . . shall be a public record unless otherwise exempted by law.”<sup>343</sup> (See also Competitive health care information.))

In 1999 the Court of Appeals applied the same definitions and considered the same factors and concluded that telephone company reports filed with the state Utilities Commission that revealed numbers of customers served, plans for expansion and other information were not public records.<sup>344</sup> The court reasoned that the reports contained trade secrets and were the property of private persons — the telephone companies. The court said that although the telephone companies were classified as public utilities under state law and were regulated by the Utilities Commission, that governmental control did not overshadow the independent authority of the businesses.

Also, other state statutes prohibit state and local governments from disclosing a variety of specific trade secrets. Frequently these statutes apply to situations in which the government requires a business to submit

information about its operations in order to obtain a license or permit. One statute, for example, says that the formula for antifreeze submitted to the commissioner of agriculture by a company or individual seeking a permit to sell antifreeze is confidential information.<sup>345</sup> It can only be released to physicians to prepare an antidote in an emergency. Also, some information provided to the state Board of Agriculture by commercial livestock feed manufacturers or sellers complying with the N.C. Commercial Feed Law is confidential. The law says that “any method, records, formulations, or processes which as a trade secret is entitled to protection” is confidential.<sup>346</sup> State statutes also make confidential government-held trade secrets about uranium exploration,<sup>347</sup> the sources of precious metals purchased by licensed dealers of such materials,<sup>348</sup> elevators,<sup>349</sup> amusement devices<sup>350</sup> and forest products.<sup>351</sup>

State laws also protect some trade secrets revealed to the government in the course of government inspections,<sup>352</sup> including Occupational Safety and Health Administration Inspections,<sup>353</sup> or in the course of bidding for a state contract.<sup>354</sup>

**University of North Carolina liability insurance records.** Records pertaining to the University’s liability insurance program are not public records.<sup>355</sup>

**Uranium exploration records.** If a person engaged in uranium exploration demonstrates to the Department of Natural

341 N.C. GEN. STAT. §66-152(2).

342 N.C. GEN. STAT. §131E-97.3(a).

343 N.C. GEN. STAT. §§130A-45.11, 131E-97.3(a).

344 *Utilities Comm’n v. MCI Telecomms. Corp.*, 132 N.C. App. 625, 514 S.E.2d 276 (1999).

345 N.C. GEN. STAT. §106-579.11.

346 N.C. GEN. STAT. §106-284.44(f).

347 N.C. GEN. STAT. §74-88.

348 N.C. GEN. STAT. §66-169.

349 N.C. GEN. STAT. §95-110.14.

350 N.C. GEN. STAT. §95-111.17.

351 N.C. GEN. STAT. §113A-195(f).

352 N.C. GEN. STAT. §95-194.

353 N.C. GEN. STAT. §95-152.

354 N.C. GEN. STAT. §143-52.

355 N.C. GEN. STAT. §116-222.



Resources and Community Development that logs, surveys plats and reports filed with the department “are of a proprietary nature relating to his competitive rights,” that information will not be a public record for four years after the department receives the information. Upon written request of any such person and a showing of a continued proprietary interest affecting competitive rights, the department shall hold the material confidential for additional two-year periods.<sup>356</sup>

**Vital statistics.** Copies of birth, death<sup>357</sup> and marriage<sup>358</sup> certificates maintained by county registers of deeds are public records available for public inspection and copying. However, certified copies of the documents are available only to the categories of persons listed in the relevant state statute.<sup>359</sup>

Original birth certificates of adopted children are sealed,<sup>360</sup> health and medical information contained on birth certificates is confidential except when it is to be used for “research purposes,”<sup>361</sup> and birth certificates for persons in the federal witness protection program are not available to the public.<sup>362</sup>

The state registrar maintains a registry of each divorce and annulment granted in North Carolina, and that registry is a public record.

A schedule of fees for copies of vital records and searches of vital records is set out in a state statute.<sup>363</sup>

## What should you do if you are denied access?

The Public Records Law says that if you are denied access to or copies of public records, you can go to court for an order compelling disclosure or copying. The time limit on filing suit is three years, and the burden of proof is on the person withholding the document to show that it should be withheld.<sup>364</sup> Such matters are to receive immediate court hearings and be given priority by trial and appellate courts.<sup>365</sup> However, there often is a several-month delay.

If you win, no civil penalties or fines or other criminal sanctions are imposed on the individual or agency that originally denied you access to the record. However, the court may award you your attorney’s fees. State law says that when a party successfully compels the disclosure of public records “the court shall allow the prevailing party to recover its reasonable attorneys’ fees if attributed to those public records, unless the court finds the agency acted with substantial justification in denying access to the public records or the court finds circumstances that would make the award of attorneys’ fees unjust.”<sup>366</sup> In a 1996 case that did not involve public records but whether the operator of a Moore County sand and gravel pit needed a state mining permit, the Supreme Court elaborated on what constitutes “substantial justification.” The court said substantial justification means “justified in substance or in the main — that is, justified to a degree that could satisfy a reasonable person.”<sup>367</sup> This does not require that a lawsuit be infallible, the court said, but neither is it sufficient to prove merely that the lawsuit was not frivolous. The court also ex-

356 N.C. GEN. STAT. §74-88.

357 N.C. GEN. STAT. §130A-99(a).

358 N.C. GEN. STAT. §130A-110(d).

359 N.C. GEN. STAT. §130A-93.

360 N.C. GEN. STAT. §48-9-107(c).

361 N.C. GEN. STAT. §§130A-93(e), 130A-102.

362 N.C. GEN. STAT. §130A-93(f).

363 N.C. GEN. STAT. §130A-93.1(a).

364 N.C. GEN. STAT. §132-9(a).

365 *Id.*

366 N.C. GEN. STAT. §132-9(c).

367 *Crowell Constructors, Inc. v. North Carolina*, 342 N.C. 838, 844, 467 S.E.2d 675, 679 (1996) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 2550 (1988)).

plained that whether a party eventually wins or loses the case does not determine whether there was substantial justification to file it in the first place. A court is to evaluate the facts known at the time a claim was pressed, not at the conclusion of the case.

If the court finds that a public employee or public official has “knowingly or intentionally committed, caused, permitted, suborned, or participated in a violation” of the Public Records Law, the court may order that individual — rather than the agency — to pay all or part of the attorney’s fees.<sup>368</sup> This works both ways, however. If the court finds your access suit was filed in bad faith or was frivolous, the court may make you pay the government attorney’s fees.<sup>369</sup>

You should be aware, however, that an access case can take years to litigate. By the time you obtain access to a document, it may no longer be newsworthy. So, you see, in most cases there really are no better access tools than well-developed sources and enough knowledge of access law to enable you to present a convincing argument to a resistant record keeper. Legal advice is available from the North Carolina Press Association Hotline, 919-833-3833, and from the North Carolina Association of Broadcasters Line, 919-821-7300. Also, you can urge the government agency to seek an interpretation of the law from the state attorney general.

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368 N.C. GEN. STAT. §132-9(c).

369 N.C. GEN. STAT. §132-9(d).

**Sample N.C. Public Records Law Request**

VIA CERTIFIED MAIL

Appropriate Public Information Officer

Re: North Carolina Public Records Law Request

Dear \_\_\_\_\_:

Pursuant to the North Carolina Public Records Law (North Carolina General Statute Section 132-1, et seq.), I request that you allow immediate inspection of the following public records, in whatever form the records are kept: *(include specific description of information sought)*.

If you take the position that the above-described public records are not open to public inspection under the Public Records Law, please explain the basis for your position and identify any statute, rule of law or other authority upon which you rely.

Pursuant to the Public Records Law, I am willing to pay the actual cost of the copies I am requesting but ask that I be furnished with an estimate prior to any costs being incurred in excess of \$\_\_\_\_\_. N.C. Gen. Stat. 132-6.1.

I look forward to your immediate reply.

Sincerely,

*(Your name)*

## N. C. Public Records Law (Excerpts)

### § 132-1. "Public records" defined

(a) "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

(b) The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, "minimal cost" shall mean the actual cost of reproducing the public record or public information.

#### § 132-1.1. Confidential communications by legal counsel to public board or agency; State tax information; public enterprise billing information; Address Confidentiality Program information

(a) Confidential Communications. - Public records, as defined in G.S. 132- 1, shall not include written communications (and copies thereof) to any public board, council,

commission or other governmental body of the State or of any county, municipality or other political subdivision or unit of government, made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental body, concerning any claim against or on behalf of the governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected. Such written communication and copies thereof shall not be open to public inspection, examination or copying unless specifically made public by the governmental body receiving such written communications; provided, however, that such written communications and copies thereof shall become public records as defined in G.S. 132-1 three years from the date such communication was received by such public board, council, commission or other governmental body.

(b) State and Local Tax Information. - Tax information may not be disclosed except as provided in G.S. 105-259. As used in this subsection, "tax information" has the same meaning as in G.S. 105-259. Local tax records that contain information about a taxpayer's income or receipts may not be disclosed except as provided in G.S. 153A-148.1 and G.S. 160A-208.1.

(c) Public Enterprise Billing Information. - Billing information compiled and maintained by a city or county or other public entity providing utility services in connection with the ownership or operation of a public enterprise, excluding airports, is not a public record as defined in G.S. 132-1. Nothing contained herein is intended to limit public disclosure by a city or county of billing

information:

(1) That the city or county determines will be useful or necessary to assist bond counsel, bond underwriters, underwriters' counsel, rating agencies or investors or potential investors in making informed decisions regarding bonds or other obligations incurred or to be incurred with respect to the public enterprise;

(2) That is necessary to assist the city, county, State, or public enterprise to maintain the integrity and quality of services it provides; or

(3) That is necessary to assist law enforcement, public safety, fire protection, rescue, emergency management, or judicial officers in the performance of their duties.

As used herein, "billing information" means any record or information, in whatever form, compiled or maintained with respect to individual customers by any owner or operator of a public enterprise, as defined in G.S. 160A-311, excluding subdivision (9), and G.S. 153A-274, excluding subdivision (4), or other public entity providing utility services, excluding airports, relating to services it provides or will provide to the customer.

(d) Address Confidentiality Program Information. - The actual address and telephone number of a program participant in the Address Confidentiality Program established under Chapter 15C of the General Statutes is not a public record within the meaning of Chapter 132. The actual address and telephone number of a program participant may not be disclosed except as provided in Chapter 15C of the General Statutes.

(e) Controlled Substances Reporting System Information. -- Information compiled or maintained in the Controlled Substances

Reporting System established under Article 5D of Chapter 90 of the General Statutes is not a public record as defined in G.S. 132-1 and may be released only as provided under Article 5D of Chapter 90 of the General Statutes.

### **§ 132-1.2. Confidential information**

Nothing in this Chapter shall be construed to require or authorize a public agency or its subdivision to disclose any information that:

(1) Meets all of the following conditions:

a. Constitutes a "trade secret" as defined in G.S. 66-152(3).

b. Is the property of a private "person" as defined in G.S. 66-152(2).

c. Is disclosed or furnished to the public agency in connection with the owner's performance of a public contract or in connection with a bid, application, proposal, industrial development project, or in compliance with laws, regulations, rules, or ordinances of the United States, the State, or political subdivisions of the State.

d. Is designated or indicated as "confidential" or as a "trade secret" at the time of its initial disclosure to the public agency.

(2) Reveals an account number for electronic payment as defined in G.S. 147- 86.20 and obtained pursuant to Articles 6A or 6B of Chapter 147 of the General Statutes or G.S. 159-32.1.

(3) Reveals a document, file number, password, or any other information maintained by the Secretary of State pursuant to Article 21 of Chapter 130A of the General Statutes.

(4) Reveals the electronically captured image



of an individual's signature, date of birth, drivers license number, or a portion of an individual's social security number if the agency has those items because they are on a voter registration document.

**§ 132-1.3. Settlements made by or on behalf of public agencies, public officials, or public employees; public records**

(a) Public records, as defined in G.S. 132-1, shall include all settlement documents in any suit, administrative proceeding or arbitration instituted against any agency of North Carolina government or its subdivisions, as defined in G.S. 132-1, in connection with or arising out of such agency's official actions, duties or responsibilities, except in an action for medical malpractice against a hospital facility. No agency of North Carolina government or its subdivisions, nor any counsel, insurance company or other representative acting on behalf of such agency, shall approve, accept or enter into any settlement of any such suit, arbitration or proceeding if the settlement provides that its terms and conditions shall be confidential, except in an action for medical malpractice against a hospital facility. No settlement document sealed under subsection (b) of this section shall be open for public inspection.

(b) No judge, administrative judge or administrative hearing officer of this State, nor any board or commission, nor any arbitrator appointed pursuant to the laws of North Carolina, shall order or permit the sealing of any settlement document in any proceeding described herein except on the basis of a written order concluding that (1) the presumption of openness is overcome by an overriding interest and (2) that such overriding interest cannot be protected by any measure short of sealing the settlement. Such order shall articulate the overriding interest and shall include findings of fact that

are sufficiently specific to permit a reviewing court to determine whether the order was proper.

(c) Except for confidential communications as provided in G.S. 132-1.1, the term "settlement documents," as used herein, shall include all documents which reflect, or which are made or utilized in connection with, the terms and conditions upon which any proceedings described in this section are compromised, settled, terminated or dismissed, including but not limited to correspondence, settlement agreements, consent orders, checks, and bank drafts.

**§ 132-1.4. Criminal investigations; intelligence information records**

(a) Records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information compiled by public law enforcement agencies are not public records as defined by G.S. 132-1. Records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information may be released by order of a court of competent jurisdiction.

(b) As used in this section:

(1) "Records of criminal investigations" means all records or any information that pertains to a person or group of persons that is compiled by public law enforcement agencies for the purpose of attempting to prevent or solve violations of the law, including information derived from witnesses, laboratory tests, surveillance, investigators, confidential informants, photographs, and measurements.

(2) "Records of criminal intelligence information" means records or information that pertain to a person or group of persons

that is compiled by a public law enforcement agency in an effort to anticipate, prevent, or monitor possible violations of the law.

(3) “Public law enforcement agency” means a municipal police department, a county police department, a sheriff’s department, a company police agency commissioned by the Attorney General pursuant to G.S. 74E-1, et seq., and any State or local agency, force, department, or unit responsible for investigating, preventing, or solving violations of the law.

(4) “Violations of the law” means crimes and offenses that are prosecutable in the criminal courts in this State or the United States and infractions as defined in G.S. 14-3.1.

(5) “Complaining witness” means an alleged victim or other person who reports a violation or apparent violation of the law to a public law enforcement agency.

(c) Notwithstanding the provisions of this section, and unless otherwise prohibited by law, the following information shall be public records within the meaning of G.S. 132-1.

(1) The time, date, location, and nature of a violation or apparent violation of the law reported to a public law enforcement agency.

(2) The name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted.

(3) The circumstances surrounding an arrest, including the time and place of the arrest, whether the arrest involved resistance, possession or use of weapons, or pursuit, and a description of any items seized in connection with the arrest.

(4) The contents of “911” and other emergency telephone calls received by or on

behalf of public law enforcement agencies, except for such contents that reveal the name, address, telephone number, or other information that may identify the caller, victim, or witness.

(5) The contents of communications between or among employees of public law enforcement agencies that are broadcast over the public airways.

(6) The name, sex, age, and address of a complaining witness.

(d) A public law enforcement agency shall temporarily withhold the name or address of a complaining witness if release of the information is reasonably likely to pose a threat to the mental health, physical health, or personal safety of the complaining witness or materially compromise a continuing or future criminal investigation or criminal intelligence operation. Information temporarily withheld under this subsection shall be made available for release to the public in accordance with G.S. 132-6 as soon as the circumstances that justify withholding it cease to exist. Any person denied access to information withheld under this subsection may apply to a court of competent jurisdiction for an order compelling disclosure of the information. In such action, the court shall balance the interests of the public in disclosure against the interests of the law enforcement agency and the alleged victim in withholding the information. Actions brought pursuant to this subsection shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

(e) If a public law enforcement agency believes that release of information that is a public record under subdivisions (c)(1) through (c)(5) of this section will jeopardize

the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation, it may seek an order from a court of competent jurisdiction to prevent disclosure of the information. In such action the law enforcement agency shall have the burden of showing by a preponderance of the evidence that disclosure of the information in question will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation. Actions brought pursuant to this subsection shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

(f) Nothing in this section shall be construed as authorizing any public law enforcement agency to prohibit or prevent another public agency having custody of a public record from permitting the inspection, examination, or copying of such public record in compliance with G.S. 132-6. The use of a public record in connection with a criminal investigation or the gathering of criminal intelligence shall not affect its status as a public record.

(g) Disclosure of records of criminal investigations and criminal intelligence information that have been transmitted to a district attorney or other attorney authorized to prosecute a violation of law shall be governed by this section and Chapter 15A of the General Statutes.

(h) Nothing in this section shall be construed as requiring law enforcement agencies to disclose the following:

(1) Information that would not be required to be disclosed under Chapter 15A of the General Statutes; or

(2) Information that is reasonably likely to identify a confidential informant.

(i) Law enforcement agencies shall not be required to maintain any tape recordings of "911" or other communications for more than 30 days from the time of the call, unless a court of competent jurisdiction orders a portion sealed.

(j) When information that is not a public record under the provisions of this section is deleted from a document, tape recording, or other record, the law enforcement agency shall make clear that a deletion has been made. Nothing in this subsection shall authorize the destruction of the original record.

(k) The following court records are public records and may be withheld only when sealed by court order: arrest and search warrants that have been returned by law enforcement agencies, indictments, criminal summons, and nontestimonial identification orders.

(l) Records of investigations of alleged child abuse shall be governed by Article 29 of Chapter 7B of the General Statutes.

#### **§ 132-1.5. 911 database**

Automatic number identification and automatic location identification information that consists of the name, address, and telephone numbers of telephone subscribers which is contained in a county 911 database is confidential and is not a public record as defined by Chapter 132 of the General Statutes if that information is required to be confidential by the agreement with the telephone company by which the information was obtained. Dissemination of the information contained in the 911 automatic number and automatic location database is

prohibited except on a call-by-call basis only for the purpose of handling emergency calls or for training, and any permanent record of the information shall be secured by the public safety answering points and disposed of in a manner which will retain that security except as otherwise required by applicable law.

#### **§ 132-1.6. Emergency response plans**

Emergency response plans adopted by a constituent institution of The University of North Carolina, a community college, or a public hospital as defined in G.S. 159-39 and the records related to the planning and development of these emergency response plans are not public records as defined by G.S. 132-1 and shall not be subject to inspection and examination under G.S. 132-6.

#### **§ 132-1.7. Sensitive public security information**

(a) Public records, as defined in G.S. 132-1, shall not include information containing specific details of public security plans and arrangements or the detailed plans and drawings of public buildings and infrastructure facilities.

(b) Public records as defined in G.S. 132-1 do not include plans to prevent or respond to terrorist activity, to the extent such records set forth vulnerability and risk assessments, potential targets, specific tactics, or specific security or emergency procedures, the disclosure of which would jeopardize the safety of governmental personnel or the general public or the security of any governmental facility, building, structure, or information storage system.

(c) Information relating to the general adoption of public security plans and arrangements, and budgetary information

concerning the authorization or expenditure of public funds to implement public security plans and arrangements, or for the construction, renovation, or repair of public buildings and infrastructure facilities shall be public records.

#### **§ 132-1.8. Confidentiality of photographs and video or audio recordings made pursuant to autopsy**

Except as otherwise provided in G.S. 130A-389.1, a photograph or video or audio recording of an official autopsy is not a public record as defined by G.S. 132-1. However, the text of an official autopsy report, including any findings and interpretations prepared in accordance with G.S. 130A-389(a), is a public record and fully accessible by the public. For purposes of this section, an official autopsy is an autopsy performed pursuant to G.S. 130A-389(a).

#### **§ 132-1.9. Trial preparation materials**

(a) Scope. -- A request to inspect, examine, or copy a public record that is also trial preparation material is governed by this section, and, to the extent this section conflicts with any other provision of law, this section applies.

(b) Right to Deny Access. -- Except as otherwise provided in this section, a custodian may deny access to a public record that is also trial preparation material. If the denial is based on an assertion that the public record is trial preparation material that was prepared in anticipation of a legal proceeding that has not commenced, the custodian shall, upon request, provide a written justification for the assertion that the public record was prepared in anticipation of a legal proceeding.

(c) Trial Preparation Material Prepared in Anticipation of a Legal Proceeding. -

- Any person who is denied access to a public record that is also claimed to be trial preparation material that was prepared in anticipation of a legal proceeding that has not yet been commenced may petition the court pursuant to G.S. 132-9 for determination as to whether the public record is trial preparation material that was prepared in anticipation of a legal proceeding.

(d) During a Legal Proceeding. --

(1) When a legal proceeding is subject to G.S. 1A-1, Rule 26(b)(3), or subject to Rule 26(b)(3) of the Federal Rules of Civil Procedure, a party to the pending legal proceeding, including any appeals and postjudgment proceedings, who is denied access to a public record that is also claimed to be trial preparation material that pertains to the pending proceeding may seek access to such record only by motion made in the pending legal proceeding and pursuant to the procedural and substantive standards that apply to that proceeding. A party to the pending legal proceeding may not directly or indirectly commence a separate proceeding for release of such record pursuant to G.S. 132-9 in any other court or tribunal.

(2) When a legal proceeding is not subject to G.S. 1A-1, Rule 26(b)(3), and not subject to Rule 26(b)(3) of the Federal Rules of Civil Procedure, a party to the pending legal proceeding, including any appeals and postjudgment proceedings, who is denied access to a public record that is also claimed to be trial preparation material that pertains to the pending legal proceeding may petition the court pursuant to G.S. 132-9 for access to such record. In determining whether to require the custodian to provide access to all or any portion of the record, the court or other tribunal shall apply the provisions of G.S. 1A-1, Rule 26(b)(3).

(3) Any person who is denied access to a public record that is also claimed to be trial preparation material and who is not a party to the pending legal proceeding to which such record pertains, and who is not acting in concert with or as an agent for any party to the pending legal proceeding, may petition the court pursuant to G.S. 132-9 for a determination as to whether the public record is trial preparation material.

(e) Following a Legal Proceeding. -- Upon the conclusion of a legal proceeding, including the completion of all appeals and postjudgment proceedings, or, in the case where no legal proceeding has been commenced, upon the expiration of all applicable statutes of limitations and periods of repose, the custodian of a public record that is also claimed to be trial preparation material shall permit the inspection, examination, or copying of such record if any law that is applicable so provides.

(f) Effect of Disclosure. -- Disclosure pursuant to this section of all or any portion of a public record that is also trial preparation material, whether voluntary or pursuant to an order issued by a court, or issued by an officer in an administrative or quasi-judicial legal proceeding, shall not constitute a waiver of the right to claim that any other document or record constitutes trial preparation material.

(g) Trial Preparation Materials That Are Not Public Records. -- This section does not require disclosure, or authorize a court to require disclosure, of trial preparation material that is not also a public record or that is under other provisions of this Chapter exempted or protected from disclosure by law or by an order issued by a court, or by an officer in an administrative or quasi-judicial legal proceeding.

(h) Definitions. -- As used in this section, the



following definitions apply:

(1) Legal proceeding. -- Civil proceedings in any federal or State court. Legal proceeding also includes any federal, State, or local government administrative or quasi-judicial proceeding that is not expressly subject to the provisions of Chapter 1A of the General Statutes or the Federal Rules of Civil Procedure.

(2) Trial preparation material. -- Any record, wherever located and in whatever form, that is trial preparation material within the meaning of G. S. 1A-1, Rule 26(b)(3), any comparable material prepared for any other legal proceeding, and any comparable material exchanged pursuant to a joint defense, joint prosecution, or joint interest agreement in connection with any pending or anticipated legal proceeding.

#### **§ 132-1.10. Social security numbers and other personal identifying information**

(a) The General Assembly finds the following:

(1) The social security number can be used as a tool to perpetuate fraud against a person and to acquire sensitive personal, financial, medical, and familial information, the release of which could cause great financial or personal harm to an individual. While the social security number was intended to be used solely for the administration of the federal Social Security System, over time this unique numeric identifier has been used extensively for identity verification purposes and other legitimate consensual purposes.

(2) Although there are legitimate reasons for State and local government agencies to collect social security numbers and other personal identifying information from individuals, government should collect the information only for legitimate purposes or when

required by law.

(3) When State and local government agencies possess social security numbers or other personal identifying information, the governments should minimize the instances this information is disseminated either internally within government or externally with the general public.

(b) Except as provided in subsections (c) and (d) of this section, no agency of the State or its political subdivisions, or any agent or employee of a government agency, shall do any of the following:

(1) Collect a social security number from an individual unless authorized by law to do so or unless the collection of the social security number is otherwise imperative for the performance of that agency's duties and responsibilities as prescribed by law. Social security numbers collected by an agency must be relevant to the purpose for which collected and shall not be collected until and unless the need for social security numbers has been clearly documented.

(2) Fail, when collecting a social security number from an individual, to segregate that number on a separate page from the rest of the record, or as otherwise appropriate, in order that the social security number can be more easily redacted pursuant to a valid public records request.

(3) Fail, when collecting a social security number from an individual, to provide, at the time of or prior to the actual collection of the social security number by that agency, that individual, upon request, with a statement of the purpose or purposes for which the social security number is being collected and used.

(4) Use the social security number for any purpose other than the purpose stated.

(5) Intentionally communicate or otherwise make available to the general public a person's social security number or other identifying information. "Identifying information", as used in this subdivision, shall have the same meaning as in G.S. 14-113.20(b), except it shall not include electronic identification numbers, electronic mail names or addresses, Internet account numbers, Internet identification names, parent's legal surname prior to marriage, or drivers license numbers appearing on law enforcement records.

<Text of subsec. (6) eff. July 1, 2007.>

(6) Intentionally print or imbed an individual's social security number on any card required for the individual to access government services.

<Text of subsec. (7) eff. July 1, 2007.>

(7) Require an individual to transmit the individual's social security number over the Internet, unless the connection is secure or the social security number is encrypted.

<Text of subsec. (8) eff. July 1, 2007.>

(8) Require an individual to use the individual's social security number to access an Internet Web site, unless a password or unique personal identification number or other authentication device is also required to access the Internet Web site.

<Text of subsec. (9) eff. July 1, 2007.>

(9) Print an individual's social security number on any materials that are mailed to the individual, unless state or federal law required that the social security number be on the document to be mailed. A social security number that is permitted to be mailed under this subdivision may not be printed, in whole or in part, on a postcard

or other mailer not requiring an envelope, or visible on the envelope or without the envelope having been opened.

(c) Subsection (b) of this section does not apply in the following circumstances:

(1) To social security numbers or other identifying information disclosed to another governmental entity or its agents, employees, or contractors if disclosure is necessary for the receiving entity to perform its duties and responsibilities. The receiving governmental entity and its agents, employees, and contractors shall maintain the confidential and exempt status of such numbers.

(2) To social security numbers or other identifying information disclosed pursuant to a court order, warrant, or subpoena.

(3) To social security numbers or other identifying information disclosed for public health purposes pursuant to and in compliance with Chapter 130A of the General Statutes.

(4) To social security numbers or other identifying information that have been redacted.

(5) To certified copies of vital records issued by the State Registrar and other authorized officials pursuant to G.S. 130A-93(c). The State Registrar may disclose any identifying information other than social security numbers on any uncertified vital record.

(6) To any recorded document in the official records of the register of deeds of the county.

(7) To any document filed in the official records of the courts.

(d) No person preparing or filing a document to be recorded or filed in the official records

by the register of deeds or of the courts may include any person's social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords in that document, unless otherwise expressly required by law or court order, adopted by the State Registrar on records of vital events, or redacted. Any loan closing instruction that requires the inclusion of a person's social security number on a document to be recorded shall be void. Any person who violates this subsection shall be guilty of an infraction, punishable by a fine not to exceed five hundred dollars (\$500. 00) for each violation.

(e) The validity of an instrument as between the parties to the instrument is not affected by the inclusion of personal information on a document recorded or filed with the official records of the register of deeds. The register

checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords in the document, unless expressly required by law or court order, adopted by the State Registrar on records of vital events, or redacted so that no more than the last four digits of the identification number is included.

(2) Any person has a right to request a register of deeds or clerk of court to remove, from an image or copy of an official record placed on a register of deeds' or clerk of court's Internet Web site available to the general public or on an Internet Web site available to the general public used by a register of deeds or clerk of court to display public records, any social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords contained in an official record. The request must be made in writing and delivered by mail, facsimile, or electronic transmission, or delivered in person, to the register of deeds or clerk of court. The request must specify the personal information to be redacted, information that identifies the document that contains the personal information and unique information that identifies the location within the document that contains the social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords to be redacted. No fee will be charged for the redaction pursuant to such a request. Any person who requests a redaction without proper authority to do so shall be guilty of an infraction, punishable by a fine not to exceed five hundred dollars (\$500.00) for each violation.

(h) Any affected person may petition the

court for an order directing compliance with this section. No liability shall accrue to a register of deeds or clerk of court or to his or her agent for any action related to provisions of this section or for any claims or damages that might result from a social security number or other identifying information on the public record or on a register of deeds' or clerk of court's Internet website available to the general public or an Internet Web site available to the general public used by a register of deeds or clerk of court.

#### **§ 132-1.11. Economic development incentives**

(a) Assumptions and Methodologies. - Subject to the provisions of this Chapter regarding confidential information and the withholding of public records relating to the proposed expansion or location of specific business or industrial projects when the release of those records would frustrate the purpose for which they were created, whenever a public agency or its subdivision performs a cost-benefit analysis or similar assessment with respect to economic development incentives offered to a specific business or industrial project, the agency or its subdivision must describe in detail the assumptions and methodologies used in completing the analysis or assessment. This description is a public record and is subject to all provisions of this Chapter and other law regarding public records.

(b) Disclosure of Public Records Requirements. -- Whenever an agency or its subdivision first proposes, negotiates, or accepts an application for economic development incentives with respect to a specific industrial or business project, the agency or subdivision must disclose that any information obtained by the agency or subdivision is subject to laws regarding disclosure of public records. In addition,

the agency or subdivision must fully and accurately describe the instances in which confidential information may be withheld from disclosure, the types of information that qualify as confidential information, and the methods for ensuring that confidential information is not disclosed.

### **§ 132-2. Custodian designated**

The public official in charge of an office having public records shall be the custodian thereof.

### **§ 132-3. Destruction of records regulated**

(a) Prohibition.--No public official may destroy, sell, loan, or otherwise dispose of any public record, except in accordance with G.S. 121-5 and G.S. 130A-99, without the consent of the Department of Cultural Resources. Whoever unlawfully removes a public record from the office where it is usually kept, or alters, defaces, mutilates or destroys it shall be guilty of a Class 3 misdemeanor and upon conviction only fined not less than ten dollars (\$10.00) nor more than five hundred dollars (\$500.00).

(b) Revenue Records.--Notwithstanding subsection (a) of this section and G.S. 121-5, when a record of the Department of Revenue has been copied in any manner, the original record may be destroyed upon the order of the Secretary of Revenue. If a record of the Department of Revenue has not been copied, the original record shall be preserved for at least three years. After three years the original record may be destroyed upon the order of the Secretary of Revenue.

(c) Employment Security Commission Records. -- Notwithstanding subsection (a) of this section and G.S. 121-5, when a record of the Employment Security Commission has been copied in any manner, the original

record may be destroyed upon the order of the Chairman of the Employment Security Commission. If a record of the Commission has not been copied, the original record shall be preserved for at least three years. After three years the original record may be destroyed upon the order of the Chairman of the Employment Security Commission.

### **§ 132-6. Inspection and examination of records**

(a) Every custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law. As used herein, "custodian" does not mean an agency that holds the public records of other agencies solely for purposes of storage or safekeeping or solely to provide data processing.

(b) No person requesting to inspect and examine public records, or to obtain copies thereof, shall be required to disclose the purpose or motive for the request.

(c) No request to inspect, examine, or obtain copies of public records shall be denied on the grounds that confidential information is commingled with the requested nonconfidential information. If it is necessary to separate confidential from nonconfidential information in order to permit the inspection, examination, or copying of the public records, the public agency shall bear the cost of such separation on the following schedule:

State agencies after June 30, 1996;

Municipalities with populations of 10,000 or more, counties with populations of 25,000 or



more, as determined by the 1990 U.S. Census, and public hospitals in those counties, after June 30, 1997;

Municipalities with populations of less than 10,000, counties with populations of less than 25,000, as determined by the 1990 U.S. Census, and public hospitals in those counties, after June 30, 1998;

Political subdivisions and their agencies that are not otherwise covered by this schedule, after June 30, 1998.

(d) Notwithstanding the provisions of subsections (a) and (b) of this section, public records relating to the proposed expansion or location of specific business or industrial projects may be withheld so long as their inspection, examination or copying would frustrate the purpose for which such public records were created; provided, however, that nothing herein shall be construed to permit the withholding of public records relating to general economic development policies or activities. Once the State, a local government, or the specific business has announced a commitment by the business to expand or locate a specific project in this State or a final decision not to do so and the business has communicated that commitment or decision to the State or local government agency involved with the project, the provisions of this subsection allowing public records to be withheld by the agency no longer apply. Once the provisions of this subsection no longer apply, the agency shall disclose as soon as practicable, and within 25 business days, public records requested for the announced project that are not otherwise made confidential by law. An announcement that a business or industrial project has committed to expand or locate in the State shall not require disclosure of local government records relating to the project if the business has not selected a specific location within the

State for the project. Once a specific location for the project has been determined, local government records must be disclosed, upon request, in accordance with the provisions of this section. For purposes of this section, "local government records" include records maintained by the State that relate to a local government's efforts to attract the project.

(e) The application of this Chapter is subject to the provisions of Article 1 of Chapter 121 of the General Statutes, the North Carolina Archives and History Act.

(f) Notwithstanding the provisions of subsection (a) of this section, the inspection or copying of any public record which, because of its age or condition could be damaged during inspection or copying, may be made subject to reasonable restrictions intended to preserve the particular record.

#### **§ 132-6.1. Electronic data-processing records**

(a) After June 30, 1996, no public agency shall purchase, lease, create, or otherwise acquire any electronic data-processing system for the storage, manipulation, or retrieval of public records unless it first determines that the system will not impair or impede the agency's ability to permit the public inspection and examination, and to provide electronic copies of such records. Nothing in this subsection shall be construed to require the retention by the public agency of obsolete hardware or software.

(b) Every public agency shall create an index of computer databases compiled or created by a public agency on the following schedule:

State agencies by July 1, 1996;

Municipalities with populations of 10,000 or more, counties with populations of 25,000 or

more, as determined by the 1990 U.S. Census, and public hospitals in those counties, by July 1, 1997;

Municipalities with populations of less than 10,000, counties with populations of less than 25,000, as determined by the 1990 U.S. Census, and public hospitals in those counties, by July 1, 1998; Political subdivisions and their agencies that are not otherwise covered by this schedule, after June 30, 1998.

The index shall be a public record and shall include, at a minimum, the following information with respect to each database listed therein: a list of the data fields; a description of the format or record layout; information as to the frequency with which the database is updated; a list of any data fields to which public access is restricted; a description of each form in which the database can be copied or reproduced using the agency's computer facilities; and a schedule of fees for the production of copies in each available form. Electronic databases compiled or created prior to the date by which the index must be created in accordance with this subsection may be indexed at the public agency's option. The form, content, language, and guidelines for the index and the databases to be indexed shall be developed by the Office of Archives and History in consultation with officials at other public agencies.

(c) Nothing in this section shall require a public agency to create a computer database that the public agency has not otherwise created or is not otherwise required to be created. Nothing in this section requires a public agency to disclose security features of its electronic data processing systems, information technology systems, telecommunications networks, or electronic security systems, including

hardware or software security, passwords, or security standards, procedures, processes, configurations, software, and codes.

(d) The following definitions apply in this section:

(1) Computer database.--A structured collection of data or documents residing in a database management program or spreadsheet software.

(2) Computer hardware.--Any tangible machine or device utilized for the electronic storage, manipulation, or retrieval of data.

(3) Computer program.--A series of instructions or statements that permit the storage, manipulation, and retrieval of data within an electronic data-processing system, together with any associated documentation. The term does not include the original data, or any analysis, compilation, or manipulated form of the original data produced by the use of the program or software.

(4) Computer software.--Any set or combination of computer programs. The term does not include the original data, or any analysis, compilation, or manipulated form of the original data produced by the use of the program or software.

(5) Electronic data-processing system.--Computer hardware, computer software, or computer programs or any combination thereof, regardless of kind or origin.

#### **§ 132-6.2. Provisions for copies of public records; fees**

(a) Persons requesting copies of public records may elect to obtain them in any and all media in which the public agency is capable of providing them. No request for copies of public records in a particular

medium shall be denied on the grounds that the custodian has made or prefers to make the public records available in another medium. The public agency may assess different fees for different media as prescribed by law.

(b) Persons requesting copies of public records may request that the copies be certified or uncertified. The fees for certifying copies of public records shall be as provided by law. Except as otherwise provided by law, no public agency shall charge a fee for an uncertified copy of a public record that exceeds the actual cost to the public agency of making the copy. For purposes of this subsection, “actual cost” is limited to direct, chargeable costs related to the reproduction of a public record as determined by generally accepted accounting principles and does not include costs that would have been incurred by the public agency if a request to reproduce a public record had not been made. Notwithstanding the provisions of this subsection, if the request is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved, or if producing the record in the medium requested results in a greater use of information technology resources than that established by the agency for reproduction of the volume of information requested, then the agency may charge, in addition to the actual cost of duplication, a special service charge, which shall be reasonable and shall be based on the actual cost incurred for such extensive use of information technology resources or the labor costs of the personnel providing the services, or for a greater use of information technology resources that is actually incurred by the agency or attributable to the agency. If anyone requesting public information from any public agency is charged a fee that the requester believes to be unfair or

unreasonable, the requester may ask the State Chief Information Officer or his designee to mediate the dispute.

(c) Persons requesting copies of computer databases may be required to make or submit such requests in writing. Custodians of public records shall respond to all such requests as promptly as possible. If the request is granted, the copies shall be provided as soon as reasonably possible. If the request is denied, the denial shall be accompanied by an explanation of the basis for the denial. If asked to do so, the person denying the request shall, as promptly as possible, reduce the explanation for the denial to writing.

(d) Nothing in this section shall be construed to require a public agency to respond to requests for copies of public records outside of its usual business hours.

(e) Nothing in this section shall be construed to require a public agency to respond to a request for a copy of a public record by creating or compiling a record that does not exist. If a public agency, as a service to the requester, voluntarily elects to create or compile a record, it may negotiate a reasonable charge for the service with the requester. Nothing in this section shall be construed to require a public agency to put into electronic medium a record that is not kept in electronic medium.

#### **§ 132-9. Access to records**

(a) Any person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court shall have jurisdiction to issue such orders. Actions brought pursuant to this section shall be set down for immediate

hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

(b) In an action to compel disclosure of public records which have been withheld pursuant to the provisions of G.S. 132-6 concerning public records relating to the proposed expansion or location of particular businesses and industrial projects, the burden shall be on the custodian withholding the records to show that disclosure would frustrate the purpose of attracting that particular business or industrial project.

(c) In any action brought pursuant to this section in which a party successfully compels the disclosure of public records, the court shall allow the prevailing party to recover its reasonable attorneys' fees if attributed to those public records, unless the court finds the agency acted with substantial justification in denying access to the public records or the court finds circumstances that would make the award of attorneys' fees unjust.

Any attorneys' fees assessed against a public agency under this section shall be charged against the operating expenses of the agency; provided, however, that the court may order that all or any portion of any attorneys' fees so assessed be paid personally by any public employee or public official found by the court to have knowingly or intentionally committed, caused, permitted, suborned, or participated in a violation of this Article. No order against any public employee or public official shall issue in any case where the public employee or public official seeks the advice of an attorney and such advice is followed.

(d) If the court determines that an action brought pursuant to this section was filed in bad faith or was frivolous, the court shall assess a reasonable attorney's fee against the

person or persons instituting the action and award it to the public agency as part of the costs.

#### **§ 132-10. Qualified exception for geographical information systems**

Geographical information systems databases and data files developed and operated by counties and cities are public records within the meaning of this Chapter. The county or city shall provide public access to such systems by public access terminals or other output devices. Upon request, the county or city shall furnish copies, in documentary or electronic form, to anyone requesting them at reasonable cost. As a condition of furnishing an electronic copy, whether on magnetic tape, magnetic disk, compact disk, or photo-optical device, a county or city may require that the person obtaining the copy agree in writing that the copy will not be resold or otherwise used for trade or commercial purposes. For purposes of this section, publication or broadcast by the news media, real estate trade associations, or Multiple Listing Services operated by real estate trade associations shall not constitute a resale or use of the data for trade or commercial purposes and use of information without resale by a licensed professional in the course of practicing the professional's profession shall not constitute use for a commercial purpose. For purposes of this section, resale at cost by a real estate trade association or Multiple Listing Services operated by a real estate trade association shall not constitute a resale or use of the data for trade or commercial purposes.

**Editors' note:** Sections of the Public Records Law that instruct public agencies on care and protection of public records are omitted. Those sections are 132-2 through 132-5.1 and 132-7 through 132-8.2.

# Access to the Judicial Process

With few exceptions, North Carolina's courts—from the District Court level to the Supreme Court—are open public forums for the resolution of disputes. Article 1, Section 18, of the N.C. Constitution puts it succinctly: “All courts shall be open.” Also, both the Supreme Court of the United States and the North Carolina Supreme Court have ruled that criminal and civil court proceedings are presumptively open to the press and public under the First Amendment to the U.S. Constitution.<sup>1</sup> Accordingly, criminal and civil trials and appeals in North Carolina's state courts are open to the public and the press. Criminal and civil trials in North Carolina's three federal judicial districts are also open to the public and the press, but unlike state courts, federal courts do not permit in-court camera coverage.

This chapter discusses the rare circumstances under which courtrooms can be closed, which judicial records are available for public review, how to respond to a motion to close a courtroom or seal a document, and the rules governing the use of cameras and recording devices in courtrooms. This chapter also covers the law concerning orders prohibiting

the news media from publishing information seen or heard inside a courtroom (prior restraints), after-the-fact punishments for court coverage and restraints on trial participants from talking with reporters (gag orders).

This chapter attempts to provide a succinct overview of the law governing news media access to the judicial process in North Carolina. If you have any questions involving specific factual scenarios, we encourage you to contact the NCAB Hotline (919-839-0108), the NCPA Hotline (919-833-3833) or your organization's legal counsel.

## Why are courts open?

Court proceedings and court records are presumptively open to the public—which includes the news media.<sup>2</sup> This is so for various historical and policy reasons. As Justice Louis Brandeis advised more than 75 years ago, “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”<sup>3</sup> Public access to court documents ensures judicial accountability and provides a mechanism for

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1 See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *United States v. Lindh*, 198 F. Supp. 2d 739 (E.D. Va. 2002); *United States v. Moussaoui*, 205 F.R.D. 183, 30 Media L. Rep. (BNA) 1251 (E.D. Va. 2002); *Virmani v. Presbyterian Health Servs., Corp.*, 350 N.C. 449, 515 S.E.2d 675, 693 (N.C. 1999).

2 *Richmond Newspapers*, 448 U.S. at 564-69. See also, Mark J. Prak, *Settlements and their Constitutional Implications*, THE CONSTITUTIONALIST, Vol. 8, No. 2 (N.C. Bar Assn. April 2003); *The Press and the Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper*, COMMITTEE ON COMMUNICATIONS AND MEDIA LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, at 1-26 (providing an excellent overview of the history and necessity of open courts in the United States).

3 L. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (quoting the same).



critiquing and improving the system.<sup>4</sup> Public proceedings promote the search for truth at trial by enabling individuals to come forward with relevant knowledge or evidence. Public scrutiny and publication of witness testimony also deters perjury.<sup>5</sup> Moreover, as former Chief Justice Warren Burger has noted, there is a “therapeutic” value to the community that flows from open proceedings:

Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and a desire to have justice done . . . . Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.<sup>6</sup>

Finally, many private disputes that give rise to civil litigation involve general issues of significant interest to the public at large, such as products liability, environmental torts, administrative regulations, and criminal proceedings and sentencing. The broad, systemic public interest in open government should, in all but the most unusual cases, outweigh a narrow business or personal privacy interest of a party to litigation.<sup>7</sup>

The First Amendment to the U.S. Constitution has been interpreted so as to make plain that this public right of access applies to judicial documents.<sup>8</sup> It is also well established that a core purpose of the First Amendment is to prohibit prior restraints upon the dissemination of information by the press.<sup>9</sup> The federal constitutional rule forbidding prior restraints on publication has, of course, long ago been made applicable to the states through the Fourteenth Amendment.<sup>10</sup> As noted, the North Carolina Constitution, as do the constitutions of most states, echoes the federal Constitution’s emphasis on public access to state court judicial proceedings by stating that “All courts shall be open.”<sup>11</sup>

The “openness” principle expressed in these constitutions has two historical antecedents: (1) the commitment made by King John at Runnymede to provide common law courts where all subjects might resolve their civil disputes<sup>12</sup> and (2) a profoundly American response, which is quite relevant here, to the English Court of Star Chamber where proceedings were conducted in secret and individuals emerged post-verdict with their noses slit and their ears sheared off.<sup>13</sup>

8 Nixon v. Warner Commc’ns, Inc., 435 U.S. 589 (1978).

9 See *Nebraska Press Ass’n*, 427 U.S. at 556; *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974); *New York Times Co. v. United States*, 403 U.S. 713, 715-17 (1971) (Black, J., concurring); *Near v. Minnesota*, 283 U.S. 697, 713-23 (1931).

10 See *Near*, 283 U.S. at 707.

11 See N.C. CONST. art. I, § 18.

12 See J.C. HOLT, *MAGNA CARTA* 63-104 (1965).

13 See ALLEN C. THOMAS, *A HISTORY OF ENGLAND* 191, 307-08 (1922) (noting that one poor gentleman who authored a book about the ills of England was condemned to be “flogged, and to have his nose slit, one ear cut off, and his face branded”). Mr. Thomas’s book also recounts the story of William Prynne, who published a long and severe attack upon the theater called “Histriomastix, or the Scourge of Stageplayers.” In it, Prynne was especially severe in his criticism of actresses. It happened that the Queen had just taken part in a play at the court, and he was brought before the Court of Star Chamber for attacking both the King, who supported the stage, and the Queen, as an actress. For this offense, the Court of Star Chamber expelled him from the bar, deprived him of his university degree, sentenced him to lose his ears in the pillory, ordered him to pay a heavy fine and imprisoned him at the King’s pleasure. See *Id.* at 308.

4 See *Union Oil Co. v. Leavell*, 220 F.3d 562, 567-68 (7th Cir. 2000); *Washington Post Co. v. Hughes*, 923 F.2d 324, 330 (4th Cir. 1991); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983).

5 See *Brown*, 710 F.2d at 1178.

6 *Press-Enterprise Co. v. Superior Court of Riverside County*, 464 U.S. 501, 508-09 (1984).

7 See *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (“[Policy considerations behind open access to courts] support a strong presumption rather than an absolute rule. When there is a compelling interest in secrecy . . . portions and in extreme cases the entirety of a trial record can be sealed.”).

To implement the constitutional openness principle, North Carolina's legislature has gone a step further and enacted a statutory proscription against court orders restricting public discussion of matters occurring in our courts. North Carolina law provides:

No court shall make or issue any rule or order banning, prohibiting, or restricting the publication or broadcast of any report concerning any of the following: any evidence, testimony, argument, ruling, verdict, decision, judgment, or other matter occurring in open court in any hearing, trial, or other proceeding, civil or criminal; and no court shall issue any rule or order sealing, prohibiting, restricting the publication or broadcast of the contents of any public record as defined by any statute of the State, which is required to be open to public inspection under any valid statute, regulation, or rule of common law. If any rule or order is made or issued by any court in violation of the provisions of this statute, it shall be null and void and of no effect, and no person shall be punished for contempt for the violation of any such void rule or order.<sup>14</sup>

The emphasis on openness enshrined in the federal and state constitutions and in North Carolina statutory law demonstrates the truth of the U.S. Supreme Court's observation in 1947 that "what transpires in the courtroom is public property."<sup>15</sup> The fact that our courts are open to all who care to observe what transpires there is a source of great strength to our judicial system and to the citizens it serves. For citizens to maintain confidence in their court system, it is essential that they be able to observe it in action.

Reporters, of course, play an important

role in this process by informing citizens of the workings of public institutions. In today's fast-paced society, reporters function as surrogates for the public.<sup>16</sup> News media organizations, whether print or electronic, explain the "who, what, when, where, how and why" to citizens who cannot attend trials and other court proceedings. The day is long past when most Americans could lay down their plows in the fields and take a day or two off to observe a local session of court.

### When can a courtroom be closed to the public?

In a series of cases decided during the 1980s, the U.S. Supreme Court concluded that the First Amendment provides the public and the press with a presumptive right to attend *criminal* trials.<sup>17</sup> To protect this presumptive right, the Court ruled that trials (including preliminary hearings, jury selection, opening statements, witness examination and closing arguments) may not be closed unless and until the trial judge enters an order containing specific written findings. Those findings must demonstrate:

- 1) that closure is absolutely necessary to protect a "compelling" governmental interest;
- 2) that no less restrictive measure short of closing the courtroom will suffice to protect that interest; and
- 3) that the closure is "narrowly tailored" so that its scope and duration are as limited as possible.<sup>18</sup>

Although the U.S. Supreme Court has

<sup>16</sup> See *Richmond Newspapers*, 448 U.S. at 572-73.

<sup>17</sup> See *Press-Enterprise Co. v. Superior Court of Riverside County*, 478 U.S. 1 (1986); *Press-Enterprise Co. v. Superior Court of Riverside County*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-07 (1982); *Richmond Newspapers*, 448 U.S. at 580-81.

<sup>18</sup> See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984).

<sup>14</sup> See N.C. GEN. STAT. § 7A-276.1 (2001).

<sup>15</sup> *Craig v. Harney*, 331 U.S. 367, 374 (1947); see also *Virmani*, 350 N.C. at 473, 515 S.E.2d at 691.

never addressed whether the public has a First Amendment right to attend *civil* trials, the Court has noted that civil trials historically have been presumptively open to the public.<sup>19</sup> Several lower federal courts, including the U.S. Court of Appeals for the Fourth Circuit (the federal circuit that includes North Carolina), have held that civil trials are presumptively open under the First Amendment.<sup>20</sup> Accordingly, most court-closure cases have not distinguished between criminal and civil cases.

The First Amendment right of access applies to all federal and state court proceedings in North Carolina. In addition to the federal constitutional right of access, a state constitutional right flowing from Article I, Section 18 of the N.C. Constitution also applies to proceedings in state courts.

North Carolina's constitutional decree that "All courts shall be open"<sup>21</sup> has been interpreted to address access to civil cases. In *Virmani v. Presbyterian Health Services Corp.*,<sup>22</sup> the N.C. Supreme Court held that this language guarantees the public a qualified constitutional right to attend civil court proceedings. Therefore, civil court proceedings in North Carolina may be closed only

if the trial judge makes specific findings of fact demonstrating that, after considering alternatives to closure, closure is necessary to protect a "compelling countervailing public interest."<sup>23</sup> Unless such an overriding interest exists, civil court proceedings must be open to the public. The *Virmani* court also went on to hold that members of the press did not satisfy Rule 24 of the North Carolina Rules of Civil Procedure, which stipulates when a third party may intervene in a case, and therefore could not intervene in the proceeding in order to assert a right of access to the closed proceedings. So, in the court's view, there were practical issues with the press' attempt to enforce the openness principle.

In direct response to *Virmani*, the General Assembly passed a law in 2001<sup>24</sup> that gives "any member of the public" a right to petition a court for access to a judicial proceeding.<sup>25</sup> One need not be a party to the litigation or move to intervene under Rule 24 to make such a motion.<sup>26</sup> The statute provides for an "immediate" interlocutory appeal (an appeal that occurs before the trial court's final ruling in the case).<sup>27</sup> The 2001 law, N.C. Gen. Stat. § 1-72.1, therefore ensures that the intervention standards under Rule 24 do not prevent members of the press and other third parties from asserting the constitutional right to access court proceedings.

Thus, in state court cases, reporters possess three independent bases for arguing against closure of a courtroom—a presumptive right under both the First Amendment and the state constitution, and a statutory right under N.C. Gen. Stat. § 1-72.1.

19 See *Richmond Newspapers*, 448 U.S. at 580 n.17.

20 See, e.g., *Jessup*, 227 F.3d at 997 (holding that intervention pursuant to Rule 24 is the logical and appropriate vehicle by which the public and press may challenge a court's closure order sealing records of a case because the method not only guarantees the public's right to be heard, but also ensures that the issue of closure will be examined in a procedural context that affords the court an opportunity for due deliberation); *EEOC v. Nat'l Children's Center, Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3rd Cir. 1994); *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896 (7th Cir. 1994); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990); *Stone v. Univ. of Md. Media Sys. Corp.*, 855 F.2d 178, 180-81 (4th Cir. 1988); *Publiker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1070-71 (3rd Cir. 1984); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308-16 (7th Cir. 1984).

21 N.C. CONST. art. I, § 18.

22 350 N.C. 449, 515 S.E.2d 675, 693 (N.C. 1999).

23 *Id.*

24 N.C. GEN. STAT. § 1-72.1 (2006).

25 *Goldsmith v. Henderson County Bd. of Pub. Educ.*, 32 Media L. Rep. (BNA) 1353, 1356 (N.C. Super. Ct., Henderson County, July 30, 2003).

26 N.C. GEN. STAT. § 1-72.1(a).

27 N.C. GEN. STAT. § 1-72.1(e).

Both federal and state courts in North Carolina have recognized that constitutional principles mandate open court proceedings. For example, in the 1994 trial of Larry Demery for the murder of James Jordan, the father of basketball star Michael Jordan, Judge Gregory Weeks denied the defendant's motion to close the courtroom. Judge Weeks found that the "unambiguous provisions of the state constitution establish an absolute right on the part of the press and public to attend this criminal trial; accordingly, the closure motion must be denied."<sup>28</sup> Similarly, in 1995 Laura Hart McKinney, a Winston-Salem screenwriter, moved to close the courtroom during her testimony in a N.C. hearing related to the criminal prosecution of O.J. Simpson. Despite the commercial value to McKinney of the information that necessarily would be disclosed, most notably her tape-recorded interviews with Los Angeles police officer Mark Fuhrman, Judge William Wood recognized the N.C. constitutional provision relating to open courtrooms and denied the motion to close the courtroom.<sup>29</sup> In *Corrigan v. White*, after an initial misstep, Judge Abe Jones denied a motion to close a courtroom during a hearing in a civil case.<sup>30</sup> The case involved a lawsuit filed by several young women who alleged that they had been the victims of sexual assault at a Raleigh shopping mall. The judge said he found no "compelling, countervailing interests sufficient to justify closure of the courtroom."<sup>31</sup> In *Goldsmith v. Henderson County Board of Public Education*, a newspaper used N.C. Gen. Stat. § 1-72.1 in successfully challenging a protective order that restricted the parties' ability to communicate with the press, the parties' efforts to seal a settlement agreement and close the court proceeding in which the court would

consider whether to approve the settlement, and the plaintiffs' desire to proceed using pseudonyms.<sup>32</sup> Efforts to convert the public courts into private dispute resolution mechanisms are virtually always wrong. (That doesn't keep lawyers from trying, however.)

The following are the major exceptions to the general rule mandating open court proceedings:

**Commitment hearings.** The N.C. Court of Appeals has held that there is no right of access to involuntary civil commitment proceedings.<sup>33</sup> However, commitment hearings for people found not guilty by reason of insanity in criminal cases are public and must be held in the court where the original trial took place.<sup>34</sup>

**Conferences.** Bench conferences between the judges and lawyers, conferences between lawyers and their clients and the like are, for practical reasons, generally not intended for the public. However, courts should grant a "prompt post-trial release of transcripts" of bench conferences.<sup>35</sup> As noted, in light of N.C. Gen. Stat. §7A-276.1, whatever one does hear in the courtroom can always be reported.

**Grand jury proceedings.** Grand jury proceedings are conducted in private pursuant to federal and state law.<sup>36</sup> This is appropriate because the purpose of a grand jury is to determine whether there is sufficient evidence to charge an individual with having committed a crime and to begin a criminal case. Note

28 See *State v. Demery*, 22 Media L. Rep. (BNA) 2383, 2384 (1994).

29 See *In the Matter of the Subpoena of Laura Hart McKinney*, Forsyth County Superior Court, Case No. 95M18, N.C. Court of Appeals, Case No. P95-318.

30 29 Media L. Rep. (BNA) 1636 (2001).

31 *Id.* at 1638.

32 *Goldsmith v. Henderson County Bd. of Pub. Educ.*, 32 Media L. Rep. (BNA) 1353, 1356 (N.C. Super. Ct., Henderson County, July 30, 2003).

33 See *In re Belk*, 420 S.E.2d 682 (N.C. Ct. App. 1992).

34 See N.C. GEN. STAT. § 122C-268.1(g).

35 *In re Associated Press*, 172 Fed. Appx. 1 (4th Cir. 2006) (unpublished) (ordering press access to admitted documentary evidence, but denying press immediate access to transcripts of bench conferences) (citing *United States v. Edwards*, 823 F.2d 111, 119 (5th Cir. 1987)).

36 See *Press-Enterprise Co. v. Superior Court of Riverside County*, 478 U.S. 1, 8-9 (1986); N.C. GEN. STAT. § 15A-23(e).



that while it is a crime for a grand juror, prosecutor or other official to release information that is presented before the grand jury, it is not a crime for the news media to publish such information.<sup>37</sup>

**Juvenile proceedings.** Historically, juvenile proceedings were closed to the public and the news media as a matter of public policy.<sup>38</sup> The theory behind this policy was that the undisciplined child should be treated, insofar as possible, in a fashion that promoted his or her ability to reform and become a productive, law-abiding citizen. However, reforms to the N.C. juvenile code made juvenile proceedings in N.C. courts presumptively open to the public. The court must find “good cause” to close a proceeding.<sup>39</sup> No proceeding can be closed if the juvenile requests that it be open.<sup>40</sup> The presumption is now plainly that juvenile proceedings are to be open. In *In the Matter of KTL*,<sup>41</sup> the North Carolina Court of Appeals upheld the decision of the Superior Court to maintain an open courtroom in a juvenile case involving a heinous crime, notwithstanding the joint motion of the state and the juvenile to close the proceeding.

When truly heinous crimes of violence are committed by juveniles, the news media may well have an obligation to the community to report not only the nature of the crime but also the name of the juvenile accused of committing it. Such an action would obviously be contrary to the general goal of allowing juveniles to reform their conduct in relative anonymity so they can mature and develop unshackled by youthful mistakes and indiscretions. The law is clear, however:

Under the First Amendment, if a reporter lawfully obtains the name, photo or video of a juvenile charged with commission of a crime, the reporter may publish such information without sanction by the state.<sup>42</sup>

In *Smith v. Daily Mail Publishing Co.*,<sup>43</sup> the U.S. Supreme Court held unconstitutional a West Virginia law making it a crime to publish the name of a youth charged as a juvenile offender without obtaining the written approval of the juvenile court. The case involved a 14-year-old charged with murder. Two newspapers that had learned the juvenile’s identity through the use of routine reporting techniques—the monitoring of the police band radio frequency and interviews with police, witnesses and an assistant prosecutor at the scene of the killing—were indicted by a grand jury for publishing the juvenile’s name. The Supreme Court held that the indictment could not stand because the asserted state interest in protecting the anonymity of juvenile offenders to further their rehabilitation was insufficient to outweigh the constitutional prohibition against prior restraints on speech.<sup>44</sup>

In 1995, a North Carolina District Court judge elected to willfully ignore the *Smith v. Daily Mail* precedent and entered an order forbidding a local radio station and newspaper from reporting the name of a 16-year-old who had committed a heinous murder. The N.C. Supreme Court, acting without briefing or oral argument, expeditiously vacated this

37 It may result in a subpoena, however. See *State v. Hagaman*, 9 Media L. Rep. (BNA) 2525 (N.C. Super. Ct., Caldwell County, 1983).

38 See C. THOMAS DIENES, ET AL., *NEWSGATHERING AND THE LAW* § 3-3(a) (1997).

39 See N.C. GEN. STAT. § 7B-2402.

40 *Id.*

41 \_\_\_ N.C.App. \_\_\_ (May 2, 2006).

42 See *Florida Star v. BJE*, 491 U.S. 524, 542 (1989); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 105-06 (1979); *Oklahoma Publ’g Co. v. District Court*, 430 U.S. 308, 311-12 (1977); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975). See also, *In re Minor Charged*, 341 N.C. 417, 24 Media L. Rep. (BNA) 1064 (1995) (vacating a protective order forbidding publication of juvenile murder suspect’s name).

43 443 U.S. 97 (1979).

44 The Court had previously applied this principle in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), holding that a state could not impose civil sanctions on the news media for the accurate publication of the name of a rape victim obtained from public records. See also *Florida Star v. BJE*, 491 U.S. 524 (1989) (reversing civil damage award for publication of truthful information lawfully obtained).



misguided action by the District Court.<sup>45</sup>

**Potential for violence.** State law provides that a judge may limit access to the courtroom when necessary to ensure the safety of all present and to ensure an orderly trial.<sup>46</sup> This law was adopted in 1977 as a result of several acts of violence that occurred in courtrooms in the early 1970s. It is rarely used, and, if it were invoked, it probably would not call for exclusion of all persons. Also, in light of U.S. Supreme Court decisions, the closure order would have to be narrowly drawn.

**Proceedings involving medical peer review records.** In *Virmani v. Presbyterian Health Services Corp.*,<sup>47</sup> the North Carolina Supreme Court held that the public does not have a right to access court hearings that concern confidential information relating to medical peer review records.<sup>48</sup> The court reasoned that the presumptive right of access was outweighed by the “compelling public interest in protecting the confidentiality of the medical peer review process in order to foster effective, frank and uninhibited exchange among medical peer review committee members.”<sup>49</sup>

**Sex crime cases.** State law provides that in cases involving charges of rape, attempted rape, sex offense or attempted sex offense, the trial court may, during the testimony of the victim, “exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case.”<sup>50</sup> Again, however, the media are free to publish what they lawfully learn.

In *State v. Burney*,<sup>51</sup> the N.C. Supreme Court affirmed a closure order over the objection of a criminal defendant who claimed that such an order deprived him of his constitutional right to a public trial. In that case, the trial court cleared the courtroom during the testimony of a 7-year-old victim. Significantly, no member of the public or news media objected to being excluded or attempted to intervene for the purpose of arguing against the decision to close the courtroom. The N.C. Supreme Court said in its opinion, “Defendant cannot demand a new trial upon the assertion of an alleged violation of the constitutional rights of [the news media] under these particular facts.”<sup>52</sup>

In *State v. Kelly*, the notorious child sex abuse case known as “the Little Rascals case,”<sup>53</sup> a state Superior Court judge ruled that the state could not close the courtroom during the testimony of approximately 20 alleged victims. Superior Court Judge Marsh D. McLelland denied a prosecutor’s motion to close the courtroom to “all unnecessary persons” during the testimony of the victims. The state argued that testifying in open court would traumatize the children. However, the judge ruled that the state constitution provides an absolute right of access to criminal trials and that the state “made no offer of proof in support of the ‘overriding interest’ asserted in this case.”<sup>54</sup>

**Terrorism Trials or “Interrogations.”** Since Sept. 11, 2001, the United States has taken a more aggressive stance toward prosecution of suspected terrorists and enemy combatants. Courts have been hostile to press presence at proceedings involving suspected terrorists. In *Hamdi v. Rumsfeld*, for instance, American Yaser Esam Hamdi was arrested in

45 *In re Minor Charged*, 341 N.C. 417, 24 Media L. Rep. (BNA) 1064 (1995).

46 See N.C. GEN. STAT. § 15A-1034.

47 515 S.E.2d 675 (1999).

48 *Id.* at 693.

49 *Id.* at 694.

50 See N.C. GEN. STAT. § 15-166.

51 276 S.E.2d 693 (N.C. 1981).

52 *Id.* at 698.

53 19 Media L. Rep. (BNA) 1283 (N.C. Super. Ct. 1991).

54 *Id.* at 1285.

Afghanistan, believed to be a fighter with the Taliban.<sup>55</sup> The government labeled him an “enemy combatant” and planned on “holding him in the United States indefinitely—without formal charges or proceedings—unless and until [the U.S.] makes the determination that access to counsel or further process is warranted.”<sup>56</sup> He was denied access to counsel and instead of a criminal or military trial received only an “interrogation” by a U.S. Army official.<sup>57</sup> Needless to say, the interrogation and the relevant paperwork were not open to the press. Reversing the 4th Circuit, the U.S. Supreme Court ordered the Army to provide Hamdi access to an attorney and “adequate fact-finding before a neutral decision-maker,” but did not require the proceedings to be open to the public.<sup>58</sup>

The Fourth Circuit reviewed another landmark terrorism trial in *United States v. Moussaoui*.<sup>59</sup> Zacharias Moussaoui is alleged to have been a planner of the September 11 terrorist attacks.<sup>60</sup> When a federal district court judge ordered the government to provide Moussaoui’s defense team with access to a captured al Qaeda leader to enable Moussaoui to collect information important to his defense, the government appealed. The Fourth Circuit sealed oral arguments and documents related to the appeal anticipating inevitable discussion of classified material. Moussaoui appealed that decision—and media companies intervened—in an attempt to open the government’s appeal to public scrutiny.<sup>61</sup> The Fourth Circuit refused to order any access to classified material, but, citing *Richmond Newspapers*, provided the public with access to a partial transcript of oral argument and access to “unclassified materials in the classified and unclassified” files after the

government redacts classified material.<sup>62</sup>

Law enforcement has asserted wide latitude to arrest terrorism suspects without divulging their names or crimes with which they have been charged. Following Sept. 11, 2001, the Department of Justice rounded up about a thousand terrorism suspects in the midst of a “worldwide investigation.”<sup>63</sup> They were held for immigration violations or crimes or for being a material witness to the September 11 attacks.<sup>64</sup> In *Center for National Security Studies v. U.S. Department of Justice*, the federal Court of Appeals for the D.C. Circuit found that the Freedom of Information Act did not require the government to reveal the detainees’ attorneys’ names, detainees’ names or the charges against them where “production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.”<sup>65</sup>

Given the importance of preventing terrorism and fear of another attack, the press will likely have highly limited—if any—access to trials of terrorism suspects or related court documents. Congress regularly considers new legislation affecting trials of terrorists and enemy combatants.<sup>66</sup> The exact contours of the law in this area are still evolving. At this writing, it is fair to say that terrorism-related trials appear to be governed by rules and principles that differ markedly from other proceedings.

**Trade secrets.** A court generally can order the courtroom closed while trade secrets are discussed.<sup>67</sup> Closure may be justified when

55 *Hamdi v. Rumsfeld*, 542 U.S. 510, 537 (2004).

56 *Id.* at 510-11 (alteration added).

57 *Id.* at 538.

58 *Id.*

59 65 Fed. Appx. 881 (4th Cir. 2003) (unpublished).

60 *Id.* at 884.

61 *Id.* at 885.

62 *Id.* at 889.

63 *Center for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 921 (D.C. Cir. 2003).

64 *Id.*

65 *Id.* at 932, 933 (citing 5 U.S.C. § 552(b)(7)(A)).

66 R. Jeffrey Smith, *Senate OKs Terrorist Tribunals*, NEWS AND OBSERVER, September 29, 2006, at 4A.

67 See N.C. GEN. STAT. § 66-156; DIENES, *supra* note 40, § 3-2(c).

there is no reasonable alternative to closure and substantial damage to property rights in trade secrets would occur without closure.<sup>68</sup>

**Victim's compensation.** Hearings to determine whether a crime victim can be compensated for his or her injuries take place before administrative law judges. The state statute governing such hearings provides that the administrative law judge may exclude from a hearing all persons not directly involved in the hearing during the taking of medical and law enforcement information as evidence.<sup>69</sup>

### What court documents are public?

With few exceptions, the state and federal constitutional commitments to open courts mean that any person, including reporters, can review and copy court records as well as observe court proceedings. Except when a case is being tried, you will find most records in the clerk of court's office. Venturing into the clerk's office for the first time can be a daunting experience. Each clerk of court has his or her own system of keeping files and indexes in order. But once you learn the system, you generally can find what you need. The clerk's staff can be your best ally. Introduce yourself and ask for a tour. In North Carolina, courts are slowly moving toward digital storage and availability of court records on-line. The federal court system is substantially ahead of the state courts.

State law prohibits state courts from sealing or restricting access to the contents of any judicial record that is required under other state laws to be open to public inspection.<sup>70</sup> If

such orders are issued, a person violating them cannot be held in contempt of court.<sup>71</sup> There are, however, some exceptions to the general rule that court records are public records.

The following is a list of various types of court records that generally are available for inspection by the public and the media, followed by a list of judicial records that are not public.

**Appellate court materials.** The opinions issued by the N.C. Supreme Court and the Court of Appeals are public records and are available for inspection and copying in the respective clerks' offices in Raleigh. The opinions are also available on the North Carolina court web site at <http://www.aoc.state.nc.us/>. The Supreme Court generally hands down its opinions once a month and provides a summary of each case. The summary helps reporters understand which cases are of greatest public interest, but it is prepared by the court on the condition that reporters not quote or cite from it. The official opinions usually are made public at 9 a.m.

The Court of Appeals typically hands down its decisions on the first and third Tuesdays of each month. The opinions are filed with the clerk the Thursday before and usually are available for review by 9 a.m. Tuesday.

In each case these courts hear, the Supreme Court and the Court of Appeals receive briefs containing the legal arguments and a record containing the evidence and other matters from the lower court. These documents, which are public, can help a reporter learn details about a case that do not show up in the opinion, such as the age of a victim or the type of car driven in a get-away. They also set forth the legal positions

<sup>68</sup> See DIENES, *supra* note 40.

<sup>69</sup> See N.C. GEN. STAT. § 15B-12(h).

<sup>70</sup> *Id.* § 7A-276.1; Carter-Hubbard Publ'g Co. v. WRMC Hosp. Operating Corp., 633 S.E.2d 682 (N.C. App. 2006) (finding a "contract with a public hospital to purchase a medical practice" to be a public record not within the statutory exception because the contract terms were not "financial nor financially related" and "would not be

considered competitive health care information . . .") (citing N.C. GEN. STAT. § 131E-97.3).

<sup>71</sup> *Id.*

of the parties. State law specifically states that records maintained by clerks of court are open to inspection.<sup>72</sup> In more recent cases the appellate briefs, along with certain other aspects of the appellate docket, are available in .pdf form at the following web site address: <http://www.ncappellatecourts.org/>.

**Casefolders and documents.** With the case number (see the section on computerized indexes below), you can pull the case folder that contains the actual court documents such as the complaint and answer. These are public records unless sealed by court order. The procedures for challenging sealing orders are described below.

**Civil discovery.** In civil cases, the discovery process by which litigants acquire evidence and facts relevant to the issues is largely conducted in private unless disputes regarding the discovery process require the court to get involved. The law regarding the rights of the public and press to have access to civil discovery, whether by attending oral depositions or by obtaining copies of written discovery responses or of documents produced by parties, has yet to be fully fleshed out. Generally, however, discovery materials that have been filed with the court are more accessible to the news media than unfiled materials.

For example, the U.S. Court of Appeals for the Fourth Circuit, which includes North Carolina, has held that the First Amendment guarantees a right of access to filed discovery materials.<sup>73</sup> The court said the press and public have a First Amendment right of access to documents submitted to the court as attach-

ments to a motion in a libel case. The court also held that once documents are made part of such a motion they “lose their status of being ‘raw fruits of discovery.’”<sup>74</sup> However, if documents filed with the court “do not play any role in the adjudicative process,” access to such documents may be limited.<sup>75</sup>

The right of access to unfiled civil discovery materials is far more limited. The news media are often denied the right to challenge protective orders issued by the court to keep such materials confidential.<sup>76</sup> And even when the courts agree to hear the news media’s arguments, many courts refuse media requests for access to civil discovery materials because “1) discovery is a private process traditionally closed to the public; 2) the court has no power to compel a party to produce unfiled discovery materials because they are concerned with private matters; and 3) First Amendment interests in discovery are limited and can be overcome when there is ‘good cause,’ such as ensuring a fair trial or protecting one’s privacy.”<sup>77</sup> Similarly, discovery subject to a valid protective order may remain out of the reach of the press.<sup>78</sup>

Communications between client and attorney are almost always protected by the attorney-client privilege from being subject to discovery.<sup>79</sup> Attorneys’ notes and preparation are usually protected from discovery by the work-product privilege. The work-product privilege is not absolute, especially for government attorneys.<sup>80</sup> In response to a

72 *Id.* § 7A-109(a).

73 *Va. Dep’t of State Police v. Washington Post*, 386 F.3d 567, 578 (4th Cir. 2004) (requiring the state police to provide a pardoned convicted criminal defendant with sealed discovery because “the more rigorous First Amendment standard should . . . apply to documents filed in connection with a summary judgment motion in a civil case.”); *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988).

74 *Rushford*, 846 F.2d at 252.

75 *See Pugh v. AVIS Rent A Car Sys., Inc.*, 796-CV-91-F(2) (E.D.N.C. March 21, 1997) (citing *In re Policy Management*, 1995 WL 541623 at \*\*4 (4th Cir. 1995) (unpublished decision)).

76 *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31-35 (1984).

77 *See Hosoon Chang, Access to Civil Discovery Materials*, 25-26 (August 1991) (Unpublished paper presented to the Association for Education in Journalism and Mass Communication).

78 *See Pugh*, 1995 WL 541 623.

79 *But see In re Miller*, 595 S.E.2d 120, 124 (N.C. 2004).

80 *MCI Constr., L.L.C. v. Hazen & Sawyer, P.C.*, 213 F.R.D. 268, 272 (M.D.N.C. 2003) (finding communication with a government entity protected by the attorney-client privilege to become public record



decision of the North Carolina Court of Appeals holding that government attorneys may not assert a work-product privilege exception to the Public Records Law, the General Assembly in 2005 enacted N.C. Gen. Stat. § 132-1.9.<sup>81</sup> That statute provides that “trial-preparation materials” that would otherwise be subject to disclosure as public records may be withheld while a legal proceeding is pending or until all applicable limitations periods expire, if no legal proceeding is pending at the time of the request.<sup>82</sup>

**Computerized indexes.** Over the past several years, computers have replaced all of the paper indexes that list cases by the names of the parties. Criminal and civil actions usually are listed in separate databases. Both have records of parties’ names in actions filed since the computers were installed. For earlier cases, you must resort to the books that list the names of parties in alphabetical order. The computers also list judgments by the defendants’ names. Again, the computer will have only those judgments that have been filed since the computers were installed. You must go to the old books of indexes for earlier information. The computers and indexes only provide a reference point—the case number. You can use that number to locate the case file. Cases that are not generally indexed on the computers include estates, foreclosures, name changes and commitment proceedings.

**Criminal histories.** An individual’s record of criminal charges in a given county can be derived from clerk’s office records. A criminal record check through the clerk’s office only shows those instances where a person has been charged within the county in which you are searching. The files will detail

whether the case has come to trial, whether a defendant was found guilty or acquitted or whether the case was dismissed. A central computer system, called the Police Information Network (PIN), compiles statewide criminal statistics, but access to the network is limited to law enforcement officers and others whose duties relate to the administration of justice.<sup>83</sup> There are a number of private web sites, such as publicrecordfinder.com, that offer criminal history checks in multiple counties for a fee.

**Evidence admitted at trial.** Generally, evidence admitted at trial is released into the public domain. Thus, private documents lose their non-public status when introduced in evidence.<sup>84</sup> However, according to the N.C. Court of Appeals in *Times-News Publishing Co. v. North Carolina*,<sup>85</sup> such evidence can revert to its nonpublic status—for instance, if evidence is transmitted to the district attorney’s office for purpose of reinvestigation and retrial.<sup>86</sup>

**Government settlements.** Whenever a state or local government agency settles a lawsuit, the documents revealing the terms of the agreement and all documents that were made or used in the settlement are public records.<sup>87</sup> The documents considered part

83 See N.C. GEN. STAT. §§ 114-10 & 114-10.1

84 See *News & Observer Publ’g Co. v. Poole*, 412 S.E.2d 7, 12 (N.C. 1992); *Stallings v. Daniels*, No. COA02-1154, 2003 N.C. App. LEXIS 1547 (N.C. Ct. App. August 5, 2003) (unpublished) (requiring private litigant to provide back-up tape recording of relevant, previous litigation).

85 476 S.E.2d 450 (N.C. Ct. App. 1996).

86 *Id.* at 453; see also *In re McClatchy Newspapers, Inc.*, 30 Media L. Rep. (BNA) 1058 (9th Cir. 2001) (allowing newspaper’s request to have letters, offered by criminal defendant to district court in connection with his motion to reduce his sentence, unsealed and made publicly available without redaction); *Nichols v. Jackson*, 20 Media L. Rep. (BNA) 1202 (Okla. 2002) (refusing to allow sealing of record of money budgeted for and paid to defense counsel in defending an Oklahoma City bomber conspirator where the conspirator failed to demonstrate sufficient grounds for closure in light of heavy presumption of openness).

87 *Id.* § 132-1.3; see also *Wilson v. North Carolina*, 5:94-CV-878-BR-3 (E.D.N.C. 1994); *Goldsmith v. Henderson County Bd. of Pub. Educ.*, No. 02 CVS 785, 32 Media L. Rep. (BNA) 1353, 1356 (N.C. Super. Ct. July 30, 2003); *Carter v. Woodard*, 98 CVS 1120 (N.C. Sup. Ct. Jan. 1999) (ordering that a settlement with a school board

three years after the communication even if the communication relates to on-going litigation) (citing N.C. GEN. STAT. § 132-1.1(a)).

81 See *McCormick v. Hanson Aggregates Southeast, Inc.*, 164 N.C. App. 459, 596 S.E.2d 431 (2004) (holding that no “work product” exception to Public Records Law exists).

82 N.C. GEN. STAT. § 132-1.9.



of the settlement record include correspondence, settlement agreements with attachments and appendices, consent orders, checks and bank drafts.<sup>88</sup>

**Grand jury indictments and presentments.** An indictment charging an individual with a crime is a public record. Likewise, a presentment—the document in which the grand jury directs the prosecutor to pursue possible charges—is a matter of public record.<sup>89</sup> Evidence considered by a grand jury is not considered public record.<sup>90</sup>

**Search warrants.** After law enforcement officers have executed a search warrant, they are required to make a report to the court on the results of the search. The clerk's office keeps those reports on file. You can review the probable cause statement in which the officer sets forth reasons he or she believes a person is involved in criminal activity. The warrant also tells what has been searched, why the place needed to be searched and what has been seized.<sup>91</sup> A law enforcement agency may petition a court to seal a search warrant.<sup>92</sup> Bases for redacting a search warrant in federal courts in the Fourth Circuit include protecting the identity of government informers<sup>93</sup> and “protecting the ability of the government to continue with confidential investigations.”<sup>94</sup> The “privacy and reputation rights” of individuals named in a search warrant are not sufficient grounds to redact the names of employees suspected of committing

crimes at their workplace.<sup>95</sup>

**Videotaped trial exhibits.** Federal courts in North Carolina generally have allowed news organizations to review and copy video and audio tapes that are introduced into evidence. However, the issue has not been litigated in either the state or federal courts in North Carolina, so there are no court opinions on the status of a reporter's constitutional and common law right of access to such materials.

Courts in other jurisdictions vary widely on whether reporters are allowed to inspect and copy audio and video evidence presented in a trial. When courts grant access, they generally do so on the grounds that the presumptive First Amendment right of access does not depend on the form of the judicial record and that the right to copy is part of the right to inspect records.<sup>96</sup> Some courts, however, assume that news media access to taped evidence is more likely to infringe on a defendant's constitutional right to an impartial jury than is access to printed documents.<sup>97</sup>

## What court documents are not public?

Although the court records described below are not public records, the news media usually cannot be held liable for disseminating information contained in these records. Generally, court employees and others who have official access to judicial records are the ones who break the law when they release them. Should you come into possession of the kinds of records described below, you

be disclosed); Mark J. Prak, *Settlements and Their Constitutional Implications*, THE CONSTITUTIONALIST (N.C. Bar Assoc., Raleigh N.C.) April 2003, at 1.

88 N.C. GEN. STAT. § 132-1.3.

89 *Id.* § 15A-628(c).

90 *Id.* § 15A-623.

91 *Id.* §§ 15-11 & 15A-257.

92 *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 16 Media L. Rep. (BNA) 2295 (4th Cir. 1989).

93 *Id.* at 64.

94 *In re Search of Premises of L.S. Starrett Co.*, 31 Media L. Rep. (BNA) 1712, 1715 (M.D.N.C. Oct. 15, 2002) (sealing specific information in the affidavit that comes solely from a related *qui tam* action) (citing *Baltimore Sun*, 886 F.2d at 64).

95 *Id.* (refusing to redact suspects' names where “all statements are sufficiently relevant to the probable cause finding and are not based on grossly abusive, inflammatory, conclusory, or unsubstantiated evidence . . .”).

96 *See, e.g., United States v. Criden*, 648 F.2d 814, 823 (3rd Cir. 1981).

97 *Id.* at 826-28.

should discuss the matter with your employer's attorney.

**Adoption records.** Only a final order of adoption or a final order dismissing an adoption proceeding is public record. The remaining information, such as names of natural parents, is confidential.<sup>98</sup>

**Civil discovery.** See the discussion earlier in this chapter in the section regarding records that are open to the news media and the public.

**Commitment records.** Generally the public and the news media are not entitled to review court information about individuals who are committed to institutions for the mentally ill. However, when an individual is found "not guilty by reason of insanity" and is later sent to an institution, copies of the documents introduced in evidence at the automatic commitment hearing are available for public inspection.<sup>99</sup>

**Criminal Investigations.** Reporters generally do not have access to notes and records from criminal investigations, especially while they are being conducted.<sup>100</sup>

**Juvenile records.** These records are withheld from public inspection by the clerk of court. A reporter can gain access to them if an appropriate member of the youth's family, i.e., a custodial parent, gives permission.<sup>101</sup>

**Medical reports.** When a prosecutor, defendant or judge raises a question about a defendant's capacity to proceed at a trial and a report is subsequently made about his or her health, the report is confidential and not a public record unless it is admitted into evidence.<sup>102</sup>

**Presentence reports.** When a presentence report is prepared for a defendant convicted in state court, the report, as well as an oral presentation of the report, are not public.<sup>103</sup> In federal courts, however, prosecutors often file the presentence reports in the court record, and then the public has access to them.

**Probation reports.** All information obtained by a probation officer is confidential and cannot be disclosed unless a judge or the secretary of correction orders disclosure.<sup>104</sup>

**Settlements (non-government).** *Certain settlements between private parties must be approved by courts.* When a settlement is approved, filed and entered into the court record, it becomes a judicial document that is open to public scrutiny and publication under the First Amendment, federal common law and most state constitutions and public records laws.<sup>105</sup>

Simply because a client's reputation, feelings or finances may suffer does not mean that the court may seal its documents, including settlement agreements.<sup>106</sup> The Eleventh Circuit has held: "There is no question that courts should encourage settlements. How-

98 See N.C. GEN. STAT. § 48-9-102.

99 N.C. GEN. STAT. § 122C-268.1(f) and (g).

100 *McCormick v. Hanson Aggregates Southeast, Inc.*, 596 S.E.2d 431, 440 (N.C. App. 2004) (finding that a government attorney's work product is exempt from the public records law if an *in camera* review shows that it falls within the "criminal investigation exception"); *Gannett Pac. Corp. v. N.C. State Bureau of Investigation*, 595 S.E.2d 162, 165 (N.C. App. 2004) (finding motion to dismiss premature because the "burden is on the SBI to comply with Plaintiffs' request by reviewing its records and releasing all information . . ."). The SBI's criminal investigation records related to a fire are not public records because "the Public Records Act contains no exception for disclosure of records where an investigation is complete."

101 See N.C. GEN. STAT. § 7B-3000.

102 See *id.* § 15A-1002(d).

103 See *id.* § 15A-1333.

104 See *id.* § 15-207.

105 See *Goldsmith v. Henderson County Bd. of Pub. Educ.*, 32 Media L. Rep. (BNA) 1353, 1356 (N.C. Sup. Ct. July 30, 2003) (refusing to seal settlement agreement involving public agency or to close proceeding in which court considered whether to approve settlement agreement); see also *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983); N.C. CONST. art. I, § 18; N.C. GEN. STAT. § 7A-276.1; N.C. GEN. STAT. 132-1.3 (settlements involving public agencies are public records).

106 See *Shenandoah Publ'g*, 368 S.E.2d at 259.

ever, the payment of money to an injured party is simply not 'a compelling government interest' legally recognizable or even entitled to consideration in deciding whether or not to seal a record."<sup>107</sup> Furthermore, that the parties agree to keep a document confidential is not sufficient to protect it from public disclosure. If the document is in the judicial record, the court must use the test set forth in *In re Knight Publishing* before it can withhold the document from the public and the media. That is, prior to entering an order sealing the document, the court must (1) give the public notice of any request to seal the document and a reasonable opportunity to challenge it; (2) consider less restrictive alternatives to sealing; and (3) if a decision is made to seal the document, articulate its reasons supported by specific factual findings and the reasons for rejecting alternatives to sealing.<sup>108</sup> Private confidentiality agreements between the parties are not determinative.<sup>109</sup> Moreover, if the court does not follow the *Knight* standards to seal documents, the documents may not be sealed after all. Thus, clients who assume that their settlements and confidential reports are protected may later find them to be headline news, with any member of the public entitled to have access to them under the First Amendment.

Increasingly, lawyers who settle cases and make the settlement part of the court record want to seal the record so the public cannot have access to the substance of the settlement. This trend is opposed by the North Carolina Academy of Trial Lawyers and by news organizations because the sealing of court documents allows the public courts to be turned

into private dispute resolution forums. The effect is to keep from the public information that could help citizens, such as settlements for injuries stemming from the use of defective products or dangerous people.<sup>110</sup>

It is even harder for the news media to gain access to settlements that do not become part of a court record. Because trials are the exception rather than the rule, many important facts and issues involved in legal proceedings are never aired in open court. When cases are settled, the parties frequently agree to maintain the terms of the settlement and other information developed during discovery as confidential. Such confidentiality agreements may provide significant negotiating leverage to a party to a lawsuit. For example, a person who is injured as the result of a defective product and who has discovered particularly damaging documents in the manufacturer's file may obtain a greater monetary settlement by agreeing to keep the settlement amount secret and to return the documents to the manufacturer. This is particularly true if other injured persons might have similar claims against a defendant. There is a strategic value to the defendant in keeping publicity about problems with its products out of the public's view. For the most part, these private agreements become matters of contract between the parties. Court approval generally is not required for the parties to a lawsuit to voluntarily resolve their claims and dismiss their case. Thus, in many cases, even those without a confidentiality agreement, the public is simply unaware

107 *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1572 n.4 (11th Cir. 1985); *see also* *United States ex rel. Callahan v. U.S. Oncology, Inc.*, 2005 U.S. Dist. LEXIS 31848 (D. Va. 2005) (rejecting defendant's motion to seal settlement agreement and hold settlement fairness hearing in private because defendants failed to show good cause or that harm would result from public forum).

108 *In re Knight Publ'g Co.*, 743 F.2d 231, 234-35 (4th Cir. 1984).

109 *See id.*; *see also* *In re Application & Affidavit for a Search Warrant*, 923 F.2d 324, 331 (4th Cir. 1991); *Brown*, 710 F.2d at 1179.

110 Instances of sexual abuse by Catholic clergy demonstrate well the harmful effect confidential settlement agreements may have when they are either not necessary or are approved without adequate consideration of the systemic interest in openness. *See Secrecy Over Abusive Priests Comes Back to Haunt Church*, N.Y. TIMES, March 12, 2002, at A1. The 10 judges of the federal district court in South Carolina have, in recognition of the problems posed by sealing settlements, recently voted to "ban secret legal settlements, saying such agreements have made the courts complicit in hiding the truth about hazardous products, inept doctors, and sexually abusive priests." Adam Liptak, *South Carolina Judges Seek to Ban Secret Settlements*, N.Y. TIMES, September 2, 2002, at A1.

of the terms on which the case was resolved.

### When can a judge seal a court file?

As discussed above, it is generally undisputed that, like court proceedings, court records are presumptively open to the public and news media. This is not to say, however, that all testimony and documents will necessarily become public.

Courts may, where good cause is demonstrated, issue orders (1) that evidence be received by the court only on the condition that it be sealed, i.e., made unavailable to the press or public; (2) that information acquired during a lawsuit by parties or their lawyers not be disclosed; or (3) that confidentiality agreements entered into by parties in connection with the settlement of legal disputes be enforced. To some extent, all of these actions impinge upon the free flow of information to the public and, thus, upon the First Amendment. The justification for the existence of such mechanisms is the government's interest in the effective operation of the court system. Rule 26(c) of the North Carolina Rules of Civil Procedure and its federal counterpart state that courts are empowered to "make any order that justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense."<sup>111</sup>

Constitutionally, whether a court can order a court file sealed is arguably governed by the same standard concerning courtroom closure orders discussed earlier in this chapter. That is, under the First Amendment, which controls in both federal and state courts, a judge must find that sealing a certain document is absolutely necessary to protect a "compelling" governmental interest; that no less

restrictive measure short of sealing the document will suffice to protect that interest; and that the order is "narrowly tailored" so that its scope is as limited as possible.<sup>112</sup>

In addition to First Amendment arguments against sealing judicial records, the news media can also assert a common law right of access. In *Nixon v. Warner Communications*,<sup>113</sup> the U.S. Supreme Court recognized a common law right to inspect and copy judicial records and documents. However, this right of access to court records is not absolute. A judge has the discretion to seal documents if the public's right of access is outweighed by competing interests.<sup>114</sup> In federal courts located in the Fourth Circuit, it is well established that prior to entering an order sealing documents, the court must (1) give the public notice of any request to seal a document and a reasonable opportunity to challenge it; (2) consider less restrictive alternatives to sealing; and (3) if a decision is made to seal a document, articulate its reasons supported by specific factual findings and the reasons for rejecting alternatives to sealing.<sup>115</sup> "These procedures 'must be fol-

112 See *Press-Enterprise Co. v. Superior Court of Riverside County*, 478 U.S. 1 (1986); *Press-Enterprise Co. v. Superior Court of Riverside County*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-07 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980); *Dep't of State Police v. Washington Post*, 386 F.3d 567, 578 (4th Cir. 2004) (requiring the state police to provide a pardoned convicted criminal defendant with sealed discovery because "the more rigorous First Amendment standard should . . . apply to documents filed in connection with a summary judgment motion in a civil case."); *Under Seal v. Under Seal*, 326 F.3d 479, 486 (4th Cir. 2003) (affirming decision to unseal government complaint against two corporations because the corporations had no privacy interest to support continued sealing).

113 453 U.S. 589, 608 (1978).

114 See *id.* 597-608.

115 See *In re Charlotte Observer*, 882 F.2d 850, 853-54 (4th Cir. 1989); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 250-54 (4th Cir. 1988); *In re Knight Publ'g Co.*, 743 F.2d 231, 234-35 (4th Cir. 1984); *Rosenfeld v. Montgomery County Pub. Schs.*, 25 Fed. Appx. 123, 132-133 (4th Cir. 2001) (unpublished) (remanding the case to the trial court where "there is no indication on the record that the court gave public notice or an opportunity for interested parties to object and the district court's final order makes no mention of the sealed documents, nor of why they were sealed or why alternatives to leaving them sealed were rejected . . ."); *International Ass'n of Machinists & Aero. Workers v. Werner-Matsuda*, 390 F. Supp. 2d 479, 485 (D. Md. 2005) (allowing sealing of exhibits where

111 N.C. R. Civ. P. 26(c); FED. R. Civ. P. 26(c).



lowed when a district court seals judicial records or documents.”<sup>116</sup>

In *Ashcraft v. Conoco*, the Fourth Circuit Court of Appeals held that a federal district court in North Carolina had improperly sealed a \$36 million settlement agreement in a case involving drinking water contamination.<sup>117</sup> Despite the media’s demonstrated interest in the case, no public notice of the motion to seal the agreement was given, there was no opportunity for interested parties to object to the motion, the lower court failed to consider less restrictive alternatives to sealing, and the lower court did not identify any specific reasons justifying its decision to seal the agreement.<sup>118</sup>

In *Virmani v. Presbyterian Health Services*,<sup>119</sup> the N.C. Supreme Court held that, in addition to the rights of access created in First Amendment and common law, there also is a qualified right to access court records under the N.C. Constitution. That is, a court may seal court records only if the trial judge makes specific findings of fact demonstrating that, after considering alternatives to sealing, sealing is necessary to protect a “compelling countervailing public interest.”<sup>120</sup>

(1) the motions to seal had been docketed for many months, (2) the opposing party did not object to the motion, and (3) “the exhibits Plaintiff seeks to seal contain the precise confidential membership information that rests at the heart of this case and that it asserts constitutes a ‘trade secret . . . .’”; *Sawicki v. Morgan State Univ.*, No. WMN-03-1600, 2005 U.S. Dist. LEXIS 41174 (D. Md. 2005) (mem.) (denying defendant’s motion to seal the record after winning summary judgment in an employment discrimination suit because the defendant did not present evidence of a “significant countervailing interest to justify” denying public access); *Jennings v. Univ. of N.C.*, 340 F. Supp. 2d 679, 683 (M.D.N.C. 2004) (declining to seal transcript of student accusing coach of sexual harassment, despite federal law charging the university with confidentiality, because the transcript is material to coach’s defense, and declining to seal another student’s deposition testimony about plaintiff’s personal life because it is not an academic record under the federal education law).

116 See *Ashcraft v. Conoco*, 218 F.3d 288, 302 (4th Cir. 2000) (quoting *Stone v. Univ. of Md. Medical Sys. Corp.*, 855 F.2d 178 (4th Cir. 1988)).

117 *Id.*

118 *Id.*

119 515 S.E.2d 675, 693 (N.C. 1999).

120 *Id.*

In *Corrigan v. White*, a civil case involving accusations of sexual misconduct at a shopping mall, the N.C. Court of Appeals vacated lower court orders sealing the court record and allowing the parties to proceed using pseudonyms. On remand, a Superior Court judge cited both *Virmani* and *State v. Kelly*. The judge said that although the plaintiffs were minors, denials of access to information about the case would not be allowed because while “almost all criminal or civil allegations of wrongdoing are embarrassing to defendants . . . there is no evidence that the issues raised by this case are of quantifiably different nature or caliber from others routinely heard in North Carolina’s public courts in open court proceedings.”<sup>121</sup>

Courts do not find a constitutional or common law right of access to be applicable to every type of record. Courts often seal documents in commercial disputes that involve trade secrets and that are unrelated to any larger public concerns. Courts will, on request of a party who demonstrates good cause, act to prevent the disclosure of valuable commercial information.<sup>122</sup> However, the sealing of evidence relating to the safety of products such as drugs and automobiles or information relating to human health hazards such as toxic waste leaks or medical malpractice presents greater public concerns and thus may constitute a greater infringement

121 *Corrigan v. White*, 29 Media L. Rep. (BNA) at 1638.

122 For an example of a true “trade secret,” see *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288, 289 (D. Del. 1985). In this case, a federal district judge characterized the formula for Coca-Cola as “one of the best kept secrets in the world.” In the context of a contract dispute between the parent company and an independent bottler, the court found that the formula was relevant to resolve the issue of whether several Coca-Cola products were identical and thus governed by a contract. Accordingly, the court was prepared to enter a protective order to ensure that the formula was disclosed only to individuals connected with the case. This was certainly appropriate. Nevertheless, the Coca-Cola company refused to make its formula available even though the court was willing to enter a protective order. The judge then ordered that, for the purpose of the case, every possible adverse inference would be drawn against the Coca-Cola company with respect to the formula evidence. See *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 110 F.R.D. 363, 366, 369 (D. Del. 1986).



on the core interests protected by the First Amendment. This issue creates a conflict for our courts. On one hand, courts are public institutions. On the other hand, however, civil cases are brought to resolve disputes between private parties—unless governmental entities are involved. Accordingly, there is a growing tension between the court system and the news media over the extent to which evidence developed in the preparation of civil cases and the terms on which such cases are finally resolved should be made public.<sup>123</sup> In general, most civil cases are treated as disputes between private parties.<sup>124</sup> Related is

the practice of allowing a party to proceed anonymously, for instance, as “Jane Doe.”<sup>125</sup> It is unusual for a judge to allow a known party to proceed with a fictitious name.<sup>126</sup> On occasion, lawyers will properly include John Doe, defendant, in a case when a person is a necessary party to the claim, but is unknown.

### Can you publish a sealed document?

When a court issues an order sealing a document, publication of such a document can result in contempt of court. If you obtain a document that is under seal, you should immediately consult with your attorney before publishing information from that document. In general, it is permissible to publish information contained in a sealed document if that information has been lawfully obtained—this principle has been repeatedly recognized by the U.S. Supreme Court.<sup>127</sup> Thus, if a reporter lawfully receives information that is under seal, the First Amendment will generally protect him from liability for the publication of such information.

This issue was raised in *Ashcraft v. Conoco, Inc.*<sup>128</sup> In that case, a deputy clerk of court

123 Much has been written about secrecy in civil court proceedings and its adverse public interest ramifications. See Steve McGonigle, *Secret Lawsuits Shelter Wealthy, Influential; Jurist Believes Sealing Records Is Undemocratic; Judge Says Privacy Can Help Settle Suits*, DALLAS MORNING NEWS, Nov. 22, 1987, at A-1; Steve McGonigle, *Sealed Lawsuits Deal With Poisonings, Sex, Surgery*, DALLAS MORNING NEWS, Nov. 23, 1987, at A-1; Elsa Walsh & Benjamin Weiser, *Public Courts, Private Justice*, WASHINGTON POST, Oct. 23-26, 1988, March 13, 1989; Barry Meier, *System Thwarts Sharing Data On Unsafe Products*, NEWSDAY, April 24, 1989, at 24; Barry Meier, *Legal Merry-Go Round*, NEWSDAY, June 5, 1998, at 21. As the result of attention focused on the adverse ramifications on the public interest of the abuse of protective orders and sealing orders, the Texas Supreme Court in 1990 amended the Texas Rules of Civil Procedure to require the proponent of a protective order or sealing order to demonstrate a “specific, serious and substantial interest” to justify the entry of such an order. See TEX. R. CIV. PRO. 76a; see also Lloyd Doggett, *Keeping Court Records In The Open*, TRIAL, July 1990, at 62-66.

124 See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). In this case, a newspaper that was a defendant in a libel and invasion of privacy suit claimed that it could not, consistent with the First Amendment, be forbidden from publishing information about the plaintiff—the leader of a religious group—that the newspaper had obtained through the civil discovery process. The U.S. Supreme Court rejected that argument. As part of the civil discovery process, the newspaper had asked the trial court to compel production of information about the membership and finances of the religious organization. The court ordered production of the material but granted the religious group's request for a protective order prohibiting the newspaper from disseminating or otherwise using the information for any purpose other than trial preparation. The order did not prohibit the newspaper from publishing information about the religious group that it obtained through means other than the judicial discovery process. The newspaper challenged the court's protective order as a prior restraint on publication that violated the First Amendment. In a unanimous opinion, the U.S. Supreme Court upheld the protective order and rejected the newspaper's position. The Court noted that civil discovery rules often allow extensive intrusion into the affairs of both litigants and third parties. Information is often required to be produced that is not relevant to the case or even admissible at trial. The Court reasoned that permitting a party to obtain and publish information that could not otherwise be lawfully obtained would be unreasonable. The Court observed that historically pre-trial discovery had not been a component of civil trial and concluded that the balance should be struck in favor of upholding the protective order because, unlike a “classic prior

restraint,” this protective order allowed the newspaper to publish information it gleaned from independent sources. Thus protective orders and decisions to seal documents must be narrowly tailored, and they should not be granted absent a showing of good cause. Orders entered merely as the result of the consent of the parties may be subject to challenge on the grounds that they violate the First Amendment.

125 See, e.g., *Goldsmith v. Henderson County Bd. of Pub. Educ.*, 32 Media L. Rep. (BNA) 1353, 1356 (N.C. Super. Ct. July 30, 2003); *Corrigan v. White*, 29 Media L. Rep. (BNA) 1636 (2001).

126 See *Jane Doe 1 v. Merten*, 219 F.R.D. 387, 391 (D.Va. 2004) (finding that parties failed the “five factor” test that the 4th Circuit “district courts should take into account in assessing anonymity requests . . .” (quoting *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993))).

127 See *Florida Star*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978). It should be noted, however, that the U.S. Supreme Court has carefully left open the question of whether truthful publication may ever be punished consistent with the First Amendment. See *Florida Star v. BJE*, 491 U.S. at 532-33, and cases cited therein.

128 See No. 98-1212 (4th Cir. 2000) (unpublished).

mistakenly provided a sealed confidential settlement agreement, along with other court documents, to a reporter for the Wilmington Morning Star newspaper. At the time the reporter received the agreement, it was in an envelope that bore a statement that it was to be opened only by the court. The reporter did not see the statement but did observe the word “Opened,” which appeared through a window adjacent to the back flap of the envelope. The reporter opened the envelope and reported on its contents. In a decision that was ultimately overturned, the District Court determined that the reporter had not lawfully obtained the settlement information and held her in criminal and civil contempt.<sup>129</sup>

In reversing the District Court, the Fourth Circuit held that, among other infirmities, the lower court had erred because there was insufficient evidence to support the conclusion that the reporter had acted “willfully, contumaciously, intentionally, [and] with a wrongful state of mind.”<sup>130</sup> As the court put it:

[A] citizen who requests public documents from an officer of the court, who herself evidences diligence in safeguarding the confidences of the court, and is given an envelope that once was sealed but has been previously opened and is at the time open and denominated as such, is entitled to presume that the envelope and its contents are publicly available material, at least absent proof of knowledge otherwise. No citizen is responsible, upon pain of criminal and civil sanction, for ensuring that the internal procedures designed to protect the legitimate confidences of government are respected.<sup>131</sup>

In short, the government can keep its

secrets if it can. But citizens are free to discuss what they can learn about the actions of government.

### **How should a reporter respond to a court order limiting access to court proceedings?**

The simple answer to this question is call your editor or news director and, if he or she is not available, your lawyer, as quickly as possible. One practical lesson of the courtroom closure cases is that if you are covering a case and a closure motion is made, you should stand, identify yourself, explain that you and your employer object to closure of the courtroom, and request an opportunity to have counsel appear and present legal argument in opposition to the closure motion. If you fail to object, you may waive your right of access. Once the objection is made, you must then get on the telephone to both your supervisor and lawyer—quickly!

More specifically, if a motion is made to close a court proceeding, you should stand, identify yourself and make the following statement to the judge:

Your honor, I respectfully request the opportunity to register on the record an objection to the motion to close this proceeding to the public, including the press. Our legal counsel has advised us that standards set forth in U.S. Supreme Court decisions regarding the constitutional right of access to judicial proceedings recognize our right to a hearing before the court is closed. Therefore, I respectfully request such a hearing and a brief continuance so I can call our counsel to come to explain our position.

<sup>129</sup> See *Ashcraft v. Conoco, Inc.*, 26 Media L. Rep. (BNA) 1620, 1625-26 (E.D.N.C. 1998).

<sup>130</sup> See *Ashcraft v. Conoco, Inc.*, No. 98-1212, 19 (4th Cir. 2000).

<sup>131</sup> *Id.* at 26.

## Are cameras allowed in courtrooms?

Reporters have always been able to take their pens, pencils and notebooks with them into the courtroom to assist them in covering proceedings. As technology advanced, reporters made use of new tools such as still cameras, movie cameras and radio microphones to cover trials. In 1925, the trial of Tennessee school teacher John Scopes for teaching evolution was broadcast live on radio by WGN in Chicago.<sup>132</sup> Also, the notorious murder trial of Nathan Leopold Jr. and Richard Loeb was covered by still and motion picture cameras located in the courtroom.<sup>133</sup> Beginning in 1935, however, in the wake of the extensive media coverage surrounding the trial of Bruno Hauptmann for the kidnapping and murder of Charles Lindbergh's baby, reporters' ability to use cameras to cover court proceedings began to be restricted.<sup>134</sup> The American Bar Association recommended, and many states adopted, rules restricting the use of television cameras, still cameras and broadcast recorders and microphones in courtrooms.<sup>135</sup>

In 1965, the U.S. Supreme Court held that Texas financier Billy Sol Estes had been denied his right to a fair trial because the court proceedings were televised.<sup>136</sup> According to news reports, the Estes courtroom was cluttered with cameras, cables, wires and microphones. Legal scholars debated the scope of the Supreme Court's opinion. Some contended the Court had ruled that the mere presence in the courtroom of broadcast cameras and equipment automatically amounted

to a denial of due process of law to a criminal defendant. Others, including some members of the Court, suggested that the requirements of due process might not be offended if technology made cameras less obtrusive. Justice Tom Clark wrote, "When the advances in these arts permit reporting by the printed press or by television without their present hazards to a fair trial, we will have another case."<sup>137</sup> The legal debate continued for years, during which broadcast reporters and newspaper photographers were generally unable to use cameras, microphones and recorders to cover court proceedings.

North Carolina first adopted a ban on television cameras, still cameras and broadcast microphones and recorders in 1970.<sup>138</sup> In 1973 the Code of Judicial Conduct adopted by the N.C. Supreme Court also contained a prohibition against judges allowing television, radio and still photographic coverage of court proceedings.<sup>139</sup>

In 1981 the "other" case that Justice Clark had referred to 16 years earlier found its way to the U.S. Supreme Court. It began when Florida adopted rules to allow a pilot program to evaluate television coverage of court proceedings. Two men charged with burglary appealed their convictions, asserting that television coverage of their trial had denied them a fair and impartial trial. In *Chandler v. Florida*,<sup>140</sup> the U.S. Supreme Court unanimously affirmed their convictions. Rejecting the defendants' argument that televising a criminal trial inherently denies the defendant due process, the Court said that "no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast news me-

132 See A. Wurtzel, *Free Press/Fair Trial: Broadcast Access to Courtroom Proceedings*, at 3 (1978).

133 See Richard Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14 (June/July 1979).

134 See *State v. Hauptmann*, 115 N.J.L. 412, cert. denied, 296 U.S. 649 (1935).

135 See Blashfield, *The Case of the Controversial Canon*, 48 A.B.A. J. 429, 430 (1962); *Estes v. Texas*, 381 U.S. 532, 595-96 (1965) (Harlan, J., concurring).

136 See *Estes v. Texas*, 381 U.S. 532, 578 (1965).

137 *Id.* at 540.

138 GENERAL RULES OF PRACTICE 15, 276 N.C. 735, 740 (1970).

139 CODE OF JUDICIAL CONDUCT, Canon 3A(7), 283 N.C. 771, 772 (1973).

140 449 U.S. 560 (1981).

dia inherently has an adverse effect on [the judicial process].”<sup>141</sup> The Court was careful to note, as had Justice Clark in *Estes* in 1965, that if circumstances changed in the future, the legal rule might change as well.

After *Chandler*, many states, including North Carolina, began to adopt rules allowing radio, television and still photographic coverage of court proceedings.<sup>142</sup> Some states permit coverage of appellate proceedings only or limit trial coverage to civil cases. Others permit coverage of both criminal and civil trials and appeals.

### When are cameras allowed in courtrooms?

**N.C. Courts.** In 1987, in response to petitions from the North Carolina Association of Broadcasters, the Radio and Television News Directors Association of the Carolinas and the North Carolina Press Association,<sup>143</sup> the N.C. Supreme Court adopted experimental rules designed to permit electronic coverage of court proceedings in trial and appellate courts.<sup>144</sup> The state Supreme Court extended

and modified the experimental rules between 1982 and 1988. Finally, on June 25, 1990, the N.C. Supreme Court adopted permanent rules allowing cameras in the courtroom—Rule 15 of the General Rules of Practice for the Superior and District Courts.<sup>145</sup> In recognition of this fact, Canon 3A(7) of the North Carolina Code of Judicial Conduct was amended to state:

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

From the perspective of the news media and the public, court proceedings are now presumptively open to broadcast and still photographic coverage. To be sure, a judge may exercise his or her discretion to forbid such coverage for any reason. But in light of Rule 15’s statement that “Electronic media and still Photographic coverage of public judicial proceedings shall be allowed in the appellate and trial courts of this state . . . ,”<sup>146</sup> it is reasonable to infer that the burden should be on the party proposing that a judge exercise his discretion to prohibit such coverage to demonstrate why such an action should be taken.

Under the current N.C. rules, reporters must simply exercise good judgment and common sense in securing prior permission of the court for television, radio or still photographic coverage. Pooling of resources is required to minimize the number of cameras and microphones.<sup>147</sup> The state’s media trade

141 *Id.* at 561.

142 A number of lower courts have resolved the question of whether there is a constitutional right of broadcast and photographic access to courtrooms adversely to the media. See, e.g., *Conway v. United States*, 852 F.2d 187 (6th Cir. 1988); *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986); *United States v. Kerly*, 753 F.2d 617 (7th Cir. 1985); *Westmoreland v. CBS, Inc.*, 752 F.2d 16, 24 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); *United States v. Hastings*, 695 F.2d 1278 (11th Cir.), *cert denied, sub nom.* *Post-Newsweek Stations Florida, Inc. v. United States*, 461 U.S. 931 (1983); *Combined Commc’ns Corp. v. Finesilver*, 672 F.2d 818 (10th Cir. 1982); *Mazzei v. United States*, 518 F.2d 781 (10th Cir. 1975); *United States v. Yonkers*, 10 Media L. Rep (BNA) 2188 (S.D.N.Y. 1984). However, the U.S. Supreme Court has yet to squarely address the issue of whether the First Amendment right of access to judicial proceedings requires that cameras be permitted in court. *But cf.* *Estes v. Texas*, 381 U.S. at 588 (Harlan, J., concurring) (dicta suggesting no such right); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 610-11 (1978) (dicta to the effect that there is no constitutional right to have testimony recorded and broadcast).

143 NCAB is a trade association of radio and television stations in North Carolina. RTNDAC is a trade association of news directors employed at such stations. NCPA is a trade association of newspapers published in North Carolina.

144 See Order Concerning Electronic Media and Still Photographic

Coverage of Public Judicial Proceedings, 306 N.C. 797 (1982).

145 See Order Concerning Electronic Media and Still Photographic Coverage of Public Judicial Proceedings, 327 N.C. 664 (1990).

146 See GENERAL RULES OF PRACTICE 15(b) (2000).

147 *Id.* Rule 15(e).



associations are responsible for appointing coverage coordinators in all of North Carolina's 100 counties to assist in arranging for photographic or electronic coverage.<sup>148</sup> Thus, the reporter's first contact should be the coordinator assigned to the county in which the case is located. A reporter can get a list of coordinators from the NCAB or NCPA. Most judges deal with the issue on a case-by-case basis, so you will want to know the judge's philosophy and preferences.

Under the rules, coverage of certain types of cases and proceedings is prohibited. Proceedings involving adoptions, juveniles, probable cause determinations, child custody, divorce, temporary and permanent alimony, motions to suppress evidence, trade secrets, *in camera* presentations and proceedings before magistrates and clerks of court may not be covered.<sup>149</sup> In addition, the rules forbid coverage of jurors and the following types of witnesses: police informants, minors, undercover agents, relocated persons, and victims and families of victims of sex crimes.<sup>150</sup>

All reporters should familiarize themselves with the rules because violations are punishable as contempt of court. Also, reporters and camera crews should lay competitive concerns aside to ensure that judges are not called upon to arbitrate disputes between reporters or competing newspapers or stations. Rule 15 is reprinted at the end of this chapter.

**Federal courts.** The rules permitting the use of cameras in North Carolina's state courts have no parallel in the federal courts. Broadcast coverage of federal court proceedings has long been forbidden by Canon 3A(7) of the Code of Judicial Conduct for the United States Courts, by Rule 53 of the Federal Rules of Criminal Procedure and by

the local rules of most federal courts.

In 1990, the Judicial Conference of the United States voted to suspend Canon 3A(7) to permit a three-year experimental program to allow television, radio and still photographic coverage of civil cases in a handful of federal courts.<sup>151</sup> At the conclusion of the three-year experiment, the Judicial Conference voted to refuse camera access to federal trials. However, the Judicial Conference did vote to allow individual federal courts of appeals to determine, in civil cases, whether they would permit cameras in the courtroom.

In recent years, the Congress has considered several bills that would allow federal judges the option of allowing cameras and microphones in federal district courts.<sup>152</sup> None has been adopted, however.

Accordingly, at this time, broadcast coverage of trials is forbidden in federal courts in North Carolina. At the appellate level, the Fourth Circuit has generally refused all requests by the news media to use cameras and other recording devices in the courtroom. Change, if it is to come, will likely be the result of legislation allowing judges to permit coverage in their discretion.

### Can a judge order you not to publish what you see or hear about a case?

Almost certainly not. (Not lawfully, anyway.) It is well established that the core purpose of the First Amendment is to prohibit prior restraints upon the dissemination of information by the press.<sup>153</sup> A prior restraint

148 *Id.* Rule 15(d).

149 *Id.* Rule 15(b)(2).

150 *Id.* Rule 15(b)(3).

151 See, e.g., HARVEY L. ZUCKMAN, ET AL., MODERN COMMUNICATIONS LAW 150-52 (1999).

152 See Federal Courts Improvement Act of 2000, H.R. 1752, 106th Cong.

153 See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-57



is a governmental restriction on publication before it occurs—including court orders prohibiting the news media from publishing information obtained in court. In creating and debating the First Amendment, the purpose of the framers of the Constitution was simple and direct: to avoid the system of prior restraints on publication practiced in England.<sup>154</sup> In North Carolina, as in many other states, the state constitution also makes clear that the government may not forbid citizens from speaking and publishing.<sup>155</sup> The N.C. Constitution states: “Freedom of speech and of the press are two of the great bulwarks of liberty and, therefore, shall never be restrained, but every person shall be held responsible for their abuse.”<sup>156</sup> As recognized by the Fourth Circuit, in the context of publishing what a reporter sees or hears inside or outside of a courtroom, once the “cat is out of the bag,” restraints on publication are impermissible.<sup>157</sup>

Theoretically, the prohibition against prior restraints on publication is not absolute. The Supreme Court has indicated that among the very narrow range of situations that might justify a prior restraint on publication are those in which publication would jeopardize a criminal defendant’s constitutional right to a fair trial.<sup>158</sup> However, both the U.S. Supreme Court and the N.C. Supreme Court have held that prior restraints are presumptively unconstitutional and that the party who asks a court to issue such an order

bears a very heavy burden of justifying the imposition of such a restraint.<sup>159</sup> Indeed, the U.S. Supreme Court has never upheld a prior restraint upon speech.<sup>160</sup>

The U.S. Supreme Court first addressed the question of whether prior restraints on publication could be used to protect the right of a criminal defendant to a fair trial in *Nebraska Press Association v. Stuart* in 1976.<sup>161</sup> In that case, a state trial judge, in anticipation of a criminal defendant’s trial for the highly publicized murders of six people, entered an order that forbade newspapers, broadcasters, national networks and wire services from disseminating accounts of confessions made by the defendant and other information tending to implicate the defendant as the killer. The order was issued at the request of both the state’s attorney and the defendant. In granting the order, the trial judge reasoned that the “mass coverage by news media” and the “reasonable likelihood of prejudicial news . .

(1974); *New York Times Co. v. United States*, 403 U.S. 713, 715-17 (1971); *Near v. Minnesota*, 283 U.S. 697, 713-23 (1931). See also generally FRED W. FRIENDLY, *MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS* (1981).

154 See *Near*, 283 U.S. at 713-23.

155 See, e.g., *In re Minor Charged*, 463 S.E.2d 72 (N.C. 1995).

156 N.C. CONST. art. I, § 14.

157 See *In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990).

158 See *Nebraska Press Ass’n*, 427 U.S. at 558; *State v. Williams*, 304 N.C. 394, 443-44 (1981). See also *Near*, 283 U.S. at 716 (“the protection even as to previous restraint is not absolutely unlimited”; hypothesizing “exceptional” cases such as publication of information relating to troop ship locations in time of war).

159 The restraint imposed on CNN in connection with the drug trafficking trial of former Panamanian dictator Manuel Noriega generated much attention among the media and their advocates. In that case, CNN obtained tapes of telephone conversations between Noriega and his attorney and broadcast them. Noriega moved that CNN be ordered not to broadcast the tapes further. The federal trial judge handling the case granted an order temporarily restraining CNN from broadcasting the tapes until he could hold a hearing on the matter on the grounds that because the tapes concerned potentially privileged conversations between Noriega and his attorneys and because the tapes were not before him he could not perform the three-step analysis required by *Nebraska Press Ass’n v. Stuart*. See *United States v. Noriega*, 752 F.Supp. 1032 (S.D. Fla. 1990). CNN then reportedly refused to turn over the tapes to the judge for review, continued broadcasting them and appealed unsuccessfully to the Eleventh Circuit Court of Appeals. See *In re Cable News Network, Inc.*, 917 F.2d 1543 (11th Cir. 1990). The U.S. Supreme Court refused to review the case. See *Cable News Network, Inc. v. Noriega*, 498 U.S. 976 (1990); see also *United States v. Noriega*, 752 F.Supp. 1045 (S.D. Fla. 1990). Viewed in perspective, the Noriega case involves nothing more than the unremarkable requirement that in order to determine the merits of a particular controversy, a court must be able to make some judgment about the facts at issue. But see *New York Times Co. v. United States*, 403 U.S. 713, 715-17 (Black, J., concurring) (for an eloquent statement of the view that every moment’s delay in even considering the contentions of the party seeking imposition of a prior restraint violates the First Amendment). Where a party elects, rightly or wrongly, not to participate in making the facts clear for the court, it may very well find some courts reluctant to exercise discretion in its favor.

160 See *Nebraska Press Ass’n*, 427 U.S. at 565-67; cf. *Florida Star v. B.J.F.*, 491 U.S. 524, 532-33 (1989).

161 427 U.S. 539 (1976).

. would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial.”<sup>162</sup>

In reversing the state supreme court’s decision upholding the trial judge, the U.S. Supreme Court held that in order to justify an order forbidding the publication of information regarding a criminal case, a three-part test must be satisfied:

- 1) The nature and extent of pre-trial publicity must be such that it would necessarily impair the criminal defendant’s right to a fair trial;
- 2) There must exist no less restrictive alternative measures that would mitigate the effects of such publicity; and
- 3) The record must show that the issuance of a court order restraining the media from publishing the information would effectively prevent the harm.

The Supreme Court made clear that it was not fashioning an absolute ban on prior restraints. However, it went on to discuss the particular order and noted that the state court judge had failed to consider alternatives such as postponing the trial, changing the location of the trial and carefully questioning prospective jurors to ferret out persons unable to treat all parties fairly. Moreover, much of the information the judge sought to keep from being published had already been communicated by word of mouth in the tiny community of 850 persons where the crimes occurred. This standard was followed in North Carolina in *Sherrill v. Amerada Hess Corp.*<sup>163</sup> A trial judge had ordered counsel for parties to the civil suit to refrain from speaking about the case with any “person or entity not a party to either [a]ction concerning either [a]ction . . .”<sup>164</sup> The North Carolina

Court of Appeals reversed the order because it did not comply with *Nebraska Press Association*: “Although the record reflects a finding that communications concerning the action by the parties to persons not involved in the suit would ‘be detrimental to the fair and impartial administration of justice,’ there is no evidence in the record to support this finding.”<sup>165</sup>

Prior restraint orders are always of dubious constitutionality because the three-part test set out in *Nebraska Press Association v. Stuart* can almost never be satisfied.<sup>166</sup> Orders silencing the news media are rarely effective because there are virtually always alternatives a court can employ to ensure a fair trial, and the burden and quality of proof required of a party seeking a prior restraint is very high.<sup>167</sup>

Moreover, as noted previously, N.C. law specifically prohibits the entry of any order that would prohibit the publication or broadcast of “any evidence, testimony, argument, ruling, verdict, decision, judgment, or other matter occurring in open court in any hearing, trial, or other proceeding.”<sup>168</sup> N.C. Gen. Stat. 7A-276.1 provides that if any such order is entered, it may be ignored.<sup>169</sup> This is a significant, and highly unusual, legislative statement about the impropriety of judicial efforts to control public discussions of judicial proceedings. In short, the N.C. General Assembly has determined that judges who issue such orders need not be obeyed.

<sup>165</sup> *Id.* at 720.

<sup>166</sup> For instance, in *Schmitt v. The United Methodist Retirement Homes, Inc.*, 95 CVS 04877 (April 11, 1996), Superior Court Judge Narley L. Cashwell vacated an order prohibiting the release of videotapes as a prior restraint.

<sup>167</sup> For observations regarding means by which trial judges can effectively control court proceedings, thus avoiding the need for imposing prior restraints on the media, see *Sheppard v. Maxwell*, 384 U.S. 333, 350-63 (1966).

<sup>168</sup> N.C. GEN. STAT. § 7A-276.1.

<sup>169</sup> *Id.*

<sup>162</sup> *Id.* at 542.

<sup>163</sup> 504 S.E.2d 802, 27 Media L. Rep. (BNA) 2334 (N.C. App. 1998).

<sup>164</sup> *Id.* at 718.

## Can reporters be punished after the fact for their court coverage?

In addition to prohibitions on prior restraints, it is well established that the First Amendment also prohibits subsequent punishment of the press for the publication of accurate information of interest to the public.<sup>170</sup> In *Landmark Communications, Inc. v. Virginia*,<sup>171</sup> the U.S. Supreme Court held that subsequent criminal punishment can be just as dangerous to the news media's ability to inform the public as prior restraints.<sup>172</sup> Accordingly, in general, journalists cannot be punished after the fact for their court coverage, and any statute that purports to do so is constitutionally suspect.

Similarly, journalists cannot be sued for publishing information that appears in the public record. For instance, a sexual assault victim cannot sue a newspaper for publishing the fact that the victim was a victim of sexual assault if this information appeared in court documents.<sup>173</sup>

## Can a judge order trial participants not to talk to reporters?

It is well settled that courts possess the power to issue gag orders on trial participants in limited circumstances.<sup>174</sup> Nevertheless, such orders are limited by the First Amendment and may be challenged if they are overbroad and not based on specific findings of fact.<sup>175</sup>

**Jurors:** In every case involving a jury, the members of the jury will be forbidden from speaking to others—including reporters—about the case until it is over. After a case is over, jurors are allowed to speak to lawyers, reporters and others about the case if they so choose.

**Attorneys:** Courts may ban attorneys from speaking to the press in only the most unusual circumstances. For instance, in *Sherrill v. Amerada Hess Corp.*,<sup>176</sup> a trial judge placed a gag order on attorneys involved in the civil suit.<sup>177</sup> The North Carolina Court of Appeals reversed the order in *Sherrill* for failure to comply with the *Nebraska Press Association* standard.<sup>178</sup>

Professional codes of ethics may restrict what an attorney may say to the press. Rule 3.6 of the Revised Rules of Professional Conduct of the North Carolina State Bar, governing all attorneys, restricts what attorneys and their employees may say to reporters about cases in which they represent a client. These rules represent specific restrictions on the content of lawyers' speech and are generally intended to prohibit interference with the ability of the court to determine facts and dispense justice. The rules are enforced by the North Carolina State Bar, and a lawyer may be disbarred for violating them.<sup>179</sup> Reporters should factor these restrictions into their analysis of lawyers' responses to questions and should not leap to unwarranted conclusions based on their perception of a lawyer as evading certain questions.

## Although North Carolina's rule regulat-

170 See *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

171 *Id.*

172 *Id.* at 841-42; see also *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 100-06 (1979).

173 *Doe 2 v. AP*, 331 F.3d 417, 421 (4th Cir. 2003).

174 See *Central S.C. Chapter, Soc'y of Prof'l Journalists v. Martin*, 556 F.2d 706 (4th Cir. 1977); *In re Oliver*, 452 F.2d 111, 114 (7th Cir. 1971). See also *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33 n.18 (1984); *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 601 (1976).

175 See *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-104 (1981); cf. *In re*

*Knight Publ'g Co.*, 743 F.2d 231 (4th Cir. 1984).

176 *Sherrill v. Amerada Hess Corp.*, 504 S.E.2d 802, 808, 27 Media L. Rep. (BNA) 2334 (N.C. App. 1998).

177 *Id.*

178 *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 571 (1976).

179 An excellent analysis and comment on the implications of these ethical rules for criminal defense lawyers is contained in R.W. Smith, *Criminal Defense Counsel And the News Media* (N.C. Bar Ass'n, Nov. 17, 1990).

ing lawyers' statements to the news media has not been challenged on First Amendment grounds, a similar rule in Nevada has been. In *Gentile v. State Bar of Nevada*,<sup>180</sup> the U.S. Supreme Court held the Nevada rule was capable of being applied in a constitutional manner but that the rule was unconstitutional as applied to the lawyer in the particular case.

The *Gentile* case involved a criminal defense lawyer who, six months prior to his client's criminal trial, held a press conference to proclaim his client's innocence. The attorney stated his opinion that the actual perpetrator of the crime was a police officer and that the government was attempting to cover up wrongdoing. The attorney's client was later found not guilty.

The Supreme Court's 5-4 decision raises, but does not definitively resolve, the questions presented by the tension between a lawyer's duty as an officer of the court, her duty to her client and her right to free speech under the First Amendment. For example, the five justices in the majority subscribed to the opinion that restrictions on the speech of a lawyer representing a party in a judicial proceeding are evaluated under a less demanding constitutional standard than prior restraints on speech by the news media or the public. Justice Sandra Day O'Connor, who provided the fifth vote for this position, stated:

[A] state may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press. Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise would be constitutionally protected speech . . . . This does not mean, of course, that lawyers forfeit their

First Amendment rights, only that a less demanding standard applies.<sup>181</sup>

Accordingly, North Carolina's rule regulating lawyers' statements to the news media is, in most cases, likely constitutional.

## Conclusion

As detailed above, courts in North Carolina are generally open to the public, including the press. The public's right of access is protected by the First Amendment and the N.C. Constitution. In addition, N.C. Gen. Stat. § 1-72.1 makes clear that the public and press are entitled to a hearing on all issues relating to restricted access to courtrooms, court records and trial participants.

However, there are very limited circumstances in which a courtroom may be permissibly closed and certain court records may be sealed from public view. If a judge issues a closure order, reporters are encouraged to object and to call their editors or news directors and lawyers immediately.

In addition to a right of access to judicial proceedings, the First Amendment also generally prohibits any restriction on the news

181 *Id.* at 1082-83 (O'Connor, J., concurring). The standard the majority would apply is a balancing test in which the state's interest in regulating the legal profession is weighed against the attorney's First Amendment right of free speech. Thus in *Gentile*, five justices concluded that the "substantial likelihood of material prejudice" standard contained in the Nevada rule did not necessarily violate the attorney's right to freedom of speech. Four other justices differed and, in an opinion by Justice Anthony Kennedy, contended that "wide-open balancing of interests is not appropriate" where the subject matter of a lawyer's speech is comment "critical of the government and its officials." Justice Kennedy went on to argue that state regulations imposing prior restraints on speech by attorneys in pending cases should be judged by the more demanding standard for prior restraints set forth in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). The question of the legal standard to be applied was actually unnecessary to the Court's holding in *Gentile* because the Court held the rule unconstitutional as applied. The statements made by the justices with respect to the applicable standard for evaluating state regulations on speech by lawyers are thus, technically, dicta. The dicta is, however, instructive because it indicates that the issue is a matter of controversy that may be decided in the future.

180 501 U.S. 1030 (1991).

media from publishing information seen or heard inside a courtroom. Moreover, the First Amendment generally protects the news media from being punished after the fact for court coverage in most circumstances. Notwithstanding the news media's right to report on court proceedings, on occasion courts will issue orders forbidding lawyers, witnesses, jurors and other participants in a case from speaking to the news media. Such orders may be permissible, but only if the rigorous requirements of the First Amendment are met.



### **N.C. Gen. Stat. § 1-72.1. Procedure to assert right of access.**

(a) Any person asserting a right of access to a civil judicial proceeding or to a judicial record in that proceeding may file a motion in the proceeding for the limited purpose of determining the person's right of access. The motion shall not constitute a request to intervene under the provisions of Rule 24 of the Rules of Civil Procedure and shall instead be governed by the procedure set forth in this statute. The movant shall not be considered a party to the action solely by virtue of filing a motion under this section or participating in proceedings on the motion. An order of the court granting a motion for access made pursuant to this section shall not make the movant a party to the action for any purpose.

(b) The movant shall serve a copy of its motion on all parties to the proceeding in any manner provided in Rule 5 of the Rules of Civil Procedure. Upon receipt of a motion filed pursuant to this section, the court shall establish the date and location of the hearing on the motion that shall be set at a time before conducting any further proceedings relative to the matter for which access is sought under the motion. The court shall cause notice of the hearing date and location to be posted at the courthouse where the hearing is scheduled. The movant shall serve a copy of the notice of the date, time, and location of the hearing on all parties to the proceeding in any manner provided in Rule 5 of the Rules of Civil Procedure.

(c) The court shall rule on the motion after consideration of such facts, legal authority, and argument as the movant and any other party to the action desire to present. The court shall issue a written ruling on the motion that shall contain a statement of reasons for the ruling sufficiently specific to permit appellate review. The order may also specify

any conditions or limitations on the movant's right of access that the court determines to be warranted under the facts and applicable law.

(d) A party seeking to seal a document or testimony to be used in a court proceeding may submit the document or testimony to the court to be reviewed in camera. This subsection also applies to (i) any document or testimony that is the subject of a motion made under this section and that is submitted for review for the purposes of the court's consideration of the motion to seal, and (ii) to any document or testimony that is the subject of a motion made under this section and that was submitted under seal or offered in closed session prior to the filing of a motion under this section. Submission of the document or proffer of testimony to the court pursuant to this section shall not in itself result in the document or testimony thereby becoming a judicial record subject to constitutional, common law, or statutory rights of access unless the document or testimony is thereafter introduced into evidence after a motion to seal or to restrict access is denied.

(e) A ruling on a motion made pursuant to this section may be the subject of an immediate interlocutory appeal by the movant or any party to the proceeding. Notice of appeal must be given in writing, filed with the court, and served on all parties no later than 10 days after entry of the court's ruling. If notice of appeal is timely given and given before further proceedings are held in the court that might be affected by appellate review of the matter, the court, on its own motion or on the motion of the movant or any party, shall consider whether to stay any proceedings that could be affected by appellate review of the court's ruling on the motion. If notice of appeal is timely given but is given only after further proceedings in the trial court that could be affected by appellate review of the ruling on a motion made pursuant to this section,

or if a request for stay of proceedings is made and is denied, then the sole relief that shall be available on any appeal in the event the appellate court determines that the ruling of the trial court was erroneous shall be reversal of the trial court's ruling on the motion and remand for rehearing or retrial. On appeal the court may determine that a ruling of the trial court sealing a document or restricting access to proceedings or refusing to unseal documents or open proceedings was erroneously entered, but it may not retroactively order the unsealing of documents or the opening of testimony that was sealed or closed by the trial court's order.

(f) This section is intended to establish a civil procedure for hearing and determining claims of access to documents and to testimony in civil judicial proceedings and shall not be deemed or construed to limit, expand, change, or otherwise preempt any provisions of substantive law that define or declare the rights and restrictions with respect to claims of access. Without in any way limiting the generality of the foregoing provision, this section shall not apply to juvenile proceedings or court records of juvenile proceedings conducted pursuant to Chapters 7A, 7B, 90, or any other Chapter of the General Statutes dealing with juvenile proceedings.

(g) Nothing in this section diminishes the rights of a movant or any party to seek appropriate relief at any time from the Supreme Court or Court of Appeals through the use of the prerogative writs of mandamus or supersedeas.

## **RULE 15: ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS**

(a) Definition. The terms “electronic media coverage” and “electronic coverage” are used in the generic sense to include coverage by television, motion picture and still photography cameras, broadcast microphones and recorders.

(b) Coverage Allowed. Electronic media and still photography coverage of public judicial proceedings shall be allowed in the appellate and trial courts of this state, subject to the conditions below.

(1) The presiding justice or judge shall at all times have authority to prohibit or terminate electronic media and still photography coverage of public judicial proceedings, in the courtroom or the corridors immediately adjacent thereto.

(2) Coverage of the following types of judicial proceedings is expressly prohibited: adoption proceedings, juvenile proceedings, proceedings held before clerks of court, proceedings held before magistrates, probable cause proceedings, child custody proceedings, divorce proceedings, temporary and permanent alimony proceedings, proceedings for the hearing of motions to suppress evidence, proceedings involving trade secrets, and in camera proceedings.

(3) Coverage of the following categories of witnesses is expressly prohibited: police informants, minors, undercover agents, relocated witnesses, and victims and families of victims of sex crimes.

(4) Coverage of jurors is prohibited expressly at any stage of a judicial proceeding, including that portion of a proceeding during which a jury is selected. The trial judge shall inform all potential jurors at the beginning of the jury selection process of the restrictions of this

particular provision which is designated (b)(4).

(c) Location of Equipment and Personnel.

(1) The location of equipment and personnel necessary for electronic media and still photographic coverage of trial proceedings shall be at a place either inside or outside the courtroom in such a manner that equipment and personnel are completely obscured from view from within the courtroom and not heard by anyone inside the courtroom.

(i) If located within the courtroom, this area must be set apart by a booth or other partitioning device constructed therein at the expense of the media. Such construction must be in harmony with the general architectural style and decor of the courtroom and must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(ii) If located outside the courtroom, any booth or other partitioning device must be built so that passage to and from the courtroom will not be obstructed. This arrangement must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(2) Appropriate openings to allow photographic coverage of the proceedings under these rules may be made in the booth or partitioning device, provided that no one in the courtroom will see or hear any photographic or audio equipment or the personnel operating such equipment. Those in the courtroom are not to know when or if any such equipment is in operation.

(3) The presiding judge may, however, exercise his or her discretion to permit the use of electronic media and still

photography coverage without booths or other restrictions set out in Rule 15(c)(1) and (c)(2) if the use can be made without disruption of the proceedings and without distraction to the jurors and other participants. Such permission may be withdrawn at any time.

(4) Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the courtroom.

(5) Media personnel shall not exit or enter the booth area or courtroom once the proceedings are in session except during a court recess or adjournment.

(6) Electronic media equipment and still photography equipment shall not be taken into the courtroom or removed from the designated media area except at the following times:

- (i) prior to the convening of proceedings;
- (ii) during the luncheon recess;
- (iii) during any court recess with the permission of the presiding justice or judge; and
- (iv) after adjournment for the day of the proceedings.

(7) The Chief Justice of the Supreme Court, and the Chief Judge of the Court of Appeals, may waive the requirements of Rule 15(c)(1) and (2) with respect to judicial proceedings in the Supreme Court and in the Court of Appeals, respectively.

(d) Official Representatives of the Media.

(1) This Court hereby designates the North Carolina Association of Broadcasters, the Radio and Television News Directors Association of the Carolinas, and the North Carolina Press Association, as the official representatives of the news media. The governing boards of these associations shall designate one person to represent the television media, one person to

represent the radio broadcasters, and one person to represent still photographers in each county in which electronic media and still photographic coverage is desired. The names of the persons so designated shall be forwarded to the Senior Resident Superior Court Judge, the Director of the Administrative Office of the Courts, and the county manager or other official responsible for administrative matters in the county or municipality in which coverage is desired. Thereafter, these persons shall conduct all negotiations with the appropriate officials concerning the construction of the booths or partitioning devices referred to above. Such persons shall also be the only persons authorized to speak for the media to the presiding judge concerning the coverage of any judicial proceedings.

(2) It is the express intent and purpose of this rule to preclude judges and other officials from having to “negotiate” with various representatives of the news media. Since these rules require pooling of equipment and personnel, cooperation by the media is of the essence and the designation of three media representatives is expressly intended to prevent presiding judges from having to engage in discussion with others from the media.

(e) Equipment and Personnel.

(1) Not more than two television cameras shall be permitted in any trial or appellate court proceedings.

(2) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes, shall be permitted in any proceeding in a trial or appellate court.

(3) Not more than one wired audio system for radio broadcast purposes shall be permitted in any proceeding in a trial

or appellate court. Audio pickup for all media purposes shall be accomplished with existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes may be installed and maintained at media expense. The microphones and wiring must be unobtrusive and shall be located in places designated in advance of any proceeding by the Senior Resident Superior Court Judge of the judicial district in which the court facility is located. Such modifications or additions must be approved by the governing body of the county or municipality which owns the facility. Provided, however, hand-held audio tape recorders may be used upon prior notification to, and with the approval of, the presiding judge; such approval may be withdrawn at any time.

(4) Any “pooling” arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

(5) In no event shall the number of personnel in the designated area exceed the number necessary to operate the designated equipment or which can comfortably be secluded in the restricted area.

(f) Sound and Light Criteria.

(1) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind

shall be employed in connection with the television camera.

(2) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with a still camera.

(g) Courtroom Light Sources. With the concurrence of the Senior Resident Superior Court Judge of the judicial district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense and provided such modifications or additions are approved by the governing body of the county or municipality which owns the facility.

(h) Conferences of Counsel. To protect the attorney-client privilege and the right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, between adverse counsel, or between counsel and the presiding judge held at the bench.

(i) Impermissible Use of Media Material. None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent and collateral thereto, or upon any retrial or appeal of such proceedings.



# The Journalist's Privilege

Because news reporters frequently cover events that result in civil or criminal litigation, reporters often are subpoenaed to provide testimony or other evidence. Since 1972, when the U.S. Supreme Court ruled in *Branzburg v. Hayes*<sup>1</sup> that the First Amendment does not provide news reporters with an absolute privilege protecting them from revealing confidential sources and information, state and federal courts around the country have disagreed regarding the existence and scope of a qualified journalist's privilege based on the First Amendment.<sup>2</sup>

In North Carolina, the courts have not provided clear guidance about the First Amendment-based testimonial privilege. However, in 1999 the N.C. General Assembly enacted a strong shield law providing a broad qualified privilege for news personnel subpoenaed to testify in court or in similar quasi-judicial proceedings.<sup>3</sup>

This chapter begins with a review of the state's shield law. Then it discusses the law on the First Amendment-based privilege

in North Carolina. The chapter concludes with some practical advice for dealing with subpoenas, an explanation of the law on the related topic of newsroom searches, and the text of the shield law.

## What protection does the N.C. Shield Law provide?

The state's shield law, which is found at N.C. Gen. Stat. § 8-53.11, provides journalists broad protection against subpoenas for testimony or the disclosure of notes or other documents that they have created or obtained in the course of their newsgathering. The statute gives journalists a qualified privilege, which means its protection is not absolute.

Although the North Carolina appellate courts have not had occasion to apply or interpret the shield statute, numerous trial courts have done so. The first reported judicial application of the shield statute was in 2001 in the first-degree murder trial of Rae Carruth, a former Carolina Panthers football player.<sup>4</sup> The law protected a subpoenaed Charlotte Observer reporter from having to testify and produce documents about nonconfidential information from nonconfidential sources. The defense subpoena sought the reporter's correspondence with a prosecution witness. The court ruled that the defense failed to satisfy two of the three shield law requirements to compel

1 408 U.S. 665.

2 British and American jurisprudence has long adhered to the principle that, absent a specific privilege (such as the attorney-client or doctor-patient privilege), litigants are entitled to "every man's evidence." See 4 THE WORKS OF JEREMY BENTHAM 320-21: "Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow woman were in dispute about a halfpenny-worth of apples, and the chimney-sweeper and the barrow woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly." Many lawyers who subpoena news reporters are still surprised to learn of the journalist's qualified privilege.

3 Thirty-two states and the District of Columbia have some form of statutory testimonial privilege for news reporters.

4 State v. Wiggins, 29 Media L. Rep. (BNA) 1597 (N.C. Super. Ct. 2001).

testimony. The defense failed to demonstrate that the reporter's evidence was essential to his case and that the information could not be obtained from alternate sources, in particular the prosecution witness in question. Since then, other trial courts have issued orders addressing the journalist's qualified privilege under the statute.<sup>5</sup>

The shield law protects reporters in any "legal proceeding." The definition of legal proceeding includes grand jury proceedings or investigations, criminal prosecutions, civil suits and related proceedings in any state court. The shield law applies in all state courts and in some federal court cases. It also applies in judicial or "quasi-judicial" administrative, legislative and regulatory proceedings.

Unlike many states' shield laws, North Carolina's law applies in actions in which the journalist or media company is a party, such as libel actions.

Journalists who assert the shield law's protections cannot be compelled to give testimony or produce material without first receiving notice and an opportunity to be heard in court. Any order compelling a journalist to testify or produce material must include "clear and specific findings" regarding the need for the information or material sought.

### Who is protected by the shield law?

The protection applies to anyone, and any company, engaged in "gathering, compiling, writing, editing, photographing, recording or

processing information that is disseminated by any news medium." It covers print, broadcast and other electronic media. By its terms, the privilege appears broad enough to cover information sought from the "business side" of a newspaper or broadcaster. It also, by its terms, applies to independent contractors such as freelance writers.

### What types of information does the shield law protect?

North Carolina's broad shield statute covers nonconfidential as well as confidential information, as illustrated in the Carruth trial. It protects both published and unpublished information. It covers a reporter's notes, audio-recordings, story drafts, videotape recordings, photographs, outtakes of audio-recordings and videotapes, e-mails and other communications.

### Does the shield law always protect a reporter?

No. Because the shield statute creates a qualified privilege, not an absolute one, a court can compel a reporter to testify or produce documents if the party seeking the testimony or documents can demonstrate that: (1) the information or material sought is "relevant and material" to the legal proceeding concerned; (2) the information or material sought cannot be obtained from alternate sources; and (3) the information or material sought is essential to the maintenance of the subpoenaing party's claim or defense.

Suppose, for example, that an accident or other event covered by a newspaper engenders a civil lawsuit, and one of the parties subpoenas a reporter to testify about whether individuals quoted by name in a story actually made such comments. The reporter's

<sup>5</sup> See *Higgins v. Young*, 29 Media L. Rep. (BNA) 2528 (N.C. Super. Ct. 2001) (quashing subpoena to reporter in civil case); *State v. Peterson*, 31 Media L. Rep. (BNA) 2501 (N.C. Super. Ct. 2003) (quashing subpoenas to reporters for notes and testimony in murder case despite defendant's claim that information sought was from "eyewitnesses" and not protected by the qualified privilege); *State v. McLeod Oil Co.*, 34 Media L. Rep. (BNA) 1703 (2006) (quashing subpoena to television station for videotape of news interview program).

qualified privilege under the shield statute would apply, and the reporter would not be compelled to testify unless the attorney for the civil litigant demonstrated to the court: (1) that the information was relevant and material to the proceedings; (2) that there were no alternate sources for the information; and (3) that the information sought was essential to the subpoenaing party's case. In this case, the court should first require the subpoenaing party to attempt to obtain the information directly from the persons quoted in the story – not from the reporter.

A journalist does not, however, have a privilege against disclosure of any information, document or item obtained as a result of the journalist's eyewitness observations of criminal or tortious conduct. Tortious conduct is that which can result in civil liability and thus a civil lawsuit. A reporter who witnesses criminal or tortious activity, or a photographer who photographs or videotapes such activity, has no qualified privilege to withhold such information if subpoenaed to produce it. Finally, information obtained by a news reporter prior to Oct. 1, 1999, the effective date of the statute, is not subject to the statutory privilege. In the increasingly rare instance in which a reporter is subpoenaed to testify about newsgathering activity that occurred prior to Oct. 1, 1999, the statutory qualified privilege will not apply.

### **When is the First Amendment-based privilege important?**

Journalists subpoenaed in federal court in civil cases are protected by the state shield law only in cases where N.C. substantive law applies (such as cases in which the federal court's diversity jurisdiction has been invoked because the parties to the case are from different states). In other civil cases and in criminal cases in federal court, journalists

must rely on the First Amendment-based qualified privilege.

Although the shield law has made the First Amendment-based privilege less important in state court cases than it once was, it should not be overlooked altogether. While it appears to be strong, the shield law has only begun to be tested in court, and journalists might still need the First Amendment-based privilege.

### **What protection does the First Amendment provide?**

Federal judges in all three districts in North Carolina – the Western, Middle and Eastern Districts – have recognized and applied a qualified privilege for news reporters.<sup>6</sup> The Fourth Circuit Court of Appeals has also recognized the privilege. Journalists subpoenaed to testify do not have to testify or produce notes or records unless the party seeking the information can demonstrate: (1) that the information sought was relevant and material to the litigation; (2) that the information sought was necessary for the maintenance of the claim; and (3) that there were no alternative means of obtaining the required information.<sup>7</sup>

6 Penland v. Long, 922 F. Supp. 1080 (W.D.N.C. 1995); Miller v. Mecklenburg County, 602 F. Supp. 675 (W.D.N.C. 1985); Miller v. Mecklenburg County, 606 F. Supp. 488 (W.D.N.C. 1985); Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F. Supp. 1211 (M.D.N.C. 1996); Ashcraft v. Conoco, Inc., 1998 WI 404491, 26 Media L. Rep. (BNA) 1620 (E.D.N.C. 1998) *aff'd in part, rev'd in part*, 218 F.3d 288 (4th Cir. 2000).

7 LaRouche v. NBC, 780 F.2d 1134 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); Church of Scientology Int'l v. Daniels, 992 F.2d 1329 (4th Cir.), *cert. denied*, 510 U.S. 869 (1993); Ashcraft v. Conoco, Inc., 218 F.3d 288 (4th Cir. 2000). The scope of the qualified privilege in the Fourth Circuit is, however, unclear. In *In re Shain*, 978 F.2d 850 (4th Cir. 1992), decided before *Church of Scientology*, the court upheld a finding of contempt for the refusal of a reporter to testify about nonconfidential information, finding that in the absence of confidentiality or evidence of "vindictiveness" by the subpoenaing party the reporter had no privilege. Moreover, there is legitimate concern over the recent erosion of the First Amendment privilege in the federal courts generally. See, *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005) (finding no First Amendment privilege for reporters called to testify before grand jury).

In state courts, however, the picture is considerably less clear. No case involving the First Amendment-based privilege reached the state's appellate courts until the late 1990s. As a result of the N.C. Supreme Court's opinion in that case – *In re Owens*,<sup>8</sup> affirming the N.C. Court of Appeals' 1998 decision in *In re Owens*<sup>9</sup> – there is no constitutional privilege in North Carolina for reporters subpoenaed in criminal cases to provide nonconfidential information obtained from nonconfidential sources. Those decisions did not expressly reach the issue of whether a constitutional privilege exists in civil cases, or in cases in which a confidential source or confidential information is implicated. A short history of reporter's privilege in North Carolina will help to clarify this situation.

Since the first reported state trial court opinion in 1983, most N.C. trial courts had found that a news reporter subpoenaed to give testimony about confidential or nonconfidential information had a qualified privilege not to testify. That meant that the reporter did not have to testify unless the party seeking the information could demonstrate: (1) that the information sought was relevant and material to the litigation; (2) that the information sought was necessary for the maintenance of the claim; and (3) that there were no alternative means of obtaining the required information.

Experienced trial court judges regularly have applied the constitutional privilege in some of the state's toughest and most-celebrated cases. For example, Mecklenburg County Superior Court Judge Robert Johnston applied the reporter's privilege and quashed subpoenas to reporters from accused multiple-murderer Henry Wallace in 1995.<sup>10</sup> Cumberland County Superior Court Judge

Gregory Weeks applied the constitutional reporter's privilege to quash subpoenas in the trial of two men accused of killing Michael Jordan's father in 1995.<sup>11</sup> It has, in fact, been an exceedingly rare event for a North Carolina news reporter to be required to provide testimony or produce records when subpoenaed to do so.

In early 1997, Wake County Superior Court Judge Robert Farmer held a Raleigh television reporter in contempt of court and sentenced her to 30 days in jail for refusing to testify in a criminal case regarding nonconfidential information obtained from a nonconfidential source. Judge Farmer refused to find the existence of the First Amendment-based reporter's privilege, and thus he ruled that the prosecutor seeking the information did not need to demonstrate that it was relevant and necessary to his case or that it was unobtainable from other sources. After spending two hours in jail, Owens was released and appealed her criminal contempt conviction to the N.C. Court of Appeals. The Court of Appeals rejected the reasoning of dozens of courts in other jurisdictions that had recognized a constitutional privilege. It held that – at least in criminal cases where only nonconfidential information and nonconfidential sources were involved – neither the First Amendment nor the N.C. Constitution provided a reporter's privilege.<sup>12</sup> Owens appealed that decision to the N.C. Supreme Court, which heard oral argument in that case on Sept. 30, 1998. In the meantime, in light of the Court of Appeals' strongly worded opinion, N.C. reporters faced considerable uncertainty when served with subpoenas. In the early spring of 1999, after months of waiting for a decision by the state Supreme Court, the North Carolina Press Association and the North Carolina Association of Broadcast-

8 350 N.C. 656, 27 Media L. Rep. (BNA) 2340 (1999).

9 *In re Owens*, 128 N.C. App. 577.

10 *State v. Wallace*, 23 Media L. Rep. (BNA) 1473 (1995).

11 *State v. Demery*, 23 Media L. Rep. (BNA) 1958 (1995).

12 *In re Owens*, 128 N.C. App. 577 (1998).

ers decided to support the introduction and passage of a shield statute by the General Assembly. Despite the initial reluctance by some members of the media to seek a “special privilege” for journalists, at least until the Supreme Court had ruled, North Carolina Press Association lobbyist John Bussian led a savvy legislative effort. The proposed legislation moved quickly through the Senate and the House. Although it received some opposition from the state’s association of district attorneys while in conference committee, the bill passed and was signed into law on July 21, 1999, by then-Gov. James B. Hunt.

The fact that the statute does not apply to information gathered before Oct. 1, 1999, left the door ajar for some remaining disputes over the existence and scope of a reporter’s qualified privilege based on the First Amendment or the N.C. Constitution. For example, Elizabeth Chandler, a reporter for *The Charlotte Observer* who had covered the highly publicized civil litigation involving Charlotte Hornets owner George Shinn, was subpoenaed by Shinn’s attorney in April 1999 to testify at deposition and to produce her notes and all documents in her possession related to that state court case.<sup>13</sup> (Shinn’s counsel was simultaneously demanding that the newspaper remove her from coverage of the dispute.) She moved to quash the subpoena, and Superior Court Judge Timothy C. Patti heard that motion on July 15, 1999. He had still not ruled on July 23, when the N.C. Supreme Court, on its first opinion day since the shield statute was signed into law, affirmed the Court of Appeals’ 1998 decision in *Owens* in a one-sentence opinion noting the recent enactment of the shield law. On July 26, Judge Patti ruled that the constitutional reporter’s privilege applied and quashed the subpoena. He distinguished the Shinn-

Chandler matter from the *Owens* case, noting that the case before him involved a subpoena in a civil case that implicated confidential as well as nonconfidential sources. That order was not appealed.

### What other protections exist?

The U.S. attorney general has adopted strict policies limiting the issuance of subpoenas by U.S. Attorneys to members of the news media, subpoenas for telephone records of members of the news media, and with regard to the interrogation, indictment or arrest of members of the news media.<sup>14</sup> U.S. Attorneys must demonstrate to the attorney general that all reasonable attempts have been made to obtain information from alternative sources and obtain authorization from the attorney general before subpoenas are issued to reporters. The nature of the protection afforded by this policy is, however, questionable. The D.C. Circuit Court of Appeals held that the policy created “no enforceable right.” *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 975 (D.C. Cir. 2005). The decision as to whether a subpoena complies with the department’s policy thus lies solely in the discretion of the Attorney General.

### What else does a reporter need to know?

- Although there is necessarily some give and take between reporters and their lawyer-sources, reporters should be cautious about discussing their news gathering activities or previously published articles with lawyers or parties interested in that information. The lawyer may be engaging in discussion with the reporter to establish a basis for claiming that the reporter has waived any privilege

<sup>13</sup> *Shinn v. Price*, 27 Media L. Rep. (BNA) 2341 (N.C. Super. Ct. 1999).

<sup>14</sup> 28 CFR § 50.10 (1991).



under the shield statute or under the First Amendment.

- If a reporter is served with a subpoena, the reporter should immediately contact a supervising editor. (Don't tuck the subpoena into a drawer and wait until the day before your appearance is required to let your editor know!) The reporter and editor should promptly contact the newspaper's attorney. Remember that subpoenas for testimony (but not for documents) in state court actions may be served by a telephone call from the sheriff's department.<sup>15</sup>

- If a reporter who has been served with a subpoena fails to respond to it, the reporter may be held in contempt of court and subjected to civil or criminal penalties.

- If a reporter refuses a judge's order to testify, the reporter or her newspaper may be sentenced to civil or criminal contempt and/or subjected to jail time or fines. In an extreme case, which has never occurred in North Carolina, a reporter could be ordered to jail until he or she agrees to provide the information sought.

- If a reporter breaks a promise of confidentiality to a source, he should be mindful that courts in some jurisdictions have permitted a confidential source to sue reporters and publications that reveal the source's identity in violation of a pledge of confidentiality. Those cases have been based on breach of contract, promissory estoppel and other theories.<sup>16</sup>

15 N.C. GEN. STAT. § 1A-1, Rule 45(e).

16 *Ventura v. The Cincinnati Enquirer*, 246 F.Supp.2d 876 (S.D. Ohio 2003) (denying newspaper's motion to dismiss source's claims based on promissory estoppel and promissory fraud); *Huskey v. Nat'l Broad. Co., Inc.*, 632 F. Supp. 1282 (N.D. Ill. 1986); *Doe v. Am. Broad. Co.*, 543 N.Y.S.2d 455 (A.D. 1 Dept.), *appeal dismissed*, 74 N.Y.2d 945 (1989). The U.S. Supreme Court has held that the First Amendment does not protect reporters and news organizations in such situations. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991). Although there are no N.C. cases involving such breaches of confidentiality agreements by journalists, North Carolina does recognize the breach of contract and promissory estoppel theories

## Can the police search a newsroom with a search warrant?

The federal Privacy Protection Act<sup>17</sup> protects journalists against most searches of newsrooms by law enforcement officials. The Act generally prohibits federal, state and local law officials from searching for or seizing journalists' "work product materials" and documentary materials. Unless someone in the newsroom is involved in illegal activity, any warrant issued for the search of a newsroom is prohibited. If the purported criminal act is the communication of the information to be seized, the seizure is inappropriate unless the information deals with national defense, classified information, child pornography, sexual exploitation of children, or the sale of children. The act also permits searches of newsrooms for work product materials if seizure is necessary to prevent death or serious bodily injury; there is reason to believe that subpoenas would result in the destruction, alteration or concealment of information; if the newsroom has ignored orders to produce the information; or if there is reason to believe that delay would be against the interests of justice.<sup>18</sup> Every newsroom should have a readily accessible file memorandum on how to handle a surprise search warrant.

## Conclusions

Every North Carolina journalist should have a copy of the state's shield law and be well aware of what it does and does not pro-

that usually form the basis of these claims. While some courts decline to enforce reporter-source confidentiality agreements on public policy grounds, that is not the only possible result. See *Cohen v. Cowles Media Co.*, 457 N.W.2d 199 (Minn. 1990); *Ruzicka v. Conde Nast Publ'ns*, 999 F.2d 1319 (8th Cir. 1993). Note, however, that if a reporter is required by law – for example, by a court order – to reveal the identity of a source, the reporter would probably be immune from a suit despite breach of the agreement. See *Moon v. Jordan*, 390 S.E.2d 488 (S.C. App. 1990); *Pennsylvania State Shopping Plazas, Inc. v. Olive*, 120 S.E.2d 372 (Va. 1961).

17 42 U.S.C. § 2000aa (2000).

18 42 U.S.C. § 2000aa(b)-(c) (2000).

tect. You also should know your employer's policies regarding the use of confidential sources, and do not make promises of confidentiality you aren't prepared to keep – even if keeping it means going to jail or being subjected to fines imposed by the Court.

### **How to handle confidential sources: A checklist**

1) Don't promise confidentiality casually or needlessly. Many sources expect an agreement that a comment will not be attributed to them by name in an article, but they do not expect a reporter to promise absolute confidentiality. Unless you have discussed and agreed to absolute confidentiality, don't assume that a source expects you will never reveal his or her identity.

2) If a source requests confidentiality or wants to talk "off the record" or "on background," discuss what he or she means by those terms. Attempt to persuade the source not to require confidentiality as part of the bargain for information. Attempt to persuade the source to agree that any pledge of confidentiality will become void in the event a court orders disclosure and all available appeals are exhausted.

3) If you intend to promise confidentiality, do so clearly and negotiate limitations if possible. Don't leave yourself in a position of being uncertain whether you have promised confidentiality to a source.

4) If the source insists upon absolute confidentiality, make a determination in your own mind regarding whether the source would – if approached after a court ordered disclosure of his or her identity – be likely to release you from your pledge of confidentiality. Determine whether the source's asserted need for confidentiality is a matter of convenience, job security or personal safety.

5) Know your newspaper's or station's policy regarding confidential sources and abide by it. Note that even when the statutory or First Amendment qualified privilege is applied by a court, it can be overcome by a demonstration that the information sought is relevant, essential, and cannot be obtained from alternative sources. The court may then order the disclosure of the name of the confidential source and impose sanctions – jail and/or fines – on the reporter and the newspaper or broadcaster for failure to obey its order.

6) Before publication, determine how you would attempt to prove the truth of all statements in a story without reliance on the information provided by the source.

7) Determine whether a prosecutor or potential criminal or civil litigant would have alternative sources of the information you have obtained from the confidential source.

8) If you promise confidentiality, maintain it. Don't disclose the source's identity to anyone who has no compelling need to know, especially friends or family members. Don't disclose the identity of the source to your attorney unless your editor and the attorney agree that there is a need for the attorney to know.

9) If your newspaper or station has a policy about retaining notes and other documents related to stories, follow it. If your employer has no policy, use your common sense about the importance of those notes to the article, the quality of those notes and whether they would be helpful in the event of a libel suit. Don't include commentary or asides in your notes that you would be embarrassed to have read aloud to a jury.

10) Don't make a casual decision to disclose a confidential source for editorial

reasons. Such disclosure could subject the reporter and newspaper to liability for breach of contract or under some other legal theory, as noted above.

11) If served with a subpoena from a U.S. Attorney, check with your attorney to determine if the U.S. Attorney General's guidelines on when federal law enforcement officials may issue subpoenas to obtain information from reporters have been met.

12) Analyze facts of the criminal or civil litigation closely to bolster your argument that your confidential source or information is not crucial to the outcome of the litigation. Prepare to demonstrate to the court that there is other equivalent evidence available from other sources. Prepare to demonstrate that there are potential sources of the information that have not been investigated by the parties.

13) Should all else fail, pack your toothbrush and some good reading material and stand by your journalistic principles.

## N.C. Shield Law

§ 8-53.11. Persons, companies, or other entities engaged in gathering or dissemination of news.

(a) Definitions. The following definitions apply in this section:

(1) Journalist. -- Any person, company, or entity, or the employees, independent contractors, or agents of that person, company, or entity, engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium.

(2) Legal proceeding. -- Any grand jury proceeding or grand jury investigation; any criminal prosecution, civil suit, or related proceeding in any court; and any judicial or quasi-judicial proceeding before any administrative, legislative, or regulatory board, agency, or tribunal.

(3) News medium. -- Any entity regularly engaged in the business of publication or distribution of news via print, broadcast, or other electronic means accessible to the general public.

(b) A journalist has a qualified privilege against disclosure in any legal proceeding of any confidential or nonconfidential information, document, or item obtained or prepared while acting as a journalist.

(c) In order to overcome the qualified privilege provided by subsection (b) of this section, any person seeking to compel a journalist to testify or produce information must establish by the greater weight of the evidence that the testimony or production sought:

(1) Is relevant and material to the proper administration of the legal proceeding for which the testimony or production is sought;

(2) Cannot be obtained from alternate sources; and

(3) Is essential to the maintenance of a claim or defense of the person on whose behalf the testimony or production is sought. Any order to compel any testimony or production as to which the qualified privilege has been asserted shall be issued only after notice to the journalist and a hearing and shall include clear and specific findings as to the showing made by the person seeking the testimony or production.

(d) Notwithstanding subsections (b) and (c) of this section, a journalist has no privilege against disclosure of any information, document or item obtained as the result of the journalist's eyewitness observations of criminal or tortious conduct, including any physical evidence or visual or audio recording of the observed conduct.

Section 2. This act becomes effective October 1, 1999, and applies to information, documents, or items obtained or prepared while acting as a journalist on or after that date.

# Copyright Law

Just as you can own a car or a computer, you can also own the rights to a book, photograph or other work you have created. The difference is that your work is unique, a piece of intellectual property that is eligible for special treatment under federal law. Of course, that also means you cannot take someone else's entire creative work without permission or without paying for it. If you do, you may be violating copyright law.

The concept of intellectual property is grounded in the U.S. Constitution, which gives Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."<sup>1</sup>

That principle is the foundation of the most recent major overhaul of copyright law, the Copyright Act of 1976. That legislation includes a list of protections for copyright holders:

- To reproduce the work
- To prepare derivative works based on the original
- To distribute copies of the work to the public by sale or other transfer of ownership, or by rental, lease or lending
- To display the copyrighted work publicly
- To perform the copyrighted work publicly<sup>2</sup>

Copyright law prohibits others from taking your work and passing it off as their own or profiting from it without your permission.

Congress passed the first U.S. copyright law in 1790. It entitled authors to protect books, maps and charts for a renewable term of 14 years.<sup>3</sup> Later, musical compositions<sup>4</sup> and prints<sup>5</sup> joined the list of protected works. Inventions such as photography also required expansion of protection,<sup>6</sup> and technological advances continue to create new copyright disputes and questions.

Although copyright law has evolved over the years to provide protection for new types of works and new technologies, the bedrock principle of protecting the rights of authors of original works while fostering creativity by others holds true today. In the digital age, you can find a story or news photograph on the Internet and copy it with the click of a mouse, but you should not confuse easy access and instantaneous copying with legal permission to use, distribute or reproduce a work.

## What is protected by copyright?

Copyright protects "original works of authorship fixed in any tangible medium of expression ... from which they can be perceived, reproduced, or otherwise com-

<sup>1</sup> U.S. CONST. art. I, § 8.

<sup>2</sup> 17 U.S.C. § 101 et. seq.

<sup>3</sup> 1 Stat. 124 (1790).

<sup>4</sup> 4 Stat. 436 (1831).

<sup>5</sup> 2 Stat. 171 (1802).

<sup>6</sup> 13 Stat. 540 (1865).



municated.”<sup>7</sup> This definition includes books, newspapers, magazines, movies, screenplays, songs, drawings, graphics, paintings, photographs, sculptures, annual reports, newsletters, computer programs, animations, TV shows, podcasts, blogs and Web pages. The requirement of “originality” does not mean that a work has to be unique, special or groundbreaking. An author need only have independently created the work with some measure of intellectual effort.<sup>8</sup>

Copyright law protects the expression of an idea, not the idea itself. Nor does it protect the facts that a work contains. Instead, it protects the specific way in which those ideas and facts are expressed. This means, for example, that no one can “own” the facts described in a news story or the artistic concept reflected in a photograph.

If a work is copyrighted, you cannot use it unless you either get permission or exercise your right of “fair use” (more on that later). In order to get proper permission you will have to locate the owner of the copyright, obtain written permission and, in most cases, pay whatever license fee the owner demands.

### What isn’t protected?

An idea, a fact and a mathematical formula are among the things that cannot be protected by copyright.<sup>9</sup> Once a copyright has expired, the work is in the public domain and is no longer eligible for protection. Documents produced by the federal government are in the public domain upon their creation.

In North Carolina, government documents such as the state constitution, statutes,

bills<sup>10</sup> and court rulings<sup>11</sup> are also in the public domain. The General Assembly has enacted only two statutes that could be interpreted as allowing state or local government records to be outside the public domain.<sup>12</sup>

It’s important for journalists to remember that story ideas are not protected. That means a rival newspaper and broadcast station can use your story as the basis for their own reporting on the same topic. They can use the same set of facts and ideas, so long as they don’t express them in the same way you did.

### When does a work become protected?

A work is protected at the moment it is fixed in a tangible medium of expression from which someone can perceive, communicate or reproduce it, such as on a piece of paper, a hard drive, a CD, the back of a napkin, a memory card, a canvas, an audiotape, a videotape or a piece of photographic film.<sup>13</sup> A work that is still in your head cannot be copyrighted.

### How long is a work protected?

A work created by an individual is protected for the life of the author plus 70 years. Calculating the length of protection gets more complicated for works for hire or works created anonymously or under a pseudonym. The situation gets even more complicated for

7 17 U.S.C. § 102.

8 *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 23 S. Ct. 298 (1903).

9 17 U.S.C. § 102(b).

10 Interview by Kristin Simonetti with Jane Basnight, reference librarian, N.C. Legislative Library (Oct. 11, 2006).

11 *Op. Att’y Gen.*, Newkirk (March 16, 1994).

12 The North Carolina Real Estate Commission “may claim the copyright to written materials it creates and may charge fees for publications and programs.” N.C. GEN. STAT. §93A-3(f). The Agency for Public Telecommunications “[h]as the powers of a body corporate, including the power to sue and be sued, to make contracts, to hold and own copyrights and to adopt and use a common seal and to alter the same as may be deemed expedient.” N.C. GEN. STAT. § 143B-426.11.

13 17 U.S.C. § 102.

works created before 1978 because of significant changes to copyright law in the 1970s. See the chart in the appendix to see how long those works are protected.

### **How do I know whether something is in the public domain?**

After a copyright expires, a work is in the public domain and can be used by anyone for any purpose, but determining whether a work is in the public domain isn't always easy. The U.S. Copyright Office does not maintain a searchable list online, but it will investigate the status of a particular work for you at a cost of \$150 an hour. A search can take up to six weeks to complete.<sup>14</sup> If you are in doubt about whether a song, book or other work is in the public domain, it is best to assume that it is not.

### **Are news photographs, graphics and illustrations protected?**

Photos, graphics, illustrations and caricatures are protected, but the ideas they embody and the things they illustrate are not. For example, a photographer's image of a lovely sunset at the beach is protected by copyright. That doesn't mean, however, that other photographers can't go to the same site at the same time of day to capture a similar image.

### **Are advertisements protected?**

Although commercial speech is sometimes treated differently from news under the First Amendment, advertising is protected under copyright law. Ad copy and visuals

<sup>14</sup> U.S. Copyright Office, "How to Investigate the Copyright Status of a Work" Circular 22 (2006), available at <http://www.copyright.gov/circs/circ22.html>.

in advertising are protected. Typically, the copyright to an advertisement is owned by the company that paid for the ad.

### **Can I copyright my catchphrases or the names of newspaper columns?**

No, but it may be possible to protect such names under trademark law, another area of intellectual property law. Federal law recognizes trademarks as "any word, name, symbol or device or combination thereof, adopted and used by a manufacturer or merchant to identify its goods and distinguish them."<sup>15</sup> Some phrases and names can be trademarked,<sup>16</sup> but generic terms cannot. For example, an Internet service provider may not trademark "buddy list" because it is an everyday term. For more on trademark, including a database of registrations, go to the Patent and Trademark Office site at [www.uspto.gov](http://www.uspto.gov).

### **Who owns the copyright to a reporter's story?**

A news organization owns the copyright for all "works for hire" – i.e., works created by its regular staff reporters, photographers and graphic artists within the scope of their employment.<sup>17</sup>

### **Who owns the copyright to a freelancer's work?**

Freelance writers and photographers own the copyright to their works unless and until they execute an agreement that assigns the copyright to a newspaper, magazine or

<sup>15</sup> 15 U.S.C. § 1121.

<sup>16</sup> See, e.g., *Carson v. Here's Johnny Portable Toilets*, 698 F.2d. 831 (6th Cir. 1983).

<sup>17</sup> U.S. Copyright Office, "Works Made for Hire Under the 1976 Copyright Act" Circular 9 (2004), available at <http://www.copyright.gov/circs/circ09.pdf>.

other publisher. Such agreements customarily specify whether the copyright assignment is exclusive or non-exclusive, the geographic scope of the assignment and the forms in which the publisher may reproduce the work. Freelance writers, artists and photographers should exercise care in negotiating copyright assignments.

### **What about freelance work in online databases and archives?**

A publisher who acquires the right to publish a freelancer's work in a newspaper, magazine or on a Web site may not reproduce the work in an electronic database unless the agreement signed by the author clearly grants permission. In deciding a 2001 case about this issue, the U.S. Supreme Court ruled that including a freelancer's work in electronic databases was not equivalent to including such a work in microfilm or microfiche copies of a newspaper or magazine.<sup>18</sup> In microfilm copies, the work remains in context on the page and as part of a collective work. In a text-only database, however, the freelancer's work is removed from its context within a page layout and is no longer part of a larger collective work. The freelancer retains the copyright in this individual work divorced from its context, unless the freelancer's contract with a publisher provides otherwise.

### **When is copyright registration necessary? How is it done?**

Copyright registration is not required for a work to be protected. A work is protected at the time of its creation, and a copyright symbol is not necessary.<sup>19</sup> Copyright registration,

however, is necessary to pursue an infringement case. This can be done retroactively through the U.S. Copyright Office. The cost is \$45.<sup>20</sup>

### **What is copyright infringement?**

Infringement is the unlawful use of a copyrighted work without permission. The copyright holder must prove that (1) his or her work is original (show copyright certificate, for example) and (2) that the defendant copied the work without permission.<sup>21</sup> Most copyright cases are civil lawsuits, but criminal charges occasionally are brought, such as in cases of DVD piracy. The Copyright Office does not enforce copyright law, but its records can be used as evidence to support an infringement claim. In order to prevail on an infringement claim the copyright owner does not have to prove that the work in question was copied precisely. Except in "piracy" cases, such direct copying seldom occurs. Infringement most often is shown by proving that the alleged infringer had access to the copyrighted work and that the alleged copy is substantially similar to the copyrighted work.<sup>22</sup>

### **What is fair use?**

A "fair use" is the use of a work that is allowed under copyright law without first getting permission from its owner or paying royalties. Fair use typically involves copying of limited portions of a copyrighted work for purposes such as criticism, commentary, news reporting, teaching, scholarship or research.

18 *Tasini v. New York Times Co.*, 533 U.S. 483, 121 S. Ct. 2381 (2001).

19 U.S. Copyright Office, "Copyright Notice" Circular 3 (2004), available at <http://www.copyright.gov/circs/circ03.html>.

20 U.S. Copyright Office, "Copyright Office Fees" Circular 4 (2006), available at <http://www.copyright.gov/circs/circ04.html#fees>.

21 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01[A], at 13-6 (1999).

22 *Id.* § 13.01[B], at 13-12.

Fair use is important to journalists because it allows them to quote from works and discuss them without obtaining permission from the copyright owners. For example, fair use allows critics to quote from books, songs and movies that they are reviewing without fear of infringement. It allows commentators and columnists to write parodies of a work by conjuring up enough of the original work so readers will understand the humor.<sup>23</sup> It also allows a newspaper, magazine or Web site to reproduce an image from a television advertisement in a news story about Super Bowl™ advertising. The idea behind the fair-use doctrine is to balance the rights of the copyright owner and the rights of others to comment and excerpt the work in the interest of sharing and discussing it.

The outcome of a legal battle over fair use can be hard to predict. Courts consider four factors when deciding whether use of a work qualifies as a fair use:

- the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.<sup>24</sup>

Courts resolve fair use issues by first deciding whether each factor favors a finding of fair use and then making an overall determination whether the use is a fair one. The first factor focuses on the purpose and character of the unauthorized use. The least fair (or most unfair) purpose is simply reproducing a work without adding any new creative effort.

If the use is for a purely commercial purpose, such as copying a photograph on a T-shirt or a calendar offered for sale, the first factor will weigh against fair use. However, if the use is for a largely educational or informational purpose – such as producing criticism, commentary, news reporting, teaching, scholarship or research to share knowledge – then this factor will weigh in favor of fair use.<sup>25</sup>

The second factor in the fair-use analysis examines the nature of the copyrighted work. Courts consider such qualities as whether the work is fictional or factual, how much effort its creation required, and how available it is. If the original work is of a largely creative or imaginative nature, such as a painting, novel or song, the second factor will tend to weigh against a finding of fair use. On the other hand, if the original work is primarily factual, such as a news story, biography or textbook, this factor will weigh in favor of a fair use.<sup>26</sup> Also, if the original work is as yet unpublished and therefore unavailable, an unauthorized use of it is much less likely to be considered a fair use than a similar use of a work that was published several years ago and is widely available.<sup>27</sup>

The third factor compares the portion of the work that is used, in terms of both quantity and quality, to the original work. If the amount used is quantitatively and/or qualitatively substantial, the third factor will weigh against fair use.<sup>28</sup> The more you copy from a work, the less likely your use is to be considered a fair use. Quoting a few lines from a 500-page book may be fair, but quoting half the lyrics in a pop song probably is not. Qualitatively, quoting the best parts of a book without permission — the “heart of the

23 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S. Ct. 1164 (1994).

24 17 U.S.C. § 107.

25 See *NIMMER & NIMMER*, *supra* note 20 § 13.05[A], at 13-154.

26 See *id.* § 13.05[A][2][a] at 13-169.

27 *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 105 S. Ct. 2218 (1985).

28 See *NIMMER & NIMMER*, *supra* note 20 § 13.05[A][3], at 13-178.

book” — is unlikely to be fair.<sup>29</sup>

If the use harms the value of or potential market for the original — for example, publishing excerpts from an upcoming tell-all book without permission — the fourth factor will not favor fair use<sup>30</sup> because the publisher will have lost the ability to sell those excerpts to a magazine of its choice.<sup>31</sup> If there is little or no risk of harm to the potential market for the original work, a court is more likely to allow the use. For example, when an artist complained that use of images of his artwork in a political pamphlet was not a fair use, a court rejected his claim, largely on the grounds that the pamphlet posed no threat to his ability to sell his artwork.<sup>32</sup>

Incidental or “fortuitous” uses are also permissible. For example, a copyrighted artwork may appear in the background of a photograph of a news event. In such situations, there is no copyright violation.<sup>33</sup>

### How much copying is too much under fair use?

No quick and easy answer exists. “There are no legal rules permitting the use of a specific number of words, a certain number of musical notes, or percentage of a work,” the Copyright Office says.<sup>34</sup> You have to compare the amount you want to use against the whole work; using a large proportion may be unfair. You also have to consider whether you want to use the key part of the work; doing so may be unfair. The Copyright Office does not offer advice on individual situations on what is or

is not a fair use.

### If something is on the World Wide Web, is it in the public domain?

Not necessarily. Because it is so easy to copy and post information on the Internet, many Web sites contain copyrighted material. For example, a Google search will easily turn up the famous photograph of murder victim JonBenet Ramsey in a pink sweater. But the photo agency that controlled the rights to the image objected when newspapers and Web sites published it in the summer of 2006. The objection prompted The Associated Press and other wire services to withdraw the Ramsey photo.<sup>35</sup>

On the other hand, some sites such as Creative Commons ([creativecommons.org](http://creativecommons.org)) allow users to access creative works that can be used under conditions more liberal than those dictated by copyright law. Such sites can be useful for looking for an image of the Empire State Building that you can use without permission and without violating copyright law, for example.

### How is plagiarism different from copyright?

They are similar, but plagiarism raises ethical concerns, rather than legal ones. Taking someone’s work and claiming it as your own is a significant violation of newsroom ethics that usually results in dismissal and often ends the offender’s career. Accusations of plagiarism can become legal matters in the form of lawsuits over copyright infringement. Unlike copyright law, plagiarism also can include the ethical violation of present-

29 471 U.S. 539 (1985).

30 See NIMMER & NIMMER, *supra* note 20 § 13.05[A][4], at 13-179.

31 471 U.S. 539 (1985).

32 *Wojnarowicz v. American Family Ass’n*, 745 F. Supp. 130, 145 (S.D.N.Y. 1990).

33 U.S. Copyright Office, “Fair Use” FL-102 (2006), available at <http://www.copyright.gov/fls/fl102.html>.

34 *Id.*

35 Al Tompkins, *Story Behind the Picture: Who Owns JonBenet Photos?*, POYNTER ONLINE (Aug. 28, 2006), at [http://www.poynter.org/content/content\\_view.asp?id=106490](http://www.poynter.org/content/content_view.asp?id=106490).



ing someone else's idea, opinion or theory in your own words, as if it were your own – that is, without appropriate attribution or citation.

### Where to get help:

**Site:** U.S. Copyright Office Home Page

**Address:** [www.copyright.gov](http://www.copyright.gov)

**What's There:** The U.S. Copyright Office site offers a wealth of information about copyright, including forms, .pdf files on copyright law and links to current legislation.

**Site:** Nolo

**Address:** [www.nolo.com](http://www.nolo.com)

**What's There:** This legal-help site includes a deep section on copyright, and it's written in a straightforward way. Nolo also publishes relevant books such as "The Public Domain: How to Find Copyright-Free Writings, Music, Art & More."

**Site:** Creative Commons

**Address:** [creativecommons.org](http://creativecommons.org)

**What's There:** This site encourages the sharing of text, images and audio. Visitors can search for works they would like to use, and the creators of those works follow a "some rights reserved" model that permits uses in certain situations.

## When U.S. Works Pass Into the Public Domain

DATE OF WORK	PROTECTED FROM	TERM
Created 1-1-78 or after	When work is fixed in tangible medium of expression	Life + 70 years <sup>1</sup> (or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation <sup>2</sup> )
Published before 1923	In public domain	None
Published from 1923 - 63	When published with notice <sup>3</sup>	28 years + could be renewed for 47 years, now extended by 20 years for a total renewal of 67 years. If not so renewed, now in public domain
Published from 1964 - 77	When published with notice	28 years for first term; now automatic extension of 67 years for second term
Created before 1-1-78 but not published	1-1-78, the effective date of the 1976 Act, which eliminated common law copyright	Life + 70 years or 12-31-2002, whichever is greater
Created before 1-1-78 but published between then and 12-31-2002	1-1-78, the effective date of the 1976 Act, which eliminated common law copyright	Life + 70 years or 12-31-2047, whichever is greater

1 Term of joint works is measured by life of the longest-lived author.

2 Works for hire, anonymous and pseudonymous works also have this term. 17 U.S.C. § 302(c).

3 Under the 1909 Act, works published without notice went into the public domain upon publication. Works published without notice between 1-1-78 and 3-1-89, effective date of the Berne Convention Implementation Act, retained copyright only if efforts to correct the accidental omission of notice was made within five years, such as by placing notice on unsold copies. 17 U.S.C. § 405. (Notes courtesy of Professor Tom Field, Franklin Pierce Law Center and Lolly Gasaway)

Reprinted courtesy of Lolly Gasaway, UNC School of Law

# Advertising Regulation

The North Carolina General Statutes and Administrative Code include numerous provisions that regulate advertisements published in North Carolina. The statutes generally prohibit false, misleading and deceptive advertising but exempt media outlets from liability merely for disseminating violative advertisements in which they have no financial interest. In some circumstances, however, the statutes provide for media liability for disseminating advertisements that violate other provisions in the law.

This chapter covers some of the most important state laws that regulate advertising in North Carolina in a number of selected contexts. Although federal statutes and rules also regulate advertising in a variety of important ways and often cover advertising that also is regulated under state laws, detailed analysis of federal advertising regulation is beyond the scope of this chapter. Instead, the chapter includes some of the key federal statutes and rules that apply in contexts in which few or no state laws apply. The chapter first covers the media exemption for publishing false, misleading or deceptive advertising and then covers advertising regulations in the specific contexts of adoptions and child care services; alcoholic beverages; drug paraphernalia; employment; fireworks; food, drugs and cosmetics; gaming including lotteries, raffles, bingo games and prize-giveaways; housing sales and rentals; legal notices; political candidates and ballot measures; tobacco products; and wholesale, close-out sales and distress sales.

## When are media outlets liable under state statutes for publishing false, misleading or deceptive ads?

Generally, in North Carolina, publishers, owners, agents and employees of newspapers, periodicals, broadcast stations and other media outlets that publish or disseminate advertisements to the public cannot be held liable under state statutes for publishing or disseminating false, misleading or deceptive advertisements on behalf of third-party advertisers.<sup>1</sup> However, the exemption does not apply when a “publisher, owner, agent, or employee” of the media outlet had knowledge of the “false, misleading or deceptive character” of the advertisement but published it anyway.<sup>2</sup> In addition, the exemption does not apply when the media outlet has a “direct financial interest in the sale or distribution of the . . . product or service” that was advertised in a false, misleading or deceptive manner.<sup>3</sup> Anyone who claims exemption from liability for publication of a false, misleading or deceptive advertisement has the burden of proving that the statutory exemption indeed applies.<sup>4</sup>

North Carolina does not have a state trade commission that regulates false, misleading and deceptive advertising as do many other states. However, the Federal Trade Commission (FTC) has jurisdiction to regu-

<sup>1</sup> N.C. GEN. STAT. § 75-1.1(c).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at (d).

late much of the advertising that is published and disseminated in North Carolina. Although FTC regulation of advertising is beyond the scope of this chapter, it is important to note that there is no specific exemption from federal liability for media outlets that engage in unfair or deceptive acts or practices in commerce as regulated by the FTC including the dissemination of deceptive advertising.<sup>5</sup> The FTC defines “deception” as any “representation, omission or practice that is likely to mislead the consumer acting under reasonable circumstances, to the consumer’s detriment”<sup>6</sup> and describes “unfairness” as an act or practice that causes – or is likely to cause – substantial consumer injury that cannot be reasonably avoided by consumers and is not outweighed by countervailing consumer benefits.<sup>7</sup>

Recently, the FTC has suggested that media outlets may be held liable for disseminating false or deceptive advertisements in some circumstances. In one particular advertising category – weight loss advertising – the FTC has published guidelines for media outlets and listed specific claims the FTC deems false or deceptive. A media reference guide for reviewing and accepting weight loss advertisements is available online at the FTC website at <http://www.ftc.gov/redflag>.

### **What are the statutory restrictions on adoption and child care services advertising in North Carolina?**

**Adoptions.** The North Carolina General Statutes regulate adoption advertising

in public media like newspapers, periodicals and broadcast outlets. Only county departments of social services, “adoption facilitators” and “agencies” licensed by the North Carolina Department of Health and Human Services may advertise in public media to “place or accept a child for adoption.”<sup>8</sup> The statutes define an “adoption facilitator” as “an individual or a nonprofit entity that assists biological parents in locating and evaluating prospective parents without charge.”<sup>9</sup> An “agency” is defined statutorily as “a public or private association, corporation, institution, or other person or entity” that can legally “place minors for adoption” under the laws of the jurisdiction in which the agency operates.<sup>10</sup> Licensed out-of-state adoption agencies offering to accept or place children for adoption are not expressly prohibited from placing advertisements in North Carolina.

In addition, under the statutes, before an individual seeking a child to adopt can lawfully advertise in any print or broadcast media outlet in North Carolina, or on the Internet, the individual must have been assessed by a state-approved adoption agency and found “suitable” to adopt a child.<sup>11</sup> In such a case, the advertisement must state that the person seeking a child to adopt “has a completed preplacement assessment” and was found “suitable to be an adoptive parent,” and the advertisement must include the name of the agency that completed the assessment and the date the assessment was completed.<sup>12</sup> The advertisement may state that the person seeking a child to adopt is willing to pay statutory expenses related to the adoption including birth-related medical, hospitalization and travel expenses, and legal expenses related to the adoption, among others per-

5 Federal statutes prohibit “unfair or deceptive acts or practices in or affecting commerce” and empower the FTC to enforce this prohibition against all “persons, partnerships, or corporations” except for certain entities like banks, savings and loans, federal credit unions, and airlines. 15 U.S.C. § 45(a)(1)-(2).

6 FTC Policy Statement on Deception, <http://www.ftc.gov/bcp/policystmt/ad-decpt.htm> (Oct. 14, 1983).

7 FTC Policy Statement on Unfairness, <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm> (Dec. 17, 1980).

8 N.C. GEN. STAT. ANN. § 48-10-101(b).

9 N.C. GEN. STAT. § 48-1-101(3a).

10 *Id.* at (4).

11 N.C. GEN. STAT. § 48-10-101(b1).

12 *Id.*

mitted by statute.<sup>13</sup>

Anyone who violates state adoption advertising requirements is subject to criminal misdemeanor charges.<sup>14</sup> However, the statutes do not indicate whether media outlets can be prosecuted for publishing adoption advertisements that fail to comply with the law. Nonetheless, the statutes broadly authorize district courts to enter injunctions to prohibit anyone from violating state restrictions on placement and advertising in connection with adoptions.<sup>15</sup>

**Child care services.** North Carolina also prohibits anyone from offering child care to the public without first complying with state child welfare statutes.<sup>16</sup> Under these statutes, “child care” means:

A program or arrangement where three or more children less than 13 years old, who do not reside where the care is provided, receive care on a regular basis or at least once per week for more than four hours but less than 24 hours per day from persons other than their guardians or full-time custodians, or from persons not related to them by birth, marriage, or adoption.<sup>17</sup>

Under these provisions, an advertisement for childcare services as defined in the statutes must include the identifying number that is on the provider’s required state license or letter of compliance.<sup>18</sup>

## How does the state regulate advertising for alcoholic beverages?

North Carolina requires by statute that all alcoholic beverage advertising in the state comply with rules promulgated by the North Carolina Alcoholic Beverages Control (ABC) Commission.<sup>19</sup> In its rules, the ABC Commission defines “advertising” as publicizing “alcoholic beverages by brand name, manufacturer’s name or by other reference” and also includes publicizing the “trade name” of a retailer in connection with the licensed sale of alcoholic beverages.<sup>20</sup> However, regulated advertising under the rules excludes editorial content “for which no money or other valuable consideration is paid or promised, directly or indirectly” by anyone subject to the jurisdiction of the ABC Commission.<sup>21</sup>

**False and misleading claims.** The ABC Commission rules generally prohibit “any statement, design, device or representation

19 N.C. GEN. STAT. § 18B-105(b). The statute gives the ABC Commission specific authority to enact rules that:

- (1) Prohibit or regulate advertising of alcoholic beverages by permittees in newspapers, pamphlets, and other print media;
- (2) Prohibit or regulate advertising by on-premises permittees of brands or prices of alcoholic beverages via newspapers, radio, television, and other mass media;
- (3) Prohibit deceptive or misleading advertising of alcoholic beverages;
- (4) Require all advertisements of alcoholic beverages to disclose fully the identity of the advertiser and of the product being advertised;
- (5) Prohibit advertisements of alcoholic beverages on the premises of a permittee, or regulate the size, number, and appearance of those advertisements;
- (6) Prohibit or regulate advertisement of prices and alcoholic beverages on the premises of a permittee;
- (7) Prohibit or regulate alcoholic beverage advertisements on billboards;
- (8) Prohibit alcoholic beverage advertisements on outdoor signs, or regulate the nature, size, number, and appearance of those advertisements;
- (9) Prohibit or regulate advertising of alcoholic beverages by mail;
- (10) Prohibit or regulate contests, games, or other promotions which serve or tend to serve as advertisement for a specific brand or brands of alcoholic beverages; and
- (11) Prohibit or regulate any advertising of alcoholic beverages which is contrary to the public interest.

*Id.* The term “permittee” is defined in the rules as any person to whom the ABC Commission has issued a “permit,” which means a “written or printed authorization to engage in some phase of the alcoholic beverage industry.” 4 N.C. ADMIN. CODE 2R.0103(8)-(9).

20 4 N.C. ADMIN. CODE 2S.1001(2).

21 *Id.* at (2)(b).

13 See *id.* See also N.C. GEN. STAT. § 48-10-103.

14 N.C. GEN. STAT. § 48-10-101(c).

15 *Id.* at (d).

16 N.C. GEN. STAT. § 110-98(1).

17 N.C. GEN. STAT. § 110-86. There are various exemptions to this definition of regulated “child care” including public schools, Bible schools when “conducted during vacation periods,” and “[c]operative arrangements among parents to provide care for their own children as a convenience rather than for employment,” among others. *Id.* at (2)a-j.

18 N.C. GEN. STAT. § 110-98(2).



that is false or misleading in any material particular” in alcoholic beverage advertising.<sup>22</sup> Specific provisions in the rules restrict the use of “analysis, standards or tests” to advertise alcoholic beverages in any manner that is likely to be misleading to consumers.<sup>23</sup> In addition, advertising must not falsely represent that an alcoholic beverage product was made or imported from someplace other than the place of “actual origin” or “was produced or processed by one who was not in fact the actual producer or processor.”<sup>24</sup> Any guaranties that are offered to consumers in alcoholic beverage advertising must be presented in a non-misleading manner such as “We will refund the purchase price to the purchaser if he is in any manner dissatisfied with the contents of this package.”<sup>25</sup>

Provisions in the ABC Commission rules generally prohibit false or misleading statements or implications relating to the government in alcoholic beverage advertising. For instance, an advertising claim that an alcoholic beverage was “produced, blended, made, bottled, packed or sold under or in accordance with any authorization, law or regulation” of any government or branch of government – domestic or foreign – is prohibited unless the statement is required or specifically authorized by the governmental entity mentioned in the advertisement.<sup>26</sup> Also, if a government-issued permit number is included in alcoholic beverage advertising, the rules prohibit “any additional statement” that comments on that number.<sup>27</sup>

Similarly, the ABC Commission rules prohibit alcoholic beverage advertising that includes a government-related symbol like a “flag, seal, coat of arms, crest or other insignia” when “likely to mislead” consumers into believing erroneously that the beverage being advertised has been “endorsed, made or used by, produced for or under the supervision of or in accordance with the specifications of the government [entity]” associated with the particular symbol displayed in the advertisement.<sup>28</sup> The rules also prohibit “any statement, design, device or pictorial representation of or relating to or capable of being construed as relating to the armed forces of the United States or the American Flag, state flag, or any emblem, seal, insignia or decoration associated with any such flag of armed forces of the United States.”<sup>29</sup>

**Athletes and claims of athleticism.** The ABC Commission rules restrict advertising claims that are likely to mislead consumers into believing there is a positive correlation between alcoholic beverage consumption and athletic performance. For instance, the rules specifically prohibit alcoholic beverage advertising that includes a “statement, picture or illustration” that implies to readers that “consumption of alcoholic beverages enhances athletic prowess.”<sup>30</sup> In addition, the rules prohibit any “statement, picture or illustration referring to any known athlete” that implies to readers that using the advertised alcoholic beverage “contributed to [the] athlete’s athletic achievements.”<sup>31</sup>

**Price advertising.** Retailers that hold an ABC Commission permit to sell malt beverages and wine may advertise the price and brand of these products for sale in newspapers, circulars and magazines, and also on

28 *Id.* at (16). The alcoholic beverage rules also prohibit the use of such symbols that are associated with an “organization[,]” a “family” or an “individual” when the use of the symbol is “likely to mislead” consumers into falsely concluding that the organization, family or individual either makes, uses or endorses the product or otherwise supervises or provides specifications for the manufacturer of the product. *Id.*

29 *Id.*

30 *Id.* at (a)(7).

31 *Id.*

22 4 N.C. ADMIN. CODE 2S.1005(a)(1).

23 4 N.C. ADMIN. CODE 2S.1005(a)(4).

24 *Id.* at (a)(15).

25 *Id.* at (a)(5).

26 *Id.* at (a)(6).

27 *Id.*

radio and television.<sup>32</sup> Otherwise, the rules prohibit alcoholic beverage manufacturers, bottlers, importers, vendors, representatives and wholesalers from advertising the price of any malt beverage or wine product for sale.<sup>33</sup> Bars, taverns and others that hold an ABC Commission permit to sell mixed drinks may advertise their drink prices in print and broadcast media as long as their advertisements do not reference a particular spirituous liquor brand or company name in any manner.<sup>34</sup> The constitutionality of state restrictions on truthful, non-misleading price advertising for lawful alcoholic beverages is at least questionable, however. In a case decided in 1996, the U.S. Supreme Court held that a Rhode Island statute that banned truthful, non-misleading price advertising for lawful alcoholic beverages sold by retailers, manufacturers, wholesalers and shippers violated the First Amendment and could not be constitutionally enforced.<sup>35</sup>

***Promotions, discounts and other special offers.*** Unless exempted under the rules, promotions sponsored by alcoholic beverage manufacturers, bottlers, importers, vendors, representatives and wholesalers must be approved by the ABC Commission in advance.<sup>36</sup> The rules define a “promo-

tion” to include “any advertising, publicity or sponsorship activity in connection with any special event, function or holiday that is outside the scope of routine sales and marketing” and gives such examples as “fundraisers, concerts, sporting events, festivals, celebrations, anniversaries, ceremonies, operations, observances, sweepstakes [and] contests.”<sup>37</sup> The approval process for such promotions includes submission of “copies of broadcast and print advertisements” by the sponsor at least two months in advance of the scheduled promotion.<sup>38</sup> However, under no circumstances may alcoholic beverage advertising promote a game of chance or a lottery.<sup>39</sup>

Alcoholic beverage advertisements may not include “[c]ents-off coupons” or “coupons offering free alcoholic beverages” under the ABC Commission rules.<sup>40</sup> In addition, those who hold permits to sell alcoholic beverages for on-premises consumption like bars and taverns may not advertise drink specials such as “2 for 1,” “buy 1 get 1 free” or “any other similar statement indicating that a patron must buy more than one drink.”<sup>41</sup> The rules also generally prohibit alcoholic beverage manufacturers, bottlers, importers, vendors, representatives, wholesalers and retailers from “promot[ing] an alcoholic beverage product by giving prizes, premiums or merchandise to individuals for which any purchase of alcoholic beverages is required or based on the return of empty containers.”<sup>42</sup>

32 4 N.C. ADMIN. CODE 2S.1008 (d).

33 4 N.C. ADMIN. CODE 2S.1009(e). The rules, however, allow wholesalers to provide a “wholesale price list that contains the brand names and prices of his products to retail permittees.” *Id.*

34 4 N.C. ADMIN. CODE 2S.1010(c)(1)-(2). In addition, under the rules, mixed beverage permittees cannot “accept or utilize any spirituous liquor advertising material produced or provided by a distiller, importer or rectifier of spirituous liquor, or representative thereof.” *Id.* at (c)(2).

35 See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996). The statutory ban applied to malt beverages, cordials, wine and distilled liquor. *Id.* at 490. Also, other statutory provisions at issue in the case specifically prohibited media outlets in the state from accepting any price advertising for alcoholic beverages. *Id.*

36 4 N.C. ADMIN. CODE 2R.0103(a)(7) (defining “industry member”) and 2T.0717(a) (requiring advance approval by the ABC Commission of promotions sponsored by an “industry member”). The rules exempt from the approval process specified activities including certain sponsorships of non-profit organizations, approved point-of-sale advertising, promotions that occur on a “regular basis” in a similar format that already has been approved by the ABC Commission, and sponsorship of amateur sports teams so long as

the teams are not composed of employees of the alcoholic beverage-related sponsor. See 4 N.C. ADMIN. CODE 2T.0717(a)(1)-(4). For purposes of this rule, the term “point-of-sale advertising” is defined in the rules as “advertising material such as signs, posters, banners, and decorations that bears conspicuous and substantial product advertising matter, that has no secondary value to the retailer, and that is designed and intended to be used inside a retailer’s licensed premises where alcoholic beverage products are displayed and sold.” 4 N.C. ADMIN. CODE 2T.0702(2).

37 4 N.C. ADMIN. CODE 2T.0702(3).

38 4 N.C. ADMIN. CODE 2T.0717(b)(7), (f).

39 4 N.C. ADMIN. CODE 2S.1005(a)(9).

40 *Id.* at (a).

41 See 4 N.C. ADMIN. CODE 2S.0232 and 2S.1006(f).

42 4 N.C. ADMIN. CODE 2S.1006(e). There is an exception for the return of empty containers when “all containers of like products are

The ABC Commission rules allow refunds including rebates of money or merchandise in connection with the purchase of spirituous liquor products when the offer is made by a “manufacturer, importer, distiller, rectifier or bottler of spirituous liquor.”<sup>43</sup> The rules allow these refund and rebate offers to be advertised by “newspapers, magazines or direct mail.”<sup>44</sup> However, a redemption form may not be published in the advertisement itself but instead must be made available on the product packaging or container.<sup>45</sup> These refund and rebate offers may be made to “purchasers of the manufacturer’s original unopened container of liquor [when] purchased from a local ABC store” only.<sup>46</sup> In addition, such a refund or rebate offer must be available throughout the state and have an expiration date, and the offer must explain all pertinent redemption procedures and must not include the name of any specific liquor retailer.<sup>47</sup>

***Prohibitions on other specific claims and content.*** The ABC Commission rules also contain a number of provisions that prohibit other specific content and claims in alcoholic beverage advertising. For instance, the advertising rules prohibit “direct or indirect references to the intoxicating effect” of alcoholic beverages including the use of terms such as “high test,” “high proof,” “full strength” and “extra strong.”<sup>48</sup> The rules also restrict content that “induc[es] persons under 21 years of age to drink,”<sup>49</sup> and content that is either “inconsistent with the spirit of safety or safe driving programs”<sup>50</sup> or “contrary to state laws and

rules governing sale, storage and consumption of alcoholic beverages.”<sup>51</sup> Under the rules, alcoholic beverage advertising is prohibited during the radio or television broadcasts of any events or activities connected with an elementary or secondary school like a high school football game, for instance.<sup>52</sup>

Additionally, the rules forbid statements that are “disparaging of a competitor’s products”<sup>53</sup> and also prohibit depictions of nudity along with “obscene” and “indecent” content.<sup>54</sup> Even more broadly, the rules prohibit “any picture or illustration depicting the use of alcoholic beverages in a scene which is undignified, immodest or in bad taste.”<sup>55</sup> However, the constitutionality of some of these content restrictions is questionable. For instance, in 1999, an administrative law judge in North Carolina ruled that the ABC Commission could not constitutionally prohibit the sale of two beer products in the state solely because their labels depicted nudity.<sup>56</sup>

Two provisions in the rules apply specifically to advertising for branded alcoholic beverage products. First, statements in advertisements for a branded alcoholic beverage product must be consistent with the product’s labeling statements.<sup>57</sup> In addition, the rules prohibit any false claims that a branded alcoholic beverage product has “curative or therapeutic effects” and also prohibit any statements that have even a tendency to “create a misleading impression” that the advertised product has any such effects.<sup>58</sup>

accepted and considered on an equal basis with the product sold by the promoter.” *Id.*

43 4 N.C. ADMIN. CODE 2S.1020(a), (b)(1). A “refund offer” is defined in the rules as “an offer to a consumer for a rebate of money or merchandise from a liquor industry member, obtained by mailing a form.” 4 N.C. ADMIN. CODE 2S.1020(b).

44 4 N.C. ADMIN. CODE 2S.1020(d).

45 *Id.* at (d), (b)(3).

46 *Id.* at (b)(2).

47 *Id.* at (b)(4)-(6), (c).

48 4 N.C. ADMIN. CODE 2S.1005(a)(17).

49 *Id.* at (a)(10).

50 *Id.* at (a)(11).

51 *Id.* at (a)(12).

52 4 N.C. ADMIN. CODE 2S.1006(b). Alcoholic beverage advertising also may not be printed in the published programs for any such activities either. *Id.*

53 4 N.C. ADMIN. CODE 2S.1005(a)(2).

54 *Id.* at (a)(3).

55 *Id.* at (a)(8).

56 *Shelton v. N.C. Alcoholic Beverage Control Commission*, 99 A.B.C. 1641 (Dec. 7, 1999) (finding 4 N.C. ADMIN. CODE 2S.1005(a)(3) invalid in application to the product labels at issue in the case).

57 4 N.C. ADMIN. CODE 2S.1005(a)(13).

58 *Id.* at (a)(14).

**Additional requirements for wine advertising.** In addition to the rules that apply to alcoholic beverage advertising in general, the ABC Commission has enacted rules that apply specifically to wine advertisements. Wine advertisements may include the number of a bonded wine cellar or winery “in direct conjunction with the name and address of the person operating such winery or storeroom” in the following suggested forms:

Bonded Winecellar No. \_\_\_\_\_  
 B.W.C. No. \_\_\_\_\_  
 Bonded Winery No. \_\_\_\_\_  
 B.W. No. \_\_\_\_\_.<sup>59</sup>

No additional references regarding these numbers are permitted, and wine advertising may not “convey the impression” that the advertised wine product was “made or matured under United States Government or any state government supervision,” or under any governmental “specifications or standards.”<sup>60</sup>

Under the rules, wine advertisements may not include any “statement, design or representation” relating to “alcoholic content” including statements that “may convey the impression that a wine is ‘unfortified’ or has been ‘fortified’ or has intoxicating qualities.”<sup>61</sup> In addition, wine advertisements may not contain any “statement of age or dates, or any statement of age or representation relative to age.”<sup>62</sup> However, a wine advertisement may include the vintage year when the year also appears on the product label<sup>63</sup> and also may state the date of bottling in the following form: “Bottled in \_\_\_\_\_. ”<sup>64</sup> In addition,

wine advertisements may include “[t]ruthful references of a general and informative nature” concerning “storage or aging” of a wine such as “This wine has been mellowed in oak casks,” “Stored in small barrels” or “Matured at regulated temperatures in our cellars.”<sup>65</sup>

Other than vintage year and bottling date, any other dates that appear in wine advertising must be accompanied by an explanation of their “significance.”<sup>66</sup> This would include the “date of establishment of any business, firm or corporation,” for instance.<sup>67</sup> When required under the rules, the explanation for a date in wine advertising must appear in the “same size and kind of printing” as the date itself.<sup>68</sup>

**Additional requirements for spirituous liquor advertising.** In addition to the rules that apply generally to alcoholic beverage advertising, specific rules apply to the advertising of spirituous liquors. Terms such as “bond,” “bonded” and “bottled in bond” are prohibited under the rules in a spirituous liquor advertisement unless the term also appears on the product labeling and is presented in the advertisement in the same “manner and form” as it appears on the label.<sup>69</sup> In addition, the rules ban terms like “double distilled” and “triple distilled” in spirituous liquor advertising, and also prohibit the term “pure” unless it is part of the “bona fide name” of the advertiser.<sup>70</sup>

The rules prohibit “statements of age” in spirituous liquor advertising including “any statement, design or device directly or by implication concerning age or maturity of any brand or lot of spirituous liquor” unless the

<sup>59</sup> *Id.* at (b)(1).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at (b)(2). It is unlikely at this time that a state could constitutionally enforce a ban on the truthful publication of alcohol content information in product advertising or labeling. In 1995, the U.S. Supreme Court struck down on First Amendment grounds a federal regulatory scheme to the extent that it prohibited beer manufacturers from including such information on labeling for beer products. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

<sup>62</sup> 4 N.C. ADMIN. CODE 2S.1005(b)(3).

<sup>63</sup> *Id.* at (b)(3)(A).

<sup>64</sup> *Id.* at (b)(3)(B).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* Under the rules, the “date of establishment of any business, firm or corporation” in wine advertising “shall be stated without undue emphasis and in direct conjunction with the name of the person, firm or corporation to whom it refers.” *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> 4 N.C. ADMIN. CODE 2S.1005(c)(1).

<sup>70</sup> *Id.* at (c)(3)-(4).



same information appears on the labeling for the advertised product.<sup>71</sup> When a statement of product age is permitted in a spirituous liquor advertisement, any qualifying information that appears on the labeling also must appear in the advertisement in “substantially equal conspicuousness” as the date itself.<sup>72</sup> However, when advertising a whisky or brandy product that is more than four years old and does not include a specific age on its label, the product may be described in advertising with “inconspicuous age, maturity or other similar representation[s]” such as “aged in wood” or “mellowed in fine oak casks.”<sup>73</sup>

**Out of-state wine manufacturers and sellers.** In light of recent court decisions, out-of-state wine manufacturers and sellers can probably advertise offers to ship wine for sale to adult consumers in North Carolina lawfully despite seemingly contrary provisions in the North Carolina General Statutes that prohibit out-of-state retailers and wholesalers from shipping alcoholic beverages for sale to North Carolina residents who do not have a state wholesaler’s permit.<sup>74</sup> In 2003, a federal appeals court ruled that these provisions unconstitutionally discriminated against interstate commerce and could not be enforced by the state to the extent that the provisions prevented out-of-state wine manufacturers and sellers from shipping their products to adult consumers in North Carolina.<sup>75</sup> In addition, in 2003, the U.S. Supreme Court struck down similar statutory provisions in Michigan and New York to the extent that those provisions limited out-of-state wine shipments to adult consumers in those states.<sup>76</sup>

## Are advertisements for drug paraphernalia legal under the state statutes?

Generally, no, they are not. It is a misdemeanor crime under the North Carolina General Statutes for anyone to “purchase or otherwise procure” advertising in a medium like newspaper or magazine with the intent “to promote the sale of objects designed or intended for use as drug paraphernalia.”<sup>77</sup> However, it can be difficult to determine whether an advertisement actually involves “drug paraphernalia” under the statutes. Generally, the statutes define “drug paraphernalia” as “all equipment, products and material of any kind that are used to facilitate, or intended or designed to facilitate” any violations of controlled substances laws including “planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, and concealing controlled substances and injecting, ingesting, inhaling, or otherwise introducing controlled substances into the human body.”<sup>78</sup>

Examples of “drug paraphernalia” in the statutes include equipment used for growing or harvesting plants that produce controlled substances; scales and other equipment used to weigh or measure controlled substances; chemicals used in the processing of controlled substances; and devices used to inject, ingest or inhale controlled substances into the body including syringes and pipes.<sup>79</sup>

77 N.C. GEN. STAT. § 90-113.24 .

78 N.C. GEN. STAT. § 90-113.21(a) .

79 *Id.* Specifically, the statutes include the following non-exclusive list of examples of “drug paraphernalia” that may not be advertised: (1) Kits for planting, propagating, cultivating, growing, or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived;

(2) Kits for manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

(3) Isomerization devices for increasing the potency of any species of plant which is a controlled substance;

(4) Testing equipment for identifying, or analyzing the strength,

71 *Id.* at (c)(2).

72 *Id.*

73 *Id.*

74 N.C. GEN. STAT. § 18B-102.1(a).

75 See *Beskind v. Easley*, 325 F.3d 506, 517-20 (4th Cir. 2003). In the case, the statute was challenged in federal court by a California winery and a group of North Carolina consumers. *Id.* at 509.

76 See *Granholm v. Heald*, 544 U.S. 460 (2005).



Obviously, otherwise legal items could be advertised or promoted in connection with the production or use of illegal controlled substances. Under the statutes, whether a particular item is considered illegal “drug paraphernalia” under the circumstances depends on a number of factors including the manner in which the item is described or depicted in advertising.<sup>80</sup> Therefore, the context of an advertisement involving suspected drug paraphernalia can be important to review carefully with these points in mind.

### What laws govern employment advertising in North Carolina?

Generally, the North Carolina General Statutes provide only minimal regulation of employment advertising including “help-

wanted” advertisements. For instance, there are specific provisions in the statutes that prohibit anyone from advertising work-at-home opportunities like “stuffing envelopes, addressing envelopes, mailing circulars, [or] clipping newspaper and magazine articles” unless the advertiser “pays a wage, salary, set fee, or commission” for the advertised work and the work opportunity does not require the purchase of materials like “instructional booklets, brochures, kits [or] programs.”<sup>81</sup> On the other hand, various federal statutes and rules have broader implications for employment-related advertising published in North Carolina. Although these federal provisions do not apply explicitly to media outlets, publishers should think twice before accepting employment advertisements that seem to violate federal laws.

Under the federal Civil Rights Act of 1964, it is unlawful for an employer to discriminate against someone in the context of employment because of his or her “race, color, religion, sex, or national origin.”<sup>82</sup> These provisions do not apply to employers with fewer than fifteen employees or to the federal government, the District of Columbia, Indian tribes or tax-exempt private membership clubs as described in the federal statutes.<sup>83</sup> Employers covered by the act may not publish or cause to be published employment advertisements that “indicat[e] any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national

effectiveness, or purity of controlled substances;

(5) Scales and balances for weighing or measuring controlled substances;

(6) Dilutents and adulterants, such as quinine, hydrochloride, mannitol, mannite, dextrose, and lactose for mixing with controlled substances;

(7) Separation gins and sifters for removing twigs and seeds from, or otherwise cleaning or refining, marijuana;

(8) Blenders, bowls, containers, spoons, and mixing devices for compounding controlled substances;

(9) Capsules, balloons, envelopes and other containers for packaging small quantities of controlled substances;

(10) Containers and other objects for storing or concealing controlled substances;

(11) Hypodermic syringes, needles, and other objects for parenterally injecting controlled substances into the body;

(12) Objects for ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the body such as:

a. Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

b. Water pipes;

c. Carburetion tubes and devices;

d. Smoking and carburetion masks;

e. Objects, commonly called roach clips, for holding burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

f. Miniature cocaine spoons and cocaine vials;

g. Chamber pipes;

h. Carburetor pipes;

i. Electric pipes;

j. Air-driven pipes;

k. Chillums;

l. Bongs; [and]

m. Ice pipes or chillers.

Id.

80 Id. at (b)(9).

81 N.C. GEN. STAT. § 75-31 (1)-(2). These provisions apply to any “person, firm, association, or corporation” that advertises work-at-home solicitations. *Id.*

82 42 U.S.C. § 2000e-2(a). In addition, these provisions also make it an unlawful employment practice for an employer to fire someone or “discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment” for any of these grounds. *Id.*

83 42 U.S.C. § 2000e(b)(1)-(2). To be exempt, a private membership club must be *bona fide* and exempt from taxation under 26 U.S.C. § 501(c). *Id.* at (b)(2). In addition, religious employers such as churches and private faith-based educational institutions are exempt to the extent that they may hire employees that are members of their faith to “perform work connected with [their] activities.” 42 U.S.C. § 2000e-1(a).

origin.”<sup>84</sup> However, covered employers may advertise jobs with a preference based on religion, sex or national origin when the factor is a bona fide qualification for the job.<sup>85</sup> For example, a church might legally require that certain employees be members of its faith or denomination, or a nursing home might lawfully hire female employees to provide intimate personal care services such as bathing assistance for elderly female residents.

The federal Age Discrimination in Employment Act of 1967 (ADEA)<sup>86</sup> applies to employers with twenty or more employees including state and federal governments and their branches.<sup>87</sup> The ADEA prohibits covered employers from discriminating in the context of his or her employment based on age.<sup>88</sup> Federal rules enacted by the Equal Employment Opportunities Commission (EEOC) under the ADEA state that “help wanted” advertisements that use phrases such as “age 25 to 35, young, college student, recent college graduate, boy, girl, or others of similar nature” violate the ADEA.<sup>89</sup> According to the EEOC, it is unlawful under the ADEA to include “age preferences, limitations, or specifications” in employment advertisements unless the employer can demonstrate that age is a “*bona fide* occupational qualification” (BFOQ) reasonably necessary to the normal operation of the business.”<sup>90</sup>

Although the ADEA is intended to protect workers who are 40 years of age or

older,<sup>91</sup> federal EEOC rules also state that phrases such as “40 to 50, age over 65, retired person, or supplement your pension” are violations of the ADEA because they discriminate among individuals who are within the protected group of workers age 40 years and older.<sup>92</sup> However, the U.S. Supreme Court recently ruled that the ADEA does not “prohibit[] favoring the old over the young,”<sup>93</sup> and the EEOC recently issued a notice of proposed rulemaking in light of the “Supreme Court decision interpreting the [ADEA] as permitting employers to favor older individuals because of age” even among individuals in the protected class.<sup>94</sup> Therefore, depending on the outcome of the pending rulemaking, it might be permissible under the ADEA for covered employers to place “help-wanted” advertisements that specifically seek older workers from among the protected class of workers 40 years of age or older. Ad managers should monitor this issue.

Finally, in connection with employment advertising, the federal Americans with Disabilities Act of 1990 (ADA)<sup>95</sup> prohibits employers with fifteen or more employees from discriminating against a job applicant or an employee based on a disability when the individual could perform the “essential functions of the employment position” either with or without “reasonable accommodations.”<sup>96</sup> The ADA does not specifically mention advertising. However, as mentioned above, publishers should consider carefully any employment or “help-wanted” ads that are submitted to an advertising manager and seem to violate provisions of the ADA.

84 42 U.S.C. § 2000e-3(b).

85 *Id.*

86 29 U.S.C. § 621 *et seq.*

87 29 U.S.C. § 630(b). An “employer” includes “one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups or persons” that are “engaged in an industry affecting commerce.” *Id.* at (a)-(b).

88 29 U.S.C. § 623(a)(1)-(3).

89 29 C.F.R. § 1625.4(a).

90 U.S. Equal Employment Opportunity Commission, Age Discrimination, <http://www.eeoc.gov/types/age.html> (March 29, 2006) (last visited Oct. 30, 2006).

91 *Id.*

92 29 C.F.R. § 1625.4(a) (unless an exception applies).

93 *General Dynamic Land Systems, Inc. v. Cline*, 540 U.S. 581, 584 (2004).

94 Notice of Proposed Rulemaking, 71 Fed. Reg. 46,177 (Equal Employment Opportunities Comm’n Aug. 11, 2006).

95 42 U.S.C. § 12101 *et seq.*

96 42 U.S.C. § 12111(2), (5)(A), (8); 42 U.S.C. § 12112(a).

### What are the statutory restrictions on advertising fireworks sales or displays?

Under the North Carolina General Statutes, it is illegal to advertise “any pyrotechnics of any description whatsoever,”<sup>97</sup> though the statute does not apply to such things as sparklers, explosive caps for toy pistols, snake and glow worms, or noisemakers.<sup>98</sup> There are exceptions for fireworks displays at public events such as concerts, fairs and carnivals so long as they are approved in advance by the appropriate county board of commissioners and supervised by county-approved experts.<sup>99</sup> However, under the statutes, fireworks displays on the property of and authorized by The University of North Carolina at Chapel Hill specifically do not require county approval so long as supervised by university-approved pyrotechnics experts.<sup>100</sup> Advertising that promotes statutorily-approved fireworks displays is not prohibited under the statutes.

### What are the restrictions on advertisements for food, drugs and cosmetics under the North Carolina General Statutes?

The North Carolina General Statutes prohibit false or misleading advertising for food, drugs and cosmetics.<sup>101</sup> An “advertisement” in this context is defined in the statutes as “all representations disseminated in any manner or by any means, other than by labeling, of the purposes of inducing, or which are likely to induce, directly or indirectly, the purchase of food, drugs, [medical] devices or cosmet-

ics.”<sup>102</sup> An advertisement disseminated to the public is false as a matter of law if it claims that a drug or medical device has “any effect” whatsoever on a number of specific diseases and conditions listed in the statutes including appendicitis, cancer, diabetes, heart and vascular diseases, high blood pressure, pneumonia, prostate gland disorders, sexual impotence, and sinus infections.<sup>103</sup>

The statutes empower the North Carolina Commissioner of Agriculture to impose civil penalties up to \$2,000 on anyone violating food, drug and cosmetic statutes<sup>104</sup> and to seek either a temporary or permanent injunction from a superior court to prevent violations of these provisions.<sup>105</sup> In addition, violations of state laws for food, drugs and cosmetics can draw criminal misdemeanor charges as well.<sup>106</sup> However, criminal charges are not permitted against a media outlet – meaning any “publisher, radio-broadcast licensee, or agency or medium for the dissemination of an advertisement” – unless the media outlet refuses a request from the Commissioner to identify – by

102 N.C. GEN. STAT. § 106-121(1). “Food” is defined as including “[a]rticles used for food or drink for man or other animals” including chewing gum. *Id.* at (8)a-c. A “drug” is defined as including “[a]rticles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals.” *Id.* at (6)a-d. A “device” is defined to include “instruments, apparatus and contrivances, including their components, parts and accessories” that are intended “[f]or use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals.” *Id.* at (5)a-b. “Cosmetic” is defined as “[a]rticles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance” but does not include soap. *Id.* at (4).

103 N.C. GEN. STAT. § 106-138(b). The complete list is as follows: Albuminuria, appendicitis, arteriosclerosis, blood poison, bone disease, Bright’s disease, cancer, carbuncles, cholecystitis, diabetes, diphtheria, dropsy, erysipelas, gallstones, heart and vascular diseases, high blood pressure, mastoiditis, measles, meningitis, mumps, nephritis, otitis, media, paralysis, pneumonia, poliomyelitis, infantile paralysis, prostate gland disorders, pyelitis, scarlet fever, sexual impotence, sinus infection, smallpox, tuberculosis, tumors, typhoid, uremia, and venereal diseases. *Id.* This subsection does not apply to advertisements that are directed to “members of the medical, dental, pharmaceutical, or veterinary professions, or appears only in the scientific periodicals of these professions” or to state-sponsored public health messages. *Id.*

104 N.C. GEN. STAT. § 106-124.1(a).

105 N.C. GEN. STAT. § 106-123.

106 N.C. GEN. STAT. § 106-124(a).

97 N.C. GEN. STAT. § 14-410(a).

98 N.C. GEN. STAT. § 14-414. The term “pyrotechnics” includes “any and all kinds of fireworks and explosives . . . used for exhibitions or amusement” but does not include explosives used in the “course of ordinary business” or firearms ammunition. *Id.*

99 N.C. GEN. STAT. § 14-410(a).

100 *Id.*

101 N.C. GEN. STAT. § 106-122(5); N.C. GEN. STAT. § 106-138(a).

name and address – the person or company that placed the ad.<sup>107</sup>

The U.S. Food and Drug Administration (FDA) has jurisdiction to regulate advertising in this area as well although discussion of FDA regulation is beyond the scope of this chapter. However, it should be noted in particular that direct-to-consumer prescription drug advertising is among the most extensively regulated categories of advertising and promotion at the federal level and is under the jurisdiction of the FDA Division of Drug Marketing, Advertising, and Communications (DDMAC). More information about the regulation of direct-to-consumer prescription drug advertising can be obtained at the DDMAC website at [www.fda.gov/cder/ddmac/](http://www.fda.gov/cder/ddmac/).

### What are the state restrictions on gaming advertisements for lotteries, bingo games, raffles and prize-giveaways in North Carolina?

**Lotteries.** It is unlawful in North Carolina for anyone to operate or promote a lottery except as allowed in connection with the official North Carolina Education Lottery established in 2005 and operated under the jurisdiction of the North Carolina State Lottery Commission.<sup>108</sup> Except for approved advertising for the official state lottery, the

general statutes otherwise prohibit advertising a lottery or publishing “an account of a lottery” regardless of whether the lottery is held in North Carolina or not.<sup>109</sup> Violating the advertising and publishing ban for lotteries is a Class 2 misdemeanor.<sup>110</sup> However, the statutes include an exemption for published content “in connection with a lawful activity of [a] news medium.”<sup>111</sup> The statutes define a “news medium” as “[a]ny entity regularly engaged in the business of publication or distribution of news via print, broadcast, or other electronic means accessible to the general public.”<sup>112</sup>

**Bingo games.** Only licensed tax-exempt organizations in North Carolina can lawfully conduct and advertise bingo games and offer prizes.<sup>113</sup> As examples of exempt organizations, the statutes list “bona fide nonprofit charitable, civic, religious, fraternal, patriotic [and] veterans’ organization[s],” “a nonprofit volunteer fire department,” and “a nonprofit volunteer rescue squad.”<sup>114</sup> These groups are limited to offering prizes – cash or merchandise – worth no more than \$500 per game and \$1,500 per bingo session.<sup>115</sup> However, a group that offers only one bingo session per week can offer prizes totaling \$2,500 per weekly session.<sup>116</sup> The state allows “beach bingo” meaning bingo games with prizes of cash or merchandise worth \$10 or less per game.<sup>117</sup> However, beach bingo games may

107 *Id.* at (c).

108 N.C. GEN. STAT. § 14-290. The state-operated lottery was established by the North Carolina State Lottery Act of 2005, N.C. GEN. STAT. §§ 18C-101 to 107. The Commission has statutory authority to authorize advertising for the state lottery but the statutes require state lottery advertising to “include resources for responsible gaming information” and prohibit any state lottery advertising that “intentionally target[s] specific groups or economic classes,” that is “misleading, deceptive, or present[s] any lottery game as a means of relieving any person’s financial or personal difficulties,” or that has “the primary purpose of inducing persons to participate in the Lottery.” N.C. GEN. STAT. § 18C-114(a)(2)a-d. In addition, by statute, advertising for the state lottery must be “tastefully designed and presented in a manner to minimize the appeal of the lottery games to minors” and may not include “cartoon characters” or “false, misleading, or deceptive information.” N.C. GEN. STAT. § 18C-130(e). State lottery advertising must include the “actual or estimated overall odds of winning the game.” *Id.*

109 GEN. STAT. § 14-289.

110 *Id.*

111 *Id.*

112 N.C. GEN. STAT. § 8-53.11(a)(3).

113 N.C. GEN. STAT. § 14-309.5(a)-(b). Under the statutes, a “bingo game” is defined as “a specific game of chance played with individual cards having numbered squares ranging from one to 75, in which prizes are awarded on the basis of designated numbers on such cards conforming to a predetermined pattern of numbers.” N.C. GEN. STAT. § 14-309.6(2). A “bingo game” under the statutes does not include “instant bingo” meaning “a game of chance played by the selection of one or more prepackaged cards[] with winners determined by the appearance of a preselected designation on the card.” *Id.*

114 N.C. GEN. STAT. § 14-309.6(1).

115 N.C. GEN. STAT. § 14-309.9(a).

116 *Id.*

117 N.C. GEN. STAT. § 14-309.6(6); N.C. GEN. STAT. § 14-309.14(1).



not be advertised or promoted in connection with other lawful bingo games under the statutes and also may not be used as a promotion to obtain anything of value in excess of the \$10 limit.<sup>118</sup>

**Raffles.** In addition, nonprofit organizations that are recognized by the North Carolina Department of Revenue as tax-exempt can lawfully conduct and advertise a “raffle.”<sup>119</sup> The statutes define a “raffle” as any “game in which the prize is won by random drawing of the name or number of one or more persons purchasing chances.”<sup>120</sup> Nonprofit organizations are limited to two raffles per year and may not offer a prize of cash or merchandise worth more than \$50,000 per raffle.<sup>121</sup> In addition, real property may not be offered as a prize in a raffle.<sup>122</sup>

**Prize give-aways.** When businesses that sell or lease goods or services advertise the chance to win a “prize or item of value” in a contest or promotion, the advertisement must clearly disclose “all material conditions” that any participant must meet and also must identify “on whose behalf the contest or promotion is [being] conducted.”<sup>123</sup> In addition, “immediately adjacent to the description of the item or prize” being given away, the advertisement must disclose clearly and prominently the actual retail value of the item or prize, the number of each of the items or prizes to be given away, and the “odds of receiving each item or prize.”<sup>124</sup> The disclo-

sure requirements do not apply to broadcast radio, broadcast television or cable television advertisements so long as the required disclosure information is made available by the advertiser for free to anyone who requests the information.<sup>125</sup> Media outlets are not liable for publishing or disseminating advertisements for a prize giveaway that violates state statutes unless a “publisher, owner, agent or employee” of the outlet had knowledge that the giveaway was unlawful.<sup>126</sup>

### What law regulates advertisements for housing sales and rentals in North Carolina?

The federal Fair Housing Act of 1968 (FHA)<sup>127</sup> generally prohibits discrimination against anyone with regard to the sale or rental of housing based on “race, color, religion, sex, familial status, or national origin.”<sup>128</sup> More importantly, the FHA specifically prohibits advertisements or publications in connection with the sale or rental of a dwelling that indicate a preference or discriminate based on any of these grounds.<sup>129</sup> Under rules enacted and enforced by the federal Department of Housing and Urban Development (HUD) to implement the FHA, it is unlawful to “make, print or publish...any notice, statement or advertisement with respect to the sale or rental of a dwelling which indicates any preference, limitation or discrimination because of race, color, religion, sex, handicap, familial status, or national origin.”<sup>130</sup>

Under HUD rules, examples of FHA violations include:

118 N.C. GEN. STAT. § 14-309.14(2).

119 N.C. GEN. STAT. § 14-309.15(a).

120 *Id.* at (b).

121 *Id.* at (c)-(d). In addition, each nonprofit organization is limited to awarding \$50,000 in total per year in cash prizes in raffles each year and \$50,000 worth of merchandise in total each year in raffles. *Id.*

122 *Id.* at (d).

123 N.C. GEN. STAT. § 75-33(a). None of these requirements apply to prize giveaways in which entrants only need to “complete and mail, or deposit at a local retail establishment, an entry blank obtainable locally or by mail, or call in their entry by telephone,” and are not at any time “asked to listen to a sales presentation.” *Id.* at (b).

124 *Id.* at (a)(1)-(3).

125 *Id.* at (c).

126 *Id.* at (d).

127 42 U.S.C. §§ 3601 *et seq.*

128 42 U.S.C. § 3604(a)-(b).

129 *Id.* at (c).

130 24 C.F.R. § 100.75(a).



(1) Using words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are or are not available to a particular group of persons because of race, color, religion, sex, handicap, familial status, or national origin.

\* \* \*

(3) Selecting media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Refusing to publish advertising for the sale or rental of dwellings or requiring different charges or terms for such advertising because of race, color, religion, sex, handicap, familial status, or national origin.<sup>131</sup>

Under HUD rules, a publisher can be held liable for publishing an advertisement that violates the FHA “on its face.”<sup>132</sup> This includes an advertisement that fails to meet the following published HUD guidelines:

1. Race, color, national origin. Real estate advertisements should state no discriminatory preference or limitation on account of race, color, or national origin. Use of words describing the housing, the current or potential residents, or the neighbors or neighborhood in racial or ethnic terms (i.e., white family home, no Irish) will create liability under [the FHA].

However, advertisements which are facially neutral will not create liability. Thus, [the] use of phrases such as master bedroom, rare find, or desirable neighborhood [will not create liability under the FHA].

2. Religion. Advertisements should not contain an explicit preference, limitation or discrimination on account of religion (i.e., no Jews, Christian home). Advertisements which use the legal name of an entity which contains a religious reference (for example, Roselawn Catholic Home), or [] which contain a religious symbol, (such as a cross), standing alone, may indicate a religious preference. However, if such an advertisement includes a disclaimer (such as the statement “This Home does not discriminate on the basis of race, color, religion, national origin, sex, handicap or familial status”) it will not violate the Act. Advertisements containing descriptions of properties (apartment complex with chapel), or services (kosher meals available) do not on their face state a preference for persons likely to make use of those facilities, and are not violations of the [FHA].

The use of secularized terms or symbols relating to religious holidays such as Santa Claus, Easter Bunny or St. Valentine’s Day images, or phrases such as “Merry Christmas”, “Happy Easter”, or the like does not constitute a violation of the [FHA].

3. Sex. Advertisements for single family dwellings or separate units in a multi-family dwelling should contain no explicit preference, limitation or discrimination based on sex. Use of the term master bedroom does not constitute a violation of either the sex discrimination provisions or the race discrimination provisions.

<sup>131</sup> *Id.* at (c)(1), (3)-(4).

<sup>132</sup> Guidance Regarding Advertisements Under § 804(c) of the Fair Housing Act, 2 (Jan. 9, 1995), available at <http://www.hud.gov/offices/fheo/disabilities/sect804achtenberg.pdf> (last visited Oct. 30, 2006).

Terms such as “mother-in-law suite” and “bachelor apartment” are commonly used as physical descriptions of housing units and do not violate the [FHA].

4. Handicap. Real estate advertisements should not contain explicit exclusions, limitations, or other indications of discrimination based on handicap (i.e., no wheelchairs). Advertisements containing descriptions of properties (great view, fourth-floor walk-up, walk-in closets), services or facilities (jogging trails), or neighborhoods (walk to bus-stop) do not violate the [FHA]. Advertisements describing the conduct required of residents (“non-smoking”, “sober”) do not violate the [FHA]. Advertisements containing descriptions of accessibility features are lawful (wheelchair ramp).

5. Familial status. Advertisements may not state an explicit preference, limitation or discrimination based on familial status. Advertisements may not contain limitations on the number or ages of children, or state a preference for adults, couples or singles. Advertisements describing the properties (two bedroom, cozy, family room), services and facilities (no bicycles allowed) or neighborhoods (quiet streets) are not facially discriminatory and do not violate the [FHA].<sup>133</sup>

However, publishers are not liable for publishing advertisements that “might indicate a preference, limitation or discrimination” when it is not “readily apparent to an ordinary reader.”<sup>134</sup>

There are exemptions in the FHA. For instance, religious organizations can lawfully limit the sale, rental or occupancy of hous-

ing it owns or operates for noncommercial purposes to persons of the same religion so long as membership in the religions is not restricted based on “race, color, or national origin.”<sup>135</sup> Also, private clubs that offer lodging on a noncommercial basis can limit rental or occupancy to its own members or give them preference over nonmembers.<sup>136</sup> And, the part of the provisions regarding familial status do not apply to “housing for older persons,” which means housing intended solely for occupancy by residents that are age 62 years and older, or housing in which at least 80% of the units are occupied by at least one person age 55 years or older.<sup>137</sup> In addition, the provisions of the FHA do not apply to single-family homes that are sold or rented by their owners so long as the owner does not own more than three such properties, does not use the services of a real estate broker or rental service, and does not utilize advertisements that violate the FHA.<sup>138</sup>

### **What are the statutory requirements for legal advertisements that must be published in a newspaper?**

Before accepting and publishing legal notices that are required or permitted under state law in North Carolina, a newspaper must have filed a sworn affidavit with the clerk of the superior court in the county where the newspaper is published listing and verifying the actual rates across various

<sup>135</sup> 42 U.S.C. § 3607(a).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at (b)(1)-(2). Under the latter option, to qualify for the exemption, “at least 80 percent of the occupied units [must be] occupied by at least one person who is 55 years of age or older,” “the housing facility or community [must] publish[] and adhere[] to policies and procedures that demonstrate [such an] intent,” and the facility or community must abide by federal rules for “verification of occupancy.” *Id.* at (a)(2)(C)(i)-(iii).

<sup>138</sup> 42 U.S.C. § 3603(b)(1). The FHA also exempts the rental of “rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his [or her] residence.” *Id.* at (b)(2).

<sup>133</sup> *Id.* at 3-4.

<sup>134</sup> *Id.*

classes of advertising that the newspaper typically offers to commercial advertisers.<sup>139</sup> The owner or manager of a newspaper that fails to comply with this requirement can be charged with a Class 1 misdemeanor.<sup>140</sup> In addition, state and municipal officers and boards may not contract with a newspaper to pay more than the local commercial rates offered by the newspaper when they are required or permitted by law to provide legal notice by newspaper publication.<sup>141</sup>

Not every newspaper is qualified under the statutes to publish legal advertisements that are effective under the law. A newspaper must meet three criteria under the statutes to be legally qualified to publish effective legal advertisements: First, the newspaper must have a “general circulation to actual paid subscribers;”<sup>142</sup> second, the newspaper must “have been admitted to the United States mails in the Periodicals class in the county or political subdivision where [the] publication, advertisement or notice is required to be published;” and, third, the newspaper must “have been regularly and continuously issued in the county in which the publication, advertisement or notice is authorized or required to be published.”<sup>143</sup> However, a newspaper that meets these qualifications but for some reason has “fail[ed] for a period not exceeding four weeks in any calendar year to publish one or more of its issues” would remain qualified under the statutes to publish effective legal advertisements.<sup>144</sup>

139 N.C. GEN. STAT. § 1-596.

140 *Id.*

141 *Id.*

142 The “general circulation” requirement does not address the number of newspapers in circulation but rather the content of the newspaper. Special interest newspapers do not qualify under the statute.

143 N.C. GEN. STAT. § 1-597. The “regularly and continuously issued” requirement means the newspaper was published “at least one day in each calendar week for at least 25 of the 26 consecutive weeks immediately preceding the date of the first publication” of a particular legal advertisement.” *Id.*

144 *Id.*

Newspapers that are published within a city or town that spans two or more adjoining counties are qualified to publish legal advertisements in any of those counties regardless of which county actually contains the newspaper’s offices or publishing facilities so long as the newspaper meets all of the other statutory criteria for publishing legal advertisements in both counties.<sup>145</sup> For example, assume that a newspaper is published in City A, and City A spans both County 1 and County 2. The newspaper would be qualified to accept legal advertisements required to be published in County 2 even if the newspaper’s offices and publishing facilities are located exclusively in County 1 so long as the newspaper meets all of the other statutory requirements to publish legal advertisements in County 2.

Proof that a newspaper is qualified to publish legal advertising may be secured by sworn affidavit on behalf of the newspaper. Under the statutes, when the “owner, partner, publisher, or other authorized officer or employee” of a newspaper swears in a written statement before a notary public that the newspaper satisfied the statutory criteria on a particular date, then all state courts must accept that statement in legal proceedings as sufficient proof that the newspaper indeed met the statutory requirements on that date.<sup>146</sup> The same holds true if such a sworn statement is filed with the clerk of the superior court in which the publication of a legal advertisement was required. These provisions do not preclude the use of “any other competent evidence” aside from an affidavit to prove that a newspaper was qualified by statute to publish legal advertisements as of a certain date.<sup>147</sup>

The statutory qualifications for newspapers to accept legal advertisements as well as

145 *Id.*

146 N.C. GEN. STAT. § 1-598

147 *Id.*

the affidavit requirements mentioned above do not apply in counties where there are no newspapers that can meet the qualifications to accept legal advertisements.<sup>148</sup> However, the commercial rates requirements discussed above still apply in such a situation. Nonetheless, when legal notice by newspaper publication is required in a county where there is no qualified newspaper, then a qualified newspaper in an adjoining county can be utilized so long as the qualified newspaper has a general circulation in the county where the legal notice is required to be published in the newspaper.<sup>149</sup>

Finally, proof of publication and the date of publication of a legal advertisement in a newspaper can be made by an affidavit that is sworn under oath by the “publisher, proprietor, editor, managing editor, business or circulation manager, advertising, classified advertising or any other advertising manager or foreman of the newspaper.”<sup>150</sup> For a newspaper published by a corporation, the affidavit may be made by the “president, vice president, secretary, assistant secretary, treasurer, or assistant treasurer of the corporation.”<sup>151</sup> These provisions do not prohibit proof of publication or date of publication by other “competent evidence” although a qualifying affidavit is considered *prima facie* evidence on these matters.<sup>152</sup>

### How are ads for motor vehicle sales, rentals and repairs regulated in North Carolina?

State statutes regulate advertisements placed by licensed motor vehicle dealers, manufacturers, distributors and wholesalers

in North Carolina. By statute, an advertisement placed in a newspaper or other publication in the state must include the actual name of the licensee.<sup>153</sup> In other words, these licensees cannot lawfully place classified advertisements that appear to be offering motor vehicles for sale by private individuals. In addition, the state statutes prohibit these licensees from “[k]nowingly advertising by any means, any assertion, representation or statement of fact which is untrue, misleading or deceptive in any particular” relating to their license or conduct with regard to the sale of motor vehicles in the state.<sup>154</sup> The statutes specifically prohibit licensed motor vehicle dealers, manufacturers, distributors and wholesalers from “[k]nowingly advertising a used motor vehicle for sale as a new motor vehicle.”<sup>155</sup> In addition, no one may lawfully advertise in North Carolina any device for sale, installation or use that will alter the actual number of miles recorded by odometers on motor vehicles.<sup>156</sup>

Provisions in the federal Truth in Lending Act<sup>157</sup> and Consumer Leasing Act (CLA),<sup>158</sup> along with corresponding federal rules that implement these provisions, regulate consumer credit and lease offers including those advertised in connection with motor vehicle sales and leasing. In addition, there are specific requirements under the CLA for consumer leases that are advertised by radio.<sup>159</sup> However, media are exempt from liability for disseminating an advertisement that violates either the Truth in Lending Act<sup>160</sup> or the CLA.<sup>161</sup>

<sup>148</sup> N.C. GEN. STAT. § 1-599.

<sup>149</sup> N.C. GEN. STAT. § 1-597.

<sup>150</sup> N.C. GEN. STAT. § 1-600(a)-(b).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at (b)-(c).

<sup>153</sup> N.C. GEN. STAT. § 20-290(a), (c).

<sup>154</sup> N.C. GEN. STAT. § 20-294(7) (listed among the grounds for denying, suspending or revoking the state license of a motor vehicle dealer, manufacturer, distributor or wholesaler).

<sup>155</sup> *Id.* at (8).

<sup>156</sup> N.C. GEN. STAT. § 20-342.

<sup>157</sup> 15 U.S.C. §§ 1601 *et seq.*

<sup>158</sup> 15 U.S.C. §§ 1667 *et seq.*

<sup>159</sup> 15 U.S.C. § 1667c.

<sup>160</sup> 15 U.S.C. § 1665.

<sup>161</sup> 15 U.S.C. § 1667c(b).

State statutes also regulate advertising for automobile repairs and rentals in North Carolina. Businesses that advertise the cost of a specified vehicle repair also must disclose any additional charges that routinely apply to that type of repair except for taxes and other fees that are required by law.<sup>162</sup> Rental car companies that advertise must include the full and actual rental rate – exclusive of taxes and mileage charges – that consumers will be charged to lease a vehicle for a specified time period.<sup>163</sup> Any restrictions that apply to the advertised rate – such as mileage or geographic driving limitations – must be “clearly disclosed” in the advertisement.<sup>164</sup> Additionally, rental car advertising must disclose the daily rate the company charges for collision damage waivers and state that “collision damage waivers are not required,” and must advise consumers to “examine or inquire about their automobile insurance policies to see whether such policies will cover damage to rental vehicles.”<sup>165</sup> Finally, if a rental car company advertises a rental rate for an airport location, then the advertisement must “clearly and conspicuously disclose the existence and actual amount of the airport charges or fees.”<sup>166</sup>

### How does North Carolina regulate political advertising?

The North Carolina General Statutes include a number of requirements that apply to political advertising. Significantly here, these statutes only apply to advertising related to elections for state, county, municipal and district offices in North Carolina, or related

to an upcoming ballot measure that North Carolina voters will decide on a statewide or local level.<sup>167</sup> In other words, the state statutory requirements reviewed in this section would not apply to political advertising related to an election for a federal office. There are separate federal statutes and rules that apply to federal elections, the discussion of which is beyond the scope of this handbook. More information about federal campaign finance laws can be found at the official website of the U.S. Federal Elections Commission at [www.fec.gov](http://www.fec.gov).

In addition to federal campaign finance laws, federal statutes and corresponding Federal Communications Commission (FCC) rules provide requirements for broadcast and cable television licensees with regard to political candidate advertising. Generally, licensed broadcast stations and cable television systems must treat all political candidates running for the same office equally with regard to availability and cost of advertising time during an election cycle.<sup>168</sup> In addition, federal political candidates but not state and local candidates must be provided with “reasonable access” to use licensed broadcast facilities during an election cycle, which includes the affirmative right to purchase advertising time.<sup>169</sup> A full discussion of these complex requirements is beyond the scope of this chapter but remain critical for affected FCC licensees.<sup>170</sup> Instead, this section focuses on state statutes that govern political advertising in North Carolina.

162 N.C. GEN. STAT. § 66-285. This section only applies to services or repairs provided by businesses for “private passenger vehicles.” *Id.*

163 N.C. STAT. § 66-202(a).

164 *Id.* at (b).

165 *Id.* at (c).

166 *Id.* at (d). If the advertisement references car rental rates for more than one airport location, then the advertisement must disclose the range of applicable airport charges or fees. *Id.*

167 See N.C. GEN. STAT. § 163-278.6(4), (6), (9), (9a), (18), (18a); N.C. GEN. STAT. § 163-278.38Z(1).

168 47 U.S.C. § 315(a), (b). Corresponding rules have been enacted by the FCC as well. See 47 C.F.R. § 73.1941-41 (for broadcasting stations); 47 C.F.R. § 76.205-06 (for cable television systems).

169 47 U.S.C. § 312(a)(7). A corresponding rule has been enacted by the FCC to implement these requirements. See 47 C.F.R. § 73.1944.

170 A list of the federal statutes and rules for candidate appearances and advertising is available at the FCC website. See FCC Statutes and Rules on Candidate Appearances & Advertising, <http://www.fcc.gov/mb/policy/political/candrule.htm> (last visited Oct. 30, 2006).



**State disclosure requirements.** State election laws in North Carolina require that all print, television and radio advertisements that support or oppose the nomination or election of “one or more clearly identified candidates,” or support or oppose the passage of a ballot measure, must include a disclosure that identifies the sponsor that paid for the advertisement.<sup>171</sup> These types of advertisements are considered to be regulated “expenditures” under the statutes.<sup>172</sup> Expenditures made to either support or oppose a candidate, or a ballot measure, are considered to be “independent expenditures” when they are not coordinated with a candidate, a candidate’s campaign or a referendum committee.<sup>173</sup> It is important to note here that state election laws do not apply to what is called “issue advocacy” meaning political advertising that takes a position on an issue like abortion or stem cell research without expressly supporting or opposing a political candidate or ballot measure.

Determining whether an advertisement is issue advocacy or is an expenditure that is made “to support or oppose the nomination or election of one or more clearly identified candidates” – often referred to as “express candidate advocacy” – can depend on the specific words and phrasing used in a political advertisement.<sup>174</sup> State statutes include the following list of so-called “magic words” that, if included in a political advertisement, would render the advertisement to be a regulated expenditure:

‘[V]ote for’, ‘reelect’, ‘support’, ‘cast your ballot for’, ‘(name of candidate) for (name of office)’, ‘(name of candidate) in (year)’, ‘vote against’, ‘defeat’, ‘reject’, ‘vote pro-(policy question)’ or ‘vote anti-

(policy position) accompanied by a list of candidates clearly labeled ‘pro-(policy position)’ or ‘anti-(policy position)’, or communications of campaign words or slogans, such as posters, bumper stickers, advertisement, etc., which say ‘(name of candidate)’s the One’, ‘(name of candidate) ‘98’, ‘(name of candidate)!’, or the names of two candidates joined by a hyphen or slash.<sup>175</sup>

This list is not “exclusive or conclusive” according to the statutes, however, and the use of similar words and phrases that are not included on the list still can render an advertisement to be express candidate advocacy.<sup>176</sup> However, the statutes cannot be used to regulate any news, commentary or editorial content as an expenditure when disseminated by a media outlet such as a newspaper, magazine or broadcast station when the media outlet is not “owned or controlled” by a political party or political committee.<sup>177</sup>

When required, the “paid for” disclosure statement must utilize the words “paid for by” followed by the name of the candidate, candidate campaign committee, political party organization, political action committee, or other sponsor that actually paid for the advertisement.<sup>178</sup> In political advertising that appears in print media such as newspapers and newspa-

171 N.C. GEN. STAT. § 163-278.39(a). If more than one sponsor paid for the advertisement, then the statutes require that the disclosure statement list all the sponsors. *Id.*

172 N.C. GEN. STAT. § 163-278.6(9).

173 *Id.* at (9a).

174 *Id.* at (6).

175 N.C. GEN. STAT. § 163-278.14A(a)(1). The statutes also include a “contextual” test for express candidate advocacy when the advertisement does not utilize any of the “magic words” or equivalent terms. *Id.* at (a)(2). The “contextual” provisions were found unconstitutional in 2003 by the U.S. Court of Appeals, Fourth Circuit. See *North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418 (4th Cir. 2003). However, the judgment of the Fourth Circuit in that case was vacated on appeal to the U.S. Supreme Court in 2004, and the case was remanded to the court of appeals for further consideration. *Leake v. North Carolina Right to Life, Inc.*, 541 U.S. 1007 (2004).

176 N.C. GEN. STAT. § 163-278.14A.

177 *Id.* at (b)(1). In addition, corporate communications “distributed . . . solely to its stockholders and employees” and labor union communications directed “solely to its members or to subscribers or recipients of its regular publications, or [are] made available to individuals in response to their request, including through the Internet” also are not considered regulated expenditures under the statutes. *Id.* at (b)(2)-(3).

178 N.C. GEN. STAT. § 163-278.39(a)(1).

per inserts, the required “paid for” disclosure must be “at least five percent (5%) of the height of the printed space of the advertisement” but “in no event . . . less than 12 points in size.”<sup>179</sup> However, in newspapers or newspaper inserts, the required disclosure need not comply with the five-percent requirement so long as the disclosure is “at least 28 points in size.”<sup>180</sup> In television advertisements, the required disclosure must be “made by visual legend,”<sup>181</sup> and the text must be at least “32 scan lines in size” under the commonly-utilized broadcast measurement scale based on scan lines.<sup>182</sup> In radio advertisements, the required disclosure must be at least two seconds in length and “spoken so that [the] contents may be easily understood.”<sup>183</sup>

The statutes also require that print advertisements that support or oppose a clearly identified candidate for state or local office in North Carolina must disclose whether or not the advertisement is endorsed by a candidate.<sup>184</sup> However, this particular disclosure requirement does not apply “if the sponsor of the advertisement is the candidate the advertisement supports or that candidate’s campaign committee.”<sup>185</sup> When required, this disclosure statement either must include the phrase “Authorized by [name of candidate], candidate for [name of office]” or the phrase “Not authorized by a candidate,”<sup>186</sup> and also must meet the applicable size requirements for print advertising that were outlined in the preceding paragraph.<sup>187</sup>

In addition, if a print advertisement identifies a candidate that is opposed by the sponsor of the advertisement, the advertisement must disclose “the name of the candidate who is intended to benefit from the advertisement.”<sup>188</sup> However, this disclosure requirement only applies when the sponsor of the advertisement “coordinates or consults about the advertisement or the expenditure for it with the candidate who is intended to benefit.”<sup>189</sup> In other words, for example, if a sponsor pays for a newspaper advertisement that is hostile toward Candidate A, and the sponsor consults or coordinates with the campaign committee for Candidate A’s opposition – Candidate B – with the intent that the advertisement benefit Candidate B, then the advertisement must disclose that the advertisement is intended to benefit Candidate B. When required, this disclosure also must meet the applicable size requirements for print advertisements as described above.<sup>190</sup>

In addition to the disclosure requirements mentioned above, there are expanded disclosure requirements in the statutes specifically for television and radio advertisements that support or oppose the nomination or election of one or more individuals to office, and these disclosure requirements vary depending on whether the advertisement has been purchased by a candidate or candidate campaign committee, political party, political action committee or individual.<sup>191</sup> An intentional violation by a media outlet of these or any of the disclosure requirements mentioned above is considered a Class 2 misdemeanor under the statutes.<sup>192</sup> However, none of these disclosure requirements applies to individuals who spend less than \$1,000 in aggregate of their own funds during a political campaign

179 N.C. GEN. STAT. § 163-278.39(b). If one advertisement spans “multiple pages, folds, or faces, the disclosure requirement . . . applies only to one page, fold, or face.” *Id.*

180 *Id.*

181 *Id.* at (a)(1).

182 *Id.* at (b). The statutes define a “scan line” as “a standard term of measurement used in the electronic media industry calculating a certain area in a television advertisement.” N.C. GEN. STAT. § 163-278.38Z(9).

183 N.C. GEN. STAT. § 163-278.39(b).

184 *Id.* at (a)(5).

185 *Id.*

186 *Id.*

187 *Id.*

188 N.C. GEN. STAT. § 163-278.39(a)(6).

189 *Id.*

190 *Id.* at (b).

191 N.C. GEN. STAT. § 163-278.39A.

192 N.C. GEN. STAT. § 163-278.27(a).

to support or oppose a candidate or a ballot measure and do not coordinate or consult either with a candidate's campaign or a referendum committee.<sup>193</sup> In other words, the disclosure requirements do not apply to what are called "independent expenditures" that total less than \$1,000 in a political campaign.<sup>194</sup> In addition, the disclosure requirements do not apply to "an individual who incurs expenses with respect to a referendum."<sup>195</sup>

**Permissible media charges for political advertisers.** Newspapers, magazines and other advertising media in North Carolina may not charge a candidate, treasurer, political party or individual more than the "comparable rate charged to other persons for advertising comparable of frequency and volume" for any "advertising . . . purchased for or in support of or in opposition to any candidate, political committee, or political party."<sup>196</sup> In addition, advertising media outlets must give these political advertisers the same discounts that are available to other advertisers under "comparable conditions and circumstances."<sup>197</sup> An intentional violation of these requirements is a Class 2 misdemeanor.<sup>198</sup> However, unlike the statutory disclosure requirements mentioned above, the statutory limitations on media charges for political advertisers do not apply to political advertising that supports or opposes state or local ballot measures.

**Recordkeeping requirements.** Under the statutes, media outlets must request "written authority" from "each candidate, treasurer or individual" for each expenditure for political advertising that either supports or opposes a clearly identified candidate running for state or local office in North Carolina, or supports

or opposes a state or local ballot measure up for vote in the state.<sup>199</sup> Failure to do so is subject to criminal prosecution as a Class 2 misdemeanor.<sup>200</sup> These written authorizations are considered public records under the statutes and must be kept available for public inspection during normal business hours at the office or offices of the media outlet nearest the place or places of publication or broadcast<sup>201</sup> and must be retained "for at least two years counting from the date of the election to which [the authorizations] refer."<sup>202</sup>

### What advertising claims regarding state sales and use taxes are prohibited under state law in North Carolina?

Retailers may not lawfully advertise an offer in the state to absorb sales and use taxes levied under the North Carolina Sales and Use Tax Act.<sup>203</sup> Under the statutes, a "retailer" includes anyone who sells "tangible personal property at retail" or who takes orders for sales for "delivery, for storage, use or consumption" by consumers in North Carolina including mail order sales.<sup>204</sup> Retailers covered by the statutes may not "directly or indirectly" advertise that applicable state sales and use taxes are not part of the price that will be charged to consumers.<sup>205</sup> Any violation of these provisions by a retailer covered under the statutes is subject to criminal prosecution as a Class 1 misdemeanor.<sup>206</sup>

193 N.C. GEN. STAT. § 163-278.39C(1).

194 *Id.*

195 *Id.*

196 N.C. GEN. STAT. § 163-278.18(a), (b).

197 *Id.* at (b).

198 N.C. GEN. STAT. § 163-278.27(a).

199 N.C. GEN. STAT. § 163-278.17(b). It should be noted here that the statutes prohibit any candidate, political committee or referendum committee from making any expenditures before appointing a treasurer and certifying the treasurer's name to the North Carolina State Board of Elections and the expenditure must be made through the named treasurer. N.C. GEN. STAT. § 163-278.16.

200 N.C. GEN. STAT. § 163-278.27(a).

201 N.C. GEN. STAT. § 163-278.17(b).

202 N.C. GEN. STAT. § 163-278.35.

203 N.C. GEN. STAT. § 105-164.9.

204 N.C. GEN. STAT. § 105-164.3(35).

205 N.C. GEN. STAT. § 105-164.9.

206 *Id.*

## Does state law regulate tobacco product advertising in North Carolina?

Almost all of the legal requirements that apply specifically to tobacco product advertising are federal and not state imposed. For instance, federal statutes prohibit advertisements for cigarettes – including “little cigars” – and smokeless tobacco on electronic media under the jurisdiction of the Federal Communications Commission (FCC) including broadcast radio stations, and broadcast and cable television stations, but not the Internet.<sup>207</sup> Federal statutes specifically do not prohibit advertisements for cigars, pipes and pipe tobacco, or smoking accessories on FCC-regulated electronic media.<sup>208</sup> As set out more fully in this section, there are federal warning requirements to be aware of regarding advertisements for cigarettes, smokeless tobacco and, as of 2000, cigars.

**Cigarette advertisements: Federally-mandated warnings.** Under provisions in the Federal Cigarette Labeling and Advertising Act, cigarette advertisements in permissible media – except for billboards – must include one of the four following rotational warnings:

SURGEON GENERAL’S WARNING:  
Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL’S WARNING:  
Quitting Smoking Now Greatly Reduces Serious Risks To Your Health.

SURGEON GENERAL’S WARNING:  
Smoking By Pregnant Women May Result In Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL’S WARNING:  
Cigarette Smoke Contains Carbon Monoxide.<sup>209</sup>

These warnings must be rotated by cigarette advertisers in accordance with a plan they submit for approval by the Federal Trade Commission (FTC).<sup>210</sup> In addition, the warnings must be printed in “conspicuous and legible type in contrast of typography, layout, or color with all other printed material in the advertisement.”<sup>211</sup> The warnings must be boxed and also meet size and layout requirements that are specified in the statutes.<sup>212</sup> The statutes require slightly abbreviated versions of the warnings for cigarette advertisements that appear on billboards<sup>213</sup> and also provide specific size and height requirements for billboard advertising formats.<sup>214</sup>

### ***Smokeless tobacco and cigar advertisements: Federally-mandated warnings.***

Under provisions in the federal Comprehensive Smokeless Tobacco Health Education Act, similar warning requirements as apply to cigarette advertising apply also to permissible advertising for smokeless tobacco. However, unlike the requirements for cigarette ads, the warning requirements for smokeless tobacco advertisements do not apply to billboards.<sup>215</sup> When smokeless tobacco advertisements are run in media outlets such as newspapers and magazines, they must include one of the following three warnings:

<sup>209</sup> 15 U.S.C. § 1333(a)(2).

<sup>210</sup> *Id.* at (c)(1).

<sup>211</sup> *Id.* at (b)(2).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at (a)(3). The specific warnings for billboards are:

SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, And Emphysema.

SURGEON GENERAL’S WARNING: Quitting Smoking Now Greatly Reduces Serious Health Risks.

SURGEON GENERAL’S WARNING: Pregnant Women Who Smoke Risk Fetal Injury And Premature Birth.

SURGEON GENERAL’S WARNING: Cigarette Smoke Contains Carbon Monoxide.

*Id.*

<sup>214</sup> *Id.* at (b)(3).

<sup>215</sup> 15 U.S.C. § 4402(a)(2).

<sup>207</sup> 15 U.S.C. §§ 1335, 4402(f).

<sup>208</sup> See FED. COMM’NS COMM’N, THE PUBLIC AND BROADCASTING (1999), available at [http://www.fcc.gov/mb/audio/decdoc/public\\_and\\_broadcasting.html](http://www.fcc.gov/mb/audio/decdoc/public_and_broadcasting.html).

WARNING: THIS PRODUCT MAY  
CAUSE MOUTH CANCER

WARNING: THIS PRODUCT MAY  
CAUSE GUM DISEASE AND TOOTH  
LOSS

WARNING: THIS PRODUCT IS  
NOT A SAFE ALTERNATIVE TO  
CIGARETTES.<sup>216</sup>

These warnings must be published “in a conspicuous and prominent location in the advertisement and in conspicuous and legible type in contrast with all other printed material in the advertisement” in a format specified in the statutes.<sup>217</sup> As with the required warnings in cigarette ads, the statutory warnings in smokeless tobacco advertisements must be rotated in accordance with a plan submitted by the advertiser and approved in advance by the FTC.<sup>218</sup>

Under a consent agreement between the FTC and the seven largest U.S. cigar manufacturers in 2000,<sup>219</sup> most cigar advertising in the United States must display one of the following warnings clearly and conspicuously:

SURGEON GENERAL’S WARNING:  
Cigar Smoking Can Cause Cancers Of  
The Mouth And Throat, Even If You Do  
Not Inhale.

SURGEON GENERAL’S WARNING:  
Cigar Smoking Can Cause Lung Cancer  
And Heart Disease.

SURGEON GENERAL’S WARNING:  
Tobacco Use Increases The Risk Of  
Infertility, Stillbirth, And Low Birth  
Weight.

SURGEON GENERAL’S WARNING:  
Cigars Are Not A Safe Alternative To  
Cigarettes.

SURGEON GENERAL’S WARNING:  
Tobacco Smoke Increases The Risk Of  
Lung Cancer And Heart Disease, Even In  
Nonsmokers.<sup>220</sup>

These warnings also must be rotated in accordance with a plan submitted by the advertiser and approved by the FTC,<sup>221</sup> and the warnings must comply with specific display requirements for print, billboard or broadcast advertising formats depending on the format of the advertisement.<sup>222</sup> As mentioned above, federal statutes do not prohibit cigar advertising on FCC-regulated electronic media.

### **When is it lawful for an advertiser to offer “wholesale,” “close-out sale” or “distress sale” pricing in North Carolina?**

State statutes limit the use of the term “wholesale” in advertising and allow for media liability for knowingly publishing unlawful wholesale advertising. Specifically, no one including a firm or corporation may advertise the sale of merchandise at “wholesale” prices unless that term is lawfully used as part of the advertiser’s company or firm name, unless the advertised sale is for resellers that have a license issued and recorded by the state, or unless the advertised prices are “established by an independent agency not engaged in the manufacture, distribution or sale of [the advertised] merchandise.”<sup>223</sup> Using the term “wholesale” in violation of these requirements is an “unfair trade practice” prohibited

216 *Id.* at (a)(1).

217 *Id.* at (b)(2).

218 *Id.* at (c)-(d).

219 See Proposed Consent Agreements, 65 Fed. Reg. 41,998 (Fed. Trade Comm’n July 7, 2000). The FTC entered a decision and order on the proposed consent agreement in August 2000. In re the Matter of Swisher Int’l, Decision and Order (Fed. Trade Comm’n August 18, 2000), available at <http://www.ftc.gov/os/2000/08/swisherdo.htm>.

220 See Proposed Consent Agreements, 65 Fed. Reg. at 41,999.

221 See *id.* at 42,000.

222 See *id.* at 41,999.

223 N.C. GEN. STAT. § 75-29(a). In addition, the statutes limit the use of the term “wholesale” in company and firm names to bona fide wholesalers that meet statutorily-defined criteria. *Id.*



under the statutes.<sup>224</sup> However, advertising media including publishers, owners, agents and employees of newspapers and broadcast stations that publish and disseminate advertising cannot be held liable for a violation of these provisions unless they knowingly publish an unlawful wholesale advertisement or have a financial interest in the wholesale being advertised.<sup>225</sup>

In addition, the statutes require that anyone advertising or promoting a “closing-out” sale must have obtained a license to conduct the sale from the clerk of the town or city where the sale is being conducted.<sup>226</sup> The licensing prerequisite applies to any sale that is advertised or promoted with descriptors such as “closing-out,” “going out of business,” “discontinuance of business,” “selling out,” “liquidation,” “lost our lease,” “must vacate,” “forced out,” “removal,” or “distress sale,” or any other terms that suggest that “business conditions are so difficult that the seller is forced to conduct the sale.”<sup>227</sup> For instance, a distress sale would include advertising reduced prices for items that have been damaged by fire, smoke or water.<sup>228</sup> These requirements do not apply to sales advertised by or under order of any state or federal court or law enforcement agency.<sup>229</sup> In addition, media outlets like newspapers, periodicals and broadcast stations are not liable for publishing unlawful close-out sale advertisements unless the outlet refuses to identify the advertiser when requested to do so by a state agency including law enforcement.<sup>230</sup>

224 *Id.* at (b) (referring to N.C. GEN. STAT. § 75-1.1, which prohibits unfair methods of competition and unfair and deceptive practices and acts).

225 N.C. GEN. STAT. § 75-1.1(c).

226 N.C. GEN. STAT. § 66-77. If the sale is being held in an unincorporated area, then the license must be obtained from an appointee designated by the Board of County Commissioners that has jurisdiction over the unincorporated location where the sale is being held. *Id.*

227 N.C. GEN. STAT. § 66-76.

228 N.C. GEN. STAT. § 66-77(a).

229 N.C. GEN. STAT. § 66-82.

230 *Id.*

## Conclusion

North Carolina General Statutes include myriad provisions that regulate advertising in the state, many of which were not covered specifically here. In addition, federal statutes and rules regulate advertising in a variety of ways beyond those included in this chapter. However, this chapter has provided an overview of some of the most critical advertising issues facing North Carolina media outlets and guidance on potential areas of liability along with critical points to keep in mind during the advertising review process.

# The North Carolina Court System

North Carolina's court system, the General Court of Justice, is a unified statewide and state-operated system consisting of three divisions: the Appellate Division, the Superior Court Division and the District Court Division. Before 1966 North Carolina operated under a hybrid court system in which the state funded and operated the superior courts, which were trial courts of general jurisdiction, and a supreme court, which heard all appeals. Lower courts, however, were operated and funded by cities and counties, and their jurisdictions varied. In one county a municipal court might handle certain types of cases, while in another county a different court would handle the same matters. 1 Clerks of superior court and justices of the peace worked on a fee basis: a justice of the peace received a fee upon finding a defendant guilty, but no fee if the defendant was found not guilty. Not surprisingly, that procedure alone undermined public confidence in the judicial system.

In the 1950s the North Carolina Bar Association appointed a committee to study the court system. The committee was known as the "Bell Commission" because its chairman was J. Spencer Bell, a Charlotte attorney. After a thorough study, the Bell Commission recommended a complete restructuring of the judicial system to the General Assembly. In 1962 the voters of North Carolina approved

a constitutional amendment creating North Carolina's present court system, which began operation in 1966 on a phased-in schedule that was completed in 1970. At the trial level, original jurisdiction over misdemeanors, minor civil cases, juvenile matters and domestic relations was taken from the superior court and given to the district court, and the many varied city and county courts were replaced by a uniform district court system. The justices of the peace and mayor's courts were replaced by magistrates, who operate within the District Court Division. An intermediate appellate court – the Court of Appeals – was created in 1967 to relieve the heavy case load of the Supreme Court.

Among the significant changes brought about by this uniform judicial system was the centralization of administration and budgeting. All court personnel are paid by the state. The Administrative Office of the Courts, which manages the courts under the supervision of the chief justice, is responsible for developing and administering a budget for the entire judicial system.

## The Appellate Division

The Appellate Division of the General Court of Justice is composed of the Supreme Court and the Court of Appeals. The Supreme Court is the state's highest court. This court has a chief justice and six associate justices, who sit as a body in Raleigh and hear oral arguments in cases appealed from lower courts. The Supreme Court has no

1 At one time North Carolina had 256 various lower courts. Readers interested in a history of North Carolina courts may wish to read "The Courts of Yesterday, Today and Tomorrow" *Popular Government* Vol. 24 No. 6S (March 1958).

jury and makes no determinations of fact; rather, it considers errors in legal procedures or in judicial interpretation of the law and hears arguments on the written record from the trial below. Its decisions are printed and distributed in bound volumes known as “North Carolina Reports.” Its decisions also are posted online at the AOC’s web site, [www.nccourts.org](http://www.nccourts.org). The Supreme Court’s case load consists primarily of cases involving questions of constitutional law, legal questions of major significance and appeals from convictions imposing death sentences in first-degree murder cases.

The Court of Appeals is an intermediate appellate court composed of fifteen judges, who sit in panels of three. Most of the court’s sessions are held in Raleigh, but individual panels occasionally sit in other localities throughout the state. This court was created to relieve the Supreme Court of a portion of its caseload. Like the Supreme Court, the Court of Appeals decides only questions of law. As with the Supreme Court, the Court of Appeals posts all of its decisions online at [www.nccourts.org](http://www.nccourts.org). It also publishes many of its decisions in printed form. In 2005-06, the Supreme Court disposed of 239 cases while the Court of Appeals disposed of 1,719.

First-degree murder convictions for which the defendant is given the death penalty go directly to the Supreme Court from superior court. The Utilities Commission’s general ratemaking cases go directly from the commission to the Supreme Court. All other appeals go first to the Court of Appeals. In cases in which the appeal involves a constitutional question, or in which the decision of the three-member Court of Appeals panel is not unanimous, the losing party is entitled to take the case on to the Supreme Court. In other cases the losing party may petition the Supreme Court to hear the case. Occasionally the Supreme Court allows the parties in

significant cases to bypass the Court of Appeals and have their case decided directly by the Supreme Court.

The Supreme Court is located in the Justice Building in Raleigh, and the Court of Appeals is located across the street in the Court of Appeals Building. Each court has a clerk, who is that court’s administrative officer. Each justice or judge has two research assistants, who must be law school graduates. The Supreme Court and Court of Appeals clerks also serve as the marshal to their respective courts.

## The Superior Court Division

The Superior Court Division consists of the superior court, which is the court with general trial jurisdiction. This court sits at least twice a year in each county of the state. In the busiest counties, several sessions may be held concurrently each week.

The state is divided into 67 superior court districts for electoral purposes and 49 districts for administrative purposes. Where a superior court district comprises an area smaller than one county, several superior court electoral districts are merged for administrative purposes. For example, Wake County has four superior court districts – 10A, 10B, 10C and 10D – for electoral purposes, but all are joined together for administrative purposes under the supervision of a single senior resident superior court judge.

Judges. There are 94 regular (elected) superior court judges, of which 49 are senior resident superior court judges. The senior resident superior court judge is the most senior judge in each of the administrative districts and is responsible for carrying out various administrative duties and appointing magistrates and some other court officials. The number of judges in a judicial district

is specified by the General Assembly and is based on the volume of judicial business.

The constitution requires superior court judges to rotate, or “ride the circuit,” from one district to another in their division. Judges are assigned to a judicial district for a six-month period and then rotated to another district for the same time period. In the past many judges spent months or years holding court 100 miles or more away from their own homes, commuting on weekends or, in some instances, establishing second homes in the districts to which they were temporarily assigned. Owing to substantial travel expenses, the rotation of judges costs the state more than allowing superior court judges to preside only in their home districts. Rotation also allows lawyers, by delaying a case, to “shop” for a judge before whom the lawyer wishes to present a case, or to avoid judges they don’t like. Rotation also means in many cases several different judges hear and rule upon various parts of the case as it proceeds rather than one judge seeing the entire case through. On the other hand, the rotation system helps avoid any favoritism that might result from always having a judge hold court in a district where he or she may have close friends among the lawyers and may be more personally familiar with and interested in particular cases. Rotation also contributes to uniformity of procedure. The frequent changes of judges tend to discourage the development of local rules that are unique to that area.

In recent years, the chief justice has tried to balance the requirement for rotation with the need to better manage cases moving through the system by assigning all resident superior court judges to their home districts more frequently, by keeping senior judges in their home districts as much as possible, and by designating certain cases as “extraordinary cases,” which means that one judge is

assigned to hear all matters in that case. In 1999 the General Assembly shortened rotation distance by splitting four divisions into eight.

In addition to regular superior court judges, the Governor appoints fourteen special superior court judges to four-year terms. These judges are not elected and may reside in any county. Special superior court judges may be assigned to hold sessions of court in any county of the state where they may be needed without regard to their district of residence or rotation requirements. Theoretically, a special judge over the years could sit in every county of the state. In practice, they are usually assigned to those counties closest to their residence.

**Jurisdiction.** The civil jurisdiction of the superior court is concurrent with that of the district court. Cases involving more than \$10,000 in money and a few special categories of cases (injunctions, constitutional issues, eminent domain actions and corporate receiverships) are usually tried in superior court. A jury of twelve persons is available in civil cases.

With respect to criminal cases, the superior court has exclusive jurisdiction over all felonies. The superior court also hears appeals from misdemeanors and infractions tried in district court. Trials are by a jury of twelve. In criminal cases appealed from the district court, the defendant is entitled to a trial *de novo*, which means that the case is heard over again in its entirety. Approximately 29 percent of the criminal cases in superior court are misdemeanors on appeal from district court.

## **The District Court Division**

The state is divided into 41 district court districts. Like the superior court, the district

court sits in the county seat of each county. It may also sit in certain other cities and towns specifically authorized by the General Assembly. Most counties have only one seat of court, but a few counties have several. For example, in Alamance County the district court sits in Burlington as well as in Graham, which is the county seat. The present number of additional seats is forty.

**Judges.** Like superior and appellate court judges, North Carolina's 259 district court judges serve full time and are forbidden from practicing law privately. Each district has from two to eighteen judges, depending on population and geography. The chief justice appoints one judge in each district as chief district court judge. The chief district court judge's responsibilities include assigning all of the judges of the district to sessions of court; prescribing the times and places at which magistrates will discharge their duties; assigning civil (small claims) cases to magistrates for trial; and, in conjunction with the other chief district court judges, promulgating schedules of minor traffic, wildlife, boating, marine fisheries, state park recreation, alcoholic beverage and littering offenses for which magistrates and clerks of court may accept written appearances, waivers of trial and pleas of guilty.

**Magistrates.** Magistrates for each county are appointed for initial two-year terms by the senior superior court judge on nomination of the clerk of superior court. If the magistrate subsequently is reappointed, the term is four years. The maximum and minimum numbers of magistrates allowed each county are fixed by law; currently there are about 700 magistrates in the state. Magistrates are officers of the district court, and they are subject to the supervision of the chief district court judge in judicial matters and the clerk of court in clerical matters. Some are assigned to be on duty forty hours per week

and others for less time as determined by the chief district court judge in consultation with the Administrative Office of the Courts. Their salaries are paid by the state and are based on their length of service and number of hours worked per week. If the minimum quota (never fewer than one) of magistrates in a county proves to be inadequate, additional magistrates within a maximum quota per county may be authorized by the Administrative Office of the Courts on recommendation of the chief district court judge if funds are available.

**Jurisdiction.** The jurisdiction of the district court is somewhat complicated and can be explained clearly only by reference to both trial court divisions, including the magistrate. In addition, for convenience, the subject should be treated in four categories: civil, criminal, juvenile and magisterial.

**Civil.** Except for the clerk of superior court's exclusive original jurisdiction over the probate of wills and the administration of decedents' estates, civil jurisdiction is concurrent between the superior and district trial divisions of the General Court of Justice. The District Court Division is the proper division for cases involving amounts in controversy of \$10,000 or less, whereas the Superior Court Division is proper for cases involving amounts in controversy greater than \$10,000. Normally this \$10,000 dividing line is followed, but if the parties consent for reasons of speed or convenience, cases may be filed and tried in the "improper" division. No case is ever "thrown out," therefore, for lack of jurisdiction, although a case may be transferred to the proper division.

Exceptions to the general "proper division rule" arise in certain specific subject-matter categories. For example, civil domestic relations matters (divorce, custody and support of children) are properly the business of the



district court, while the superior court is the proper forum for constitutional issues, special proceedings, eminent domain actions, corporate receiverships and review of certain administrative agency rulings. Civil cases involving amounts not over \$5,000 may, under certain conditions, be assigned to a magistrate for trial as a “small claims” action. A jury may be requested for trial of a civil case before a district court judge but not before a magistrate. Generally, parties are represented by attorneys in district court while they appear on their own in trials before a magistrate. However, North Carolina law does not prohibit attorneys from representing clients in small claims court and allows parties to represent themselves (called appearing pro se) in any court in the state.

**Criminal.** The criminal jurisdiction of the district court is less complicated. Because felony cases must be tried in the superior court, the district court has authority in those cases only to conduct preliminary hearings to determine whether there is probable cause to bind the defendant over to the grand jury for indictment to stand trial in superior court. In misdemeanor cases, the district court has exclusive original jurisdiction which, with respect to very minor offenses, it shares with the magistrate. Trial of a criminal case in district court is always without a jury.

**Juvenile.** The district court also has jurisdiction over juvenile matters. These cases concern children under the age of sixteen who are “delinquent” and children under the age of eighteen who are “undisciplined,” “dependent,” “neglected” or “abused.” Proceedings involving children who may be found to belong in one of these statutory categories are initiated by petition (as distinguished from the arrest warrant used in adult cases), and the hearing conducted by the judge may be less formal than in adult cases. However, juveniles do have attorneys appointed to rep-

resent them. In cases involving accusations of dependency, neglect or abuse the court system also provides a guardian ad litem for the juvenile to advise the court on the child’s best interests.

**Magisterial.** Magisterial jurisdiction is both civil and criminal. The magistrate’s authority in criminal matters is limited to (a) accepting guilty pleas to minor misdemeanors and pleas of responsibility to infractions; (b) accepting waivers of trial and guilty pleas to certain traffic, littering, wildlife, boating, marine fisheries, state park recreation and alcoholic beverage violations; and (c) accepting waivers of trial and guilty pleas in worthless-check cases in which the check is for \$2,000 or less. If specifically authorized by the chief district judge, the magistrate may also hear cases and enter judgment on a plea of not guilty to a worthless-check case in which the check is for \$2,000 or less. However, very few magistrates have been authorized to try worthless-check cases on a not-guilty plea. The magistrate also issues arrest and search warrants and sets bail.

For the minor littering, traffic, wildlife, boating, marine fisheries, state park recreation and alcoholic beverage offenses, the fine for each offense is fixed in advance by a uniform statewide schedule promulgated by the chief district judges so that the magistrate has neither trial nor sentencing discretion in these cases and so that the fine that a person charged with the offense will pay is uniform throughout the state. In about 29 percent of all traffic misdemeanors and infractions (approximately 525,000 cases), trial is waived, and the matter never goes to court. And in non-motor vehicle cases, trial is waived in about three percent (21,000) of the cases. The magistrate or clerk assesses the fine according to the uniform schedule.

In civil cases, the magistrate is authorized

to try small claims involving up to \$5,000 money value, including summary ejectment (landlord's action to oust a tenant) cases, assigned by the chief district judge. In fiscal year 2005-06, magistrates disposed of 276,614 civil cases. The parties are not usually represented by attorneys, and simplified trial procedures are followed. Trial is always without a jury. The magistrate's judgment has the same effect as that of a district judge and is placed in the records of the clerk of superior court. An appeal from magistrate's court to district court gives the appealing party an entirely new trial.

Besides hearing small-claims cases, the magistrate is authorized to perform various quasi-judicial or administrative functions formerly discharged by justices of the peace. Of these, performance of the marriage ceremony is the most common. The magistrate is the only civil official in the state who can perform a marriage. Other authorized functions of the magistrate include assigning a year's allowance to a surviving spouse, administering oaths, verifying pleadings and taking acknowledgments (notarizing) of instruments.

### **Innovative courts**

Three new innovative courts – family courts, drug treatment courts and business courts – are being utilized in North Carolina to deal with certain problems where the traditional adversarial system is not always appropriate. In two of these courts the court system becomes a problem solver as well as a decider of facts.

Currently eleven district court districts are operating “family courts,” which are district court sessions set up to deal with the multiple issues of a particular family, such as divorce, child custody, adoptions and abuse. Traditionally the court has dealt with each

family issue as a separate, individual case before whichever judge was assigned to hold court the date of the hearing. Family court assigns each family to one judge who will be able to gain an understanding of the needs of the family and see the entire picture of the family. Family court also encourages families to resolve conflicts through mediation and will see that services are provided at an earlier stage of the proceedings. Intensive case management services are provided to make sure that cases move through the system as quickly as possible and the court takes on the responsibility of coordinating available court and community resources needed by a particular family.

A second innovative type of court is the drug treatment court operating in fourteen district or superior court districts. Drug treatment court is created to deal with the serious problem of the effect of substance abuse on repetitive criminal behavior. Rather than only punishing a defendant for criminal acts, this court provides specialized treatment and case tracking services for certain defendants in order to reduce their substance abuse dependence and their recidivism. To be eligible for the treatment court, a defendant must be addicted, must want to participate in the program, must not be charged with drug trafficking, and must be eligible for community or intermediate punishment. Most participants are multiple offenders for whom other programs have been unsuccessful. In drug treatment courts, the judge, prosecutor, defense attorney, probation officer, community policing officer, treatment provider and case manager work together in an on-going, non-adversarial fashion to ensure that defendants in the program are given appropriate resources to address their treatment needs but also to hold defendants accountable for their behavior while in the program. Defendants must undergo intensive treatment, followed by therapy for at least one year.

Each participant must undergo drug tests, be employed or attending school, and attend frequent court hearings. Five districts operate juvenile drug courts for non-violent juvenile offenders whose drug or alcohol abuse is affecting their lives. Also there are two family drug courts that work with drug-abusing parents who are in danger of losing custody of their children owing to abuse or neglect. One court adopts a similar approach to deal with criminal offenders who have chronic mental health problems.

A third innovative court is the business court, which operates within the superior court. As a result of a recommendation by the North Carolina Commission on Business Laws and the Economy, the North Carolina Supreme Court designated a Special Superior Court Judge for Complex Business Cases by rule in 1995. The court was created to make the court system as responsive and predictable as possible in dealing with complex corporate issues and is patterned on a similar system in Delaware. The chief justice, a senior resident superior court judge, chief district court judge, or presiding superior court judge may designate a case as complex business case, whereupon it is automatically assigned to the Special Superior Court Judge for Complex Business Cases. Although the rule does not define “complex business case,” cases involving significant issues under Business Corporation Act; Professional Corporations; Limited Liability Companies; Partnerships; Securities Act; Tender Offer Disclosure Act; and Investment Advisors Act typically are designated as complex business cases.

A key factor is deciding whether to designate a case as a complex business case is whether the outcome will have implications for business and industry beyond the conflicts of the parties to the litigation. The designation of a case as a complex business case results in the assignment of litigation to one

judge for handling all of the pretrial matters as well as the trial of the case, which differs from the normal superior court procedure of having whichever judge is assigned under the rotation system to hold court for the week hear the particular issue on the calendar. Specialization also will allow the judge to develop proficiency in both the substantive law and case management issues that arise in complex business cases and in turn that increased level of expertise will lead to greater efficiency and predictability.

The judge originally appointed to preside over the business court uses a courtroom in Guilford County provided by the state. In 2005, the General Assembly expanded the “business court” to Wake and Mecklenburg counties and directed the Chief Justice to designate special judges to preside over those courts.

### **How judges are selected and removed**

In North Carolina, judges must be attorneys, but magistrates need not be. Judges are elected in nonpartisan elections. Supreme Court and Court of Appeals judges are nominated and elected by the voters of the entire state for eight-year terms. Superior court judges are nominated and elected by the voters of their district for eight-year terms. District court judges are nominated and elected by the voters of their districts for four-year terms.

When a vacancy arises (usually through death or midterm retirement) in a judgeship, the governor fills the vacancy by appointment effective until the next general election (except for district court judges, who are appointed for the remainder of a term). Many judges initially obtain office this way rather than through election. Thus while the constitution provides for election of judges, many

first attain office by appointment.

In recent years, there has been much discussion about the method of selection of judges. Many states appoint rather than elect judges, some using a commission to recommend to the governor or to appoint (usually called merit selection) and others providing for appointment by the governor with legislative approval. Numerous bills to change the method of selection of judges have been introduced in the General Assembly during the past several years. Rather than provide for the appointment of judges, the General Assembly changed the method of election from partisan to nonpartisan elections for superior court judges in 1998, for district court judges in 2002, and for appellate judges in 2004 elections.

Because judges do run in primaries and elections (either to attain a judgeship initially or to hold a seat originally attained by appointment), judges must campaign for office and seek contributions like other elected officials. However, because judges are expected after election to be impartial, the Code of Judicial Conduct, adopted by the state Supreme Court, places certain limitations on the campaign practices of judges and candidates for judicial office. A new code adopted in 2003 establishes “safe harbors” for permissible judicial conduct. It allows a judge to attend, speak at or preside over any political gathering and allows a judge or candidate to be included in lists of political candidates, but judges may not endorse other candidates except that when a judge is a candidate, he or she may conduct a joint campaign with other judicial candidates. A judge may contribute to a political party, but not to a candidate other than himself or herself. A judge may personally solicit contributions to his or her own campaign but may not solicit funds for a political party or another candidate.

The code provides that a judicial candidate should maintain the dignity appropriate to judicial office, should prohibit officials or employees subject to the judge’s discretion or control from doing for the judge what he or she is prohibited from doing for himself or herself, and should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.

The code covers all aspects of judicial conduct, not merely conduct with regard to political matters. It requires a judge to perform the duties of office impartially and diligently and sets out standards for meeting these duties – including when a judge should disqualify himself or herself in a proceeding in which the judge’s impartiality might be questioned. Also, the code requires a judge to file a public report of extra-judicial activities for which the judge receives compensation. A judge who violates the code may be subject to disciplinary action by the Judicial Standards Commission. The Commission is discussed further under Related Agencies section of this chapter. The code is printed in the volume of the General Statutes entitled “Rules.”

Judges may be removed by the General Assembly by impeachment or address; may be removed or by the Supreme Court after recommendation of the Judicial Standards Commission for mental and physical incapacity that interferes with performance of the judge’s duties; or may be removed or censured by the Supreme Court after recommendation of the Judicial Standards Commission for willful misconduct in office, willful and persistent failure to perform judicial duties, habitual intemperance, conviction of a crime involving moral turpitude or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Magistrates are not under the jurisdic-

tion of the Judicial Standards Commission. However, the grounds for removing magistrates are the same as for removing judges. The statutes provide a removal procedure for misconduct after notice and a hearing before a superior court judge.

North Carolina law mandates that judges retire at age 72. There is no mandatory retirement age for magistrates.

### District attorneys

In all criminal and some juvenile matters, the district attorney represents the state. The state is divided into 41 prosecutorial districts that coincide with the district court districts. District attorneys are elected in partisan elections by the voters of their districts to four-year terms. Depending on the caseload, each district has at least four assistant district attorneys (the busiest district has 49), each of whom serves at the pleasure of the district attorney. District attorneys and their assistants, who are state employees, are required to devote full time to their prosecutorial duties and may not engage in the private practice of law. In some districts (primarily urban districts), local governments provide temporary funding to the state court administrator's office to pay for additional assistant district attorneys. Each district attorney has an administrative assistant to aid in office administration and calendaring of cases, at least one victim-witness assistant and other clerical support staff. Many have a staff investigator.

The primary duty of the district attorney is to prosecute all criminal cases filed in the superior and district courts in the district. Other duties include preparing the criminal trial docket, advising law enforcement officers in the district, performing such duties related to appeals to the Appellate Division from the district as the attorney general may require, and representing the state in certain

juvenile cases.

In this state, district attorneys have great discretionary power. They control the scheduling of cases and decide which cases to prosecute and in which cases to strike a "plea bargain" with the defendant. A district attorney may be removed from office for misconduct after a due process hearing before a superior court judge.

### Clerks of Superior Court

The clerk of superior court is elected for a four-year term by the voters of the county in a partisan election. Clerks are paid by the state, with their salaries scaled in accordance with the population of their counties. As the title of the office implies, the clerk is responsible for all clerical and record-keeping functions of the superior court and district court. However, the clerk also has numerous judicial functions: As judge of probate matters the clerk handles the probate of wills and the administration of estates of decedents, minors and incompetents. The clerk also hears a variety of special proceedings such as adoptions, incompetency determinations and partitions of land and is empowered to issue arrest and search warrants and to exercise the same powers as a magistrate with respect to taking pleas of guilty to minor littering, traffic, wildlife, boating, marine fisheries, alcoholic beverage, state park recreation and worthless-check offenses.

Each clerk has a number of assistants and deputies. The number of assistants and deputies that each clerk may employ varies from county to county depending on the volume of business. Assistant and deputy clerks are paid on a salary schedule based fixed by the Administrative Office of the Courts based on education and years of service in the clerk's office; the maximum and minimum salaries within that scale are fixed by the General Assembly.



The clerk's books and accounts are subject to audit by the state auditor, and the clerk is bonded by a blanket state bond. In the event of a clerk's misconduct or mental or physical incapacity, the senior resident superior court judge serving the clerk's county is authorized, after notice and a hearing, to remove the clerk.

## **Administrative Office of the Courts**

The Administrative Office of the Courts (AOC) is the organization that is responsible for administrative matters for the Judicial Department throughout the state. The AOC administers an annual budget of about \$372 million in fiscal year 2005-06. It is supervised by a director appointed by the chief justice of the state supreme court. The chief justice also appoints an assistant director, who serves as administrative assistant to the chief justice.

The AOC's basic responsibility is to aid in maintaining an efficient court system. To that end, the AOC establishes fiscal policies and prepares the budget for the Judicial Department. Equipment and supplies are purchased through AOC's purchasing division. Except for those salaries set by the General Assembly, the AOC's personnel division recommends pay plans and evaluates job classifications. There are approximately 5,200 non-elected employees and 500 elected officials in the state's court system. Another AOC function is to prepare and distribute standardized forms and records for use in the state's 100 counties. The clerk of superior court in each county operates a unified record-keeping system prescribed by the AOC.

The AOC collects and publishes statistics on the work of the appellate courts and the trial courts. For the trial courts, data are compiled on a county-by-county basis on filings and dispositions of civil and criminal (both felony and misdemeanor) cases, on juvenile proceedings and on the representation of

indigents.

In recent years, the AOC has spent a considerable amount of time and resources developing electronic data processing and record-keeping systems for court officials. What began as a need for having more detailed statistical information by the AOC has expanded into use of computers at the courthouses to enable the court system to function more efficiently and economically.

Today, each courthouse has a computerized program that keeps track of criminal cases. Developed originally for statistical record-keeping purposes, the system has been expanded to magistrates' offices so that when setting conditions of pretrial release for defendants, magistrates have access to such information as whether a defendant has any outstanding warrants, the defendant's criminal record, and whether the defendant appeared for earlier trials. A civil program has been implemented that allows the clerk to keep a computerized index of all civil cases filed and all judgments entered rather than a manual system of large, cumbersome books as has been kept in the past. The civil system also generates court calendars and tracks all actions in each case. Computer screens are available to the public in all courthouses so that information about civil cases is more accessible. Another area where computer programs have assisted clerks is in child support. The AOC developed a computer program to assist the clerk in child support enforcement.

In 2005 more than \$463 million flowed through the court system. Forty-two percent of that amount came from payments of civil judgments, restitution for victims and other payments that were received by the clerks' offices and disbursed to the persons entitled to them. Some funds are held and invested. Other funds must be distributed to counties, cities or the state. The volume of financial

transactions makes computer-based records critical for accounting purposes.

In addition to developing new computerized programs to assist in the work of the courts, the AOC installs and maintains the computers and computer programs in local court offices and operates a mainframe system in Raleigh.

The AOC also helps develop training programs for court officials and provides them with books and other educational materials needed in their jobs.

Legal counsel for indigent defendants is provided at state expense. The AOC provides administrative review of those payments. The AOC also handles the rotation assignments for superior court judges.

### **Guardian Ad Litem Program**

An Office of Guardian Ad Litem Services was established in the Administrative Office of the Courts in 1983 to provide statewide guardian ad litem services to juveniles who are alleged to be abused, neglected or dependent. A “guardian ad litem” is a trained volunteer who is appointed to serve as an advocate for a child in a particular case or proceeding. In each judicial district of the state, there is at least one program coordinator, who is a paid employee; a program attorney who works under contract; and numerous volunteer guardians. At the state level the guardian ad litem program is responsible for assuring that there are sufficient numbers of trained volunteers to serve the children who need representation. The guardians ad litem’s duties are to investigate the facts, the needs of the juvenile and the available resources within the family and community to meet those needs; to facilitate the settlement of disputed issues in appropriate cases; to present options and recommendations to the judge

at the court hearing; and generally to protect and promote the best interests of the juvenile.

### **Trial court administrators**

Twelve judicial districts have trial court administrators who are responsible for carrying out the policies of the senior resident superior court judge and chief district court judge and who provide general management for the operation of the court system in their district. The trial court administrators’ main function is civil case management – seeing that civil cases move through the system as efficiently and expeditiously as possible. They keep track of civil cases filed in both superior and district courts, determine when cases are ready for trial, and assist the judges in preparing the calendar for terms of civil court. In some counties, trial court administrators are delegated the authority to determine whether to grant continuances in civil cases. They are responsible for jury management and for establishing procedures for calling and paying jurors. Trial court administrators frequently act as the liaison between the court system and county government regarding court facilities. They are responsible for preparing reports for the judges and the Administrative Office of the Courts projecting the future needs of the system. In those judicial districts without a trial court administrator, the senior resident superior court judge and his or her judicial assistant calendar and track civil cases.

### **Court reporters**

Court reporters for each judicial district are appointed by the senior resident superior court judge. Compensation is set by the appointing judge within limits fixed by the AOC. Reporters are required to record the courtroom proceedings verbatim, including testimony of witnesses and orders, judgments and jury instructions issued by the judge. When transcripts of courtroom proceedings

are required for an appeal, as is often the case, the court reporters prepare transcripts for the appealing parties. The reporter's original notes are state property and are preserved by the clerk. In a few counties, video equipment records the proceedings and court reporters transcribe them only if a transcript is needed for an appeal.

Court reporters are not used in district court proceedings. In civil cases, a record is preserved by audio tape recorder. A party who wishes to appeal hires someone to type a transcript from the electronic recording. If they wish, the parties may hire a court reporter at their own expense. A reporter is not required in district court criminal sessions because, on appeal, there is an entirely new trial.

## Juries

In criminal cases, there are no juries in district court or before the magistrate, but a party may request a jury of twelve persons in civil district court. Civil small-claims cases are heard by the magistrate without a jury. The superior court has a twelve-person jury in both civil and criminal cases. The Appellate Division has no jury.

Every two years, a master jury list is prepared in each county by a jury commission composed of three private citizens. The list is prepared by taking names from voter registration and licensed drivers' rosters in a systematic manner to avoid favoritism and discrimination. For each week of court, prospective jurors are randomly selected from this list. North Carolina does not provide an automatic exemption from jury service because of a person's profession or age. All county residents are eligible for jury service except those who have served on the jury in the last two years, who are under eighteen years of age, who are physically or mentally

incompetent, or who have been convicted of a felony and have not had their citizenship restored. Only the judge can exempt a person who has been called from serving, but a person who is called for jury service and is 72 of age or older may state the reason for seeking an exemption from jury service in writing rather than having to personally appear before the judge. A trial juror's service is normally one week. However, some counties are using a system in which jurors are summoned for one day or one trial rather than one week.

The grand jury consists of eighteen persons, half drawn from the jurors called for the first criminal term after January 1 and half from those called for the first criminal term after July 1. The grand jury determines whether persons accused of felonies probably committed the crime for which they are charged. Indictment (official accusation by the grand jury) is a necessary prerequisite to trying a person initially in the superior court, unless the accused waives it. The accused may waive indictment in all cases except those for which the punishment would be death. A grand jury member serves twelve months. The grand jury usually meets for one or two days at the beginning of each criminal session or once a month in counties with multiple criminal sessions. A few large urban counties have two grand juries to avoid imposing unduly on those called to serve in this capacity.

An employer may not discharge or demote any employee because of the employee's service as a juror.

## Representation of indigents

Defendants accused of crimes (except for minor offenses that will not result in imprisonment) who are financially unable to employ a lawyer to represent them are entitled to the services of a lawyer at state expense.

In 2000 the General Assembly created the Office of Indigent Defense Services, which is housed in the AOC but is independent from its supervision, to administer the indigent representation system. The General Assembly also created a 13-member Commission on Indigent Defense Services to develop and improve programs by which the Office of Indigent Defense Services provides legal representation to indigent persons and develop standards for indigent representation. The Commission appoints the director of the Office of Indigent Defense Services.

In most judicial districts the clerk or trial judge assigns a local attorney to represent an accused who is determined to be indigent. In capital cases, the Office of Indigent Defense Services appoints two attorneys to represent the defendant. Fees and necessary expenses of lawyers so assigned are paid by the state.

In twelve districts, including Mecklenburg, Wake, Guilford and Cumberland counties, the assigned counsel system has been supplemented by the public defender system. The public defender is a full-time, state-paid attorney whose sole function is to represent indigent defendants in criminal cases. The public defender's office usually represents most of the indigent defendants in the district, although private attorneys are still called upon from time to time. Public defenders are appointed for four-year terms by the senior resident superior court judge on the written nomination of their district bars. Because rural districts have a relatively small volume of cases, a public defender system is not likely to be established in these districts.

A state-funded Appellate Defender Office began operations in 1981. The office was moved to the Office of Indigent Defense Services in 2000, and the Commission on Indigent Defense Services appoints the appellate defender to a four-year term. It is the responsibility of the appellate defender's

office to provide criminal defense appellate services to indigent persons who appeal their convictions to the Court of Appeals or the Supreme Court.

The state also provides special counsel at each of the state's four mental hospitals to represent patients in involuntary commitment proceedings.

The state's costs for all indigent representation services in 2005-06 exceeded \$95 million.

## **Sentencing Services Program**

The Sentencing Services Program provides sentencing information to judges in selected criminal cases and recommends whether an offender is suited for a particular community correction program. Judges are presented with a written plan that provides a detailed assessment and description of the offender's background. Sentencing Services operates in all judicial districts.

## **Financial support of the courts**

Since the unified court system was established, all operating expenses of the Judicial Department have been borne by the state. These include salaries and travel expenses of all court officials as well as legal services for indigents and juror and witness fees. In 2006-07 the General Assembly appropriated approximately \$372 million for operation of the court system. Counties and cities, however, continue to be responsible for providing courtrooms and related judicial physical facilities including furniture. Almost all of the state financing of the judicial system comes from funds appropriated by the General Assembly, with a small portion coming from federal grants. The courts return about forty percent of the amount appropriated to the state by assessing costs and fees.

In civil actions, there are two primary cost items: a General Court of Justice fee that goes to the state for the support of the court system generally and a facilities fee that goes to the county or city that supplies the court's physical facilities. Criminal actions include other fees in addition to the General Court of Justice fee and the facilities fee. The court collects a law enforcement officers' fee of \$5 for each arrest or personal service of criminal process and \$15 for the service of civil process. These fees go to the county or city whose officer performed the service. It also collects an \$7.50 fee that is remitted to the state treasurer for law enforcement officers' retirement and insurance benefits funds.

### Uniform basic costs

	Magistrate	District Court	Superior Court
Criminal Case	\$105	\$105	\$130
Civil Case	\$65	\$80	\$95

In addition to these basic cost items, in particular cases the party held liable may be charged for other expenses like witness or guardian ad litem fees. Witnesses are paid \$5 per day, and jurors receive \$12 for their first day of service, \$20 per day for days two through five, and \$40 per day thereafter.

Fines and forfeitures must be distinguished from costs and fees. A fine is a money penalty imposed by the judge on a defendant as punishment upon conviction of a crime. A forfeiture occurs when a judge orders a bond forfeited for failure to meet the conditions of the bond. Under the N. C. Constitution, fines and forfeitures go to the county school fund and are not used to support the court system. In fiscal year 2005-06, more than \$78 million from fines and forfeitures was distributed to the counties for the public schools. The county school fund

distributes moneys among all school systems within the county on a population basis.

### Alternative methods of dispute resolution

In recent years, North Carolina has been experimenting with resolving civil suits and family disputes by methods other than litigation. Adversarial court proceedings are not well suited to resolving some kinds of disputes, and the time and cost of litigation has made it important to look to alternative methods. The North Carolina Bar Association has worked closely with the Administrative Office of the Courts in supporting efforts to experiment with alternative methods of dispute resolution.

One basic alternative to court litigation is mediation, a process where an impartial third party promotes an exchange among the parties and suggests possible solutions but the parties themselves actually reach an agreement as to how to resolve their dispute. North Carolina has an extensive mediation program that operates independently of the court system. Mediation is voluntary, and the parties are not required to reach an agreement. Currently there are several dozen community dispute settlement centers in North Carolina using mediation principles; many of them serve more than one county. These dispute settlement centers rely on trained volunteers to serve as mediators and offer their services free. Although many of the centers' cases are generated privately, they also get referrals from the district court on such matters as assault, larceny, trespass, harassment and communicating threats. Some centers mediate bad check cases and others conduct mediation programs in public schools.

North Carolina also operates court-related mediation programs. In 1991 the General Assembly authorized a pilot program for



mediated settlement conferences in superior court cases; today the program is available in all counties. The program requires superior court litigants and their attorneys to participate in a settlement conference with a paid mediator before their case can be tried in court. A similar program functions for litigants in worker's compensation cases before the Industrial Commission. In 1995, the General Assembly created the Dispute Resolution Commission to administer mediator certification and regulate mediator conduct. The Commission includes judges, mediators, attorneys and citizens.

Mediation also is used in family law cases in the district court. Mediation of child custody and visitation disputes, first begun experimentally in Mecklenburg County, has been endorsed by the General Assembly. In 2006 the General Assembly expanded the program to all judicial districts. Mediation is viewed as more desirable than traditional litigation to resolve custody disputes. Unlike contract or tort cases where the parties have no contact after litigation, parents need to cooperate for years in making decisions about their children. Also the "win-lose" approach of the adversarial system often does not promote the best interests of the child. Mediators for the child custody cases are not attorneys, but rather must be trained as mediators; have a graduate degree in a human relations field; and have experience in child development and family dynamics so that issues are resolved with the children's best interest as the central focus. The Family Financial Settlement Program provides settlement opportunities for equitable distribution, alimony and child support cases. The parties and their attorneys can choose among various dispute resolution options, with mediated settlement similar to superior court mediated settlement conferences as the default procedure.

In 2003 the General Assembly enacted

a law creating a collaborative law settlement procedure for all family law issues except absolute divorce. The procedure allows husbands and wives and their attorneys to agree in writing to follow the collaborative law procedure in an attempt to resolve issues about alimony, child custody, child support and equitable distribution without resort to the courts.

One court-sponsored arbitration system is being used in North Carolina. Arbitration is submission of a dispute to a third party who renders a decision after hearing arguments and reviewing evidence. Arbitration, which generally is less formal and less time consuming than litigation, has been used for many years by agreement of the parties in commercial or labor contracts. The first court-ordered alternative dispute resolution program in North Carolina was mandatory, non-binding arbitration of civil claims for monetary damages of \$15,000 or less. The program now covers 29 district court judicial districts. The state assesses a fee of \$100, which is shared equally by the parties. The arbitrators are experienced attorneys who are paid \$75 per case by the AOC. A party who is not satisfied with the arbitrator's decision has a right to have the case heard by the district or superior court judge.

Two modified litigation techniques – mini-trials and summary jury trials – have been tried but are not widely used. Mini-trials are voluntary proceedings before a neutral third party. The parties to the dispute exchange key documents and other information and then present condensed versions of their case to the other side. The theory is that the presentations will make negotiations and settlement easier. The decision by the neutral third party is not binding. Summary jury trials are trials in which the parties make a condensed presentation of their evidence to a regular jury. The jury then delivers a ver-

dict, but it is non-binding. If the parties are unhappy, they can still have a regular trial. Summary jury trials encourage settlement because they help parties see how a jury is likely to evaluate the case.

Over the last decade the number and kinds of cases diverted to alternative dispute resolution has grown. The alternatives that seem to offer most promise will continue to be expanded in future years, and it is likely that in the next decade one area in which expansion will occur is the family law area. Readers who want more information about alternative dispute resolution should contact the North Carolina Bar Association P.O. Box 12806, Raleigh, NC 27605 and ask for their booklet entitled "Dispute Resolution Alternatives in North Carolina."

### **Caseload statistics**

The number of cases handled by the court system has increased dramatically in recent years. In fiscal year 1985-86, 15,157 superior court civil cases were filed; by 2005-06 that number had jumped to 27,511 (an 82 percent increase). Superior court criminal cases had an even greater increase, from 76,179 in 1985-86 to 152,164 in 2005-06, an 100 percent increase. Significantly, the proportion of those cases that were felonies rose from 59 percent in 1985-86 to 72 percent in 2005-06.

In district court, civil filings rose only 34 percent (from 47,763 in 1985-86 to 69,842 in 2005-06, but domestic relations filings increased dramatically from 67,335 to 136,046 (94 percent). District court criminal and infraction filings increased 92 percent during the period, from approximately 1.3 million in 1985-86 to 2.5 million in 2005-06.

In magistrates court, the number of small claims cases filed increased by 24 percent, but the volume of cases filed, 274,032 in 2005-06,

continues to be very high.

## **State Judicial Council**

The State Judicial Council was created by the General Assembly in 1999 to promote overall improvement in the judicial branch. The Council's duties are to advise the Chief Justice on priorities for funding, review the Judicial Department budget, study and recommend salaries of judges and judicial officials, recommend the creation of judgeships, recommend performance standards for courts and judicial officials, recommend guidelines for the assignment and management of cases, monitor the use of alternative dispute resolution, recommend changes in the boundaries of judicial districts and divisions, and monitor the effectiveness of the judicial branch's service to the public. The Council has 18 members who represent various court functions, the bar and the public.

### **Related agencies**

#### ***The Judicial Standards Commission.***

As previously stated, the Judicial Standards Commission was established to consider complaints against judges and, where appropriate, to make recommendations for disciplinary action, including removal. The commission is authorized to receive written complaints from citizens concerned with qualifications or conduct of any judge and to investigate those complaints.

The Commission is divided into two separate panels, one of which serves a function analogous to a grand jury by determining whether a hearing should be ordered. The other panel conducts a hearing if one is ordered. The Commission is authorized to issue a private letter of caution to a judge, to reprimand the judge publicly, or to recommend that the Supreme Court impose more serious discipline. Upon the recommenda-

tion of the Commission, which requires the vote of five of the seven members, the Supreme Court may suspend, censure or remove a judge. It is also authorized to make an investigation on its own without receiving a complaint.

The Commission's proceedings and records are confidential except when formal hearings are ordered by the commission. In such cases the notice and complaint filed by the commission concerning the formal hearing and the answer and all other pleadings related to the formal hearing are made public. If the Commission submits recommendations to the Supreme Court, the recommendations and the record filed in support of them also are public. Letters of reprimand issued by the Commission also are public.

The commission has 13 members. Five are judges appointed by the chief justice: a Court of Appeals judge, two superior court judges and two district court judges. Four attorneys are named to the commission by the State Bar Council, two citizens (not judges or lawyers) are appointed by the governor, and one citizen is appointed by the speaker of the North Carolina House of Representatives and one by the President Pro Tem of the North Carolina Senate. Members serve six-year terms and are not eligible for reappointment.

In the last five years the Commission received an average of 254 complaints against judges annually. The vast majority were dismissed after an initial review, typically because they were determined to involve matters that were not within the Commission's jurisdiction. On average, seventeen preliminary investigations were ordered and seven were dismissed when the investigations were completed. In an average year, the Commission conducted four formal hearings and made two recommendations for action to the Supreme Court. Since 1973 the Supreme

Court has removed six judges based on the Commission's recommendations. Several other judges have resigned while they were under investigation.

The address for the Commission is P.O. Box 1122, Raleigh, N.C. 27602.

***The Courts Commission.*** The North Carolina Courts Commission is directed to study the structure, organization, jurisdictions, procedures and personnel of the Judicial Department and of the General Court of Justice and to make recommendations that would facilitate the administration of justice. The commission has 28 members, including legislators, court officials, practicing attorneys, and citizens. In its early years, the Courts Commission researched, drafted and shepherded through the General Assembly all the major legislation implementing the revision of Article IV of the North Carolina Constitution concerning the judicial branch of state government that was approved by the voters in 1962. The Commission's recommendations have led to legislation creating new districts, adding court personnel, creating a category of offenses called infractions, authorizing the use of emergency judges, and other matters.

***The Department of Justice.*** The N.C. Department of Justice consists of (1) the Office of the Attorney General, which is organized into several groups of attorneys who advise and represent state agencies and who represent the state in all criminal appeals; (2) a Training and Standards Division; and (3) the State Bureau of Investigation (SBI). It is the duty and responsibility of the attorney general to appear in all actions, civil or criminal, in the appellate court division in which the state either is interested or is a party and to represent all state departments, agencies and institutions. The Attorney General's Office consults with and advises the district attorneys whenever they request such assistance.

Its Special Prosecutions Section prosecutes criminal cases at the trial level when a district attorney asks it to do so. The SBI helps identify and apprehend criminals and also helps in scientifically analyzing evidence of crimes and in investigating and preparing evidence to be used in criminal courts. The SBI aids local law enforcement officers or district attorneys whenever they ask for help. The Criminal Information Division of the SBI operates a high-speed computerized communication system for receiving and disseminating to law enforcement agencies and other authorized users (such as schools and foster care agencies) information that will help them perform their duties. Such information includes data on motor vehicle registration, stolen vehicles, wanted and missing persons, stolen property, firearms registrations, warrants and parole and probation histories. Computer terminals are set up in state and local law enforcement agencies so that an officer who needs this type of information while investigating a case can get it quickly and efficiently.

The attorney general also renders legal opinions on questions of law submitted by public officers. These opinions are usually in response to an inquiry from a governmental official about an unclear area of the law. The attorney general's opinions are of an advisory nature only.

#### ***The Governor's Crime Commission.***

The Governor's Crime Commission was established pursuant to the federal Omnibus Crime Control and Safe Street Act as a mechanism for allocating federal funds within the state's criminal justice system. The Crime Commission is composed of state and local officials involved in the criminal justice system and private citizens.

Besides awarding federal and state grant money and advising the governor on matters pertaining to the criminal justice system,

the commission studies criminal justice issues, makes long-range planning and policy recommendations for improving the criminal justice system, and develops a legislative agenda for improving the system. It also provides data analysis, research and technical assistance to state agencies, and serves as the primary clearinghouse for information on crime and the criminal justice system.

***North Carolina Sentencing and Policy Advisory Commission.*** In 1990 the General Assembly created the North Carolina Sentencing and Policy Advisory Commission (Sentencing Commission) to evaluate sentencing laws and policies and their relationship to the purposes of the criminal justice and corrections systems. The Commission is composed of 30 members, including judges, representatives from corrections, attorneys, a member of the Victims Assistance Network and citizens who are not attorneys. In response to a legislative mandate, the Sentencing Commission devised a new sentencing structure for the state known as structured sentencing whereby judicial discretion in sentencing was reduced and sentences were based on objective criteria such as previous convictions. The Commission recommended that a sentence should reflect the time a defendant would actually be incarcerated. It shortened the sentences for many offenses but ended parole, in effect increasing the actual time defendants convicted of serious or repeat offenses would be incarcerated. The Sentencing Commission's recommendations were adopted by the General Assembly. The Sentencing Commission is charged with monitoring the effect of sentencing on the prison population, determining the long-range needs of the criminal justice system and corrections systems, identifying critical problems in the criminal justice and corrections systems and recommending strategies to solve those problems. The Commission, which reports annually to the General As-

sembly, has made recommendations to the General Assembly to modify the classification of criminal sentences and to increase the amount of restitution paid by defendants to their victims. It also has reported on recidivism rates of criminal defendants.

**North Carolina State Bar.** The North Carolina State Bar licenses, regulates and disciplines attorneys in North Carolina. It also is empowered by law to adopt the canons of ethics for lawyers. To practice, an attorney must be a member of the state bar. In addition to its regular and prescribed functions, the state bar also studies matters of general importance to the adjudication process.

The North Carolina State Bar has issued a Code of Professional Responsibility that defines the ethical conduct that the public has a right to expect of attorneys. Attorneys are bound by this code and look to it for guidance with regard to acceptable professional conduct. The code is published in the volume of the General Statutes entitled “Rules.” The state bar has a committee that investigates complaints of unethical practice by an attorney and, if a violation is found, initiates disciplinary action. Any citizen who wishes to make a complaint about the conduct of an attorney should contact the North Carolina State Bar, P.O. Box 25908, Raleigh, NC 27611.

**The General Assembly.** The General Assembly is not, of course, a component of the judicial system. However, its actions have a tremendous effect on the system because the legislature, by its enactment of laws and funding of programs, determines how the system will operate and what its goals will be. The General Assembly receives reports and recommendations from commissions studying the criminal adjudication process and court system and decides whether to enact the recommendations into law. Also, the legislature enacts many laws that have not come from a

study commission but which have a significant effect on the system.

Most legislation dealing with trial procedure, substantive modifications to the criminal and civil laws, and the structure of the court system pass through the judiciary committees of the House and the Senate. The House has four judiciary committees and the Senate two. If these committees decide favorably on a bill requiring the expenditure of public funds, the bill is then referred to the Appropriations Committee, which must approve it before it comes to the floor for a vote. Each body’s appropriation committee has a subcommittee on Justice and Public Safety that is responsible for making all budgetary recommendations for the judicial department. The Justice and Public Safety subcommittees not only consider bills that have come from other committees but also initiate proposals concerning increasing the number of various court officials and funding new programs within the court system.

### **Education and training of court personnel**

Because court personnel need to keep up with ever-changing law and procedure, education and training programs for them are essential to a good judicial system. The supreme court requires judges to attend at least 30 hours of continuing legal education in a two-year period. Practicing attorneys, district attorneys and public defenders must attend at least twelve hours of training each year. Newly appointed magistrates are required to successfully complete a basic training course and attend at least twelve hours of continuing education during each two-year term of office. Two agencies play a role in providing this vital service.

**Administrative Office of the Courts.** The AOC works closely with the Institute



of Government in planning and preparing programs, and it supplies legal memoranda, books and materials to court personnel.

***Institute of Government.*** The Institute of Government, which is part of the School of Government at The University of North Carolina at Chapel Hill, engages in research, teaching and consultation with court personnel. It conducts more than 40 seminars or short courses per year for judges, clerks, district attorneys, public defenders and magistrates. It also publishes various articles, memoranda and books to aid court personnel in their work. The publications are available from the school's bookstore in Chapel Hill and at [www.sogpubs.unc.edu](http://www.sogpubs.unc.edu).

### Private organizations

Private associations of court officials and of attorneys contribute to the working of the court system.

***Private associations of court personnel.*** Each group of court officials has formed its own private organization to meet and discuss mutual problems. Each group holds at least one annual meeting, while most hold more. These meetings are primarily educational. Speakers discuss changes in the law affecting the group, and the court officials discuss matters of mutual concern. Generally, the officers of the associations plan the programs with the Institute of Government and the Administrative Office of the Courts. Another function of these organizations is to permit the particular group of court officials to take positions that reflect the opinion of the entire group on matters of concern to the group.

These organizations include: North Carolina Conference of Superior Court Judges, North Carolina District Court Judges Association, North Carolina Association of Clerks of Superior Court, Association of Assistant

and Deputy Clerks of Court, North Carolina Magistrates Association, North Carolina District Attorneys Association, North Carolina Association of Public Defenders, North Carolina Association of Court Counselors, North Carolina Conference of Court Administrators, North Carolina Shorthand Reporters Association and North Carolina Verbatim Reporters Association.

***North Carolina Bar Association.*** The North Carolina Bar Association is a private, voluntary association of North Carolina lawyers. The association has many committees that study various areas of the law. The Association each year provides numerous continuing-legal-education programs for members of the bar. These programs play an important role in keeping attorneys apprised of new procedures and changes in substantive law.

***North Carolina Academy of Trial Lawyers.*** The North Carolina Academy of Trial Lawyers is a private association of lawyers who represent plaintiffs in civil actions and defendants in criminal cases. The Academy provides numerous continuing-legal-education programs in the areas of criminal and civil litigation. It also has a representative who lobbies for the Academy's interests in the General Assembly.

***North Carolina Association of Black Lawyers.*** The North Carolina Association of Black Lawyers is a private association of black lawyers formed to express the collective concerns of black attorneys. The organization maintains strong ties with Black law students. It provides continuing-legal education programs.

***North Carolina Association of Women Attorneys.*** The North Carolina Association of Women Attorneys is a private statewide bar association to promote the participation

of women in the legal profession and to promote the rights of women under the law. The Association sponsors continuing legal education programs and lobbies for legislation of interest to the goals of the organization.

***North Carolina Association of Defense Attorneys.*** The North Carolina Association of Defense Attorneys is a private association of North Carolina attorneys who devote a substantial amount of their professional time to representing the defense in civil litigation. The Association conducts continuing-legal education seminars for its members. It occasionally retains lobbyists to address proposed legislation.

# Legal Glossary

## A

- accomplice** — A person who knowingly and voluntarily unites with the principal offender in a criminal act through aiding, abetting, advising or encouraging the offender. Mere presence, acquiescence or silence, in the absence of a duty to act, does not make a person an accomplice.
- acknowledgment** — A formal declaration before an authorized official, by a person who has executed (signed) an instrument, that the execution of the instrument was his own voluntary act.
- acquittal** — The legal certification of the innocence of a person who has been charged with a crime, setting the person free by a finding of not guilty.
- administrator** — An individual appointed by the court to manage the estate (property) of a person who died without leaving a valid will. An administrator d.b.n. (*de bonis non*) is a person appointed to complete the administration of an estate that has ceased to be represented because of the resignation, removal or death of the original administrator. If the deceased left a will but no executor qualified to administer the estate, an administrator c.t.a. (*cum testamento annexo*) is appointed. If such administrator c.t.a. is removed, an administrator d.b.n. c.t.a. is appointed.
- adversary system** — A judicial system involving opposing parties, each having the right to be represented by qualified counsel, in which the party prosecuting or seeking relief has the burden of establishing his case and giving legal warning to his adversary, who is afforded an opportunity to contest the case presented. The opposing parties, through counsel, must produce evidence, legal rules and argument to substantiate their respective contentions. This presentation of adverse positions, supervised by the presiding judge, is the foundation upon which the jury or judge determines the respective rights.
- affiant** — A person who makes and signs an affidavit.
- affidavit** — A written declaration or statement of facts made voluntarily under oath, acknowledged and signed before an official with authority to administer oaths.
- affirmative defense** — A defense that does not necessarily refute an allegation but offers new information that may defeat the right to recovery.
- aid and abet** — To aid is to assist or help another in the commission of a crime. To abet is to encourage, advise or instigate the commission of a crime. *See accomplice.*
- allegation** — The statement in a pleading made by a party to a civil action setting forth what he expects to prove.
- amicus curiae** (a-mi-kus ku-ri-e) — Literally, “a friend of the court.” A lawyer, other person or organization who is not a party to the action, but who, with the court’s permission, volunteers information and opinion upon some matter of law. Amicus curiae briefs are often filed in appellate cases.
- answer** — The pleading in a civil suit by which the defendant admits, denies or otherwise responds to the allegations of facts set forth in the plaintiff’s complaint. It also contains defenses the defendant may have to the plaintiff’s allegations.
- appeal** — A proceeding by which a party seeks a higher court review of the action taken by a lower court. In North Carolina, notice of appeal from the trial court must be filed within 30 days after the judgment is rendered.
- appearance** — The formal act by which a defendant submits to the jurisdiction of the court. It may be in person, by an attorney, by pleadings or a combination of these.
- appellant** — The party appealing to the higher court, i.e., the losing party in the lower court.
- appellate court** — A court having jurisdiction to review the action taken by a lower court.
- appellee** — The party against whom an appeal is taken, i.e., the winning party in the lower court.

**arbitration** — The referral of a dispute to an impartial third person or panel. In some instances, the parties agree in advance to abide by the arbitrator's decision following a hearing at which both parties have an opportunity to be heard. In other instances, arbitration may be ordered by a court.

**arraignment** — A proceeding in which a defendant is brought before the court to answer to a criminal charge. The charge is read to the defendant, who is asked how he or she pleads.

**arrest** — To deprive a person of his liberty by legal authority. An officer must indicate his intention to take the person under actual control. No formal declaration of arrest is required.

**arrest of judgment** — The act of staying (delaying) the effect of a judgment that has already been entered.

**arson** — The burning of the property of another or the malicious burning of one's own property with the intent to defraud.

**assault** — A willful assault or threat to inflict injury upon the person of another with an apparent present ability to do so. Also, any intentional display of force that would give the victim reason to fear or expect immediate bodily harm.

**attachment** — An ancillary or auxiliary remedy by which the plaintiff acquires a lien upon property of the defendant to ensure the payment of a civil judgment that he expects to obtain against the defendant in the future.

## B

**bail** — The release of an arrested or imprisoned person when security (cash or property) is given or pledged to ensure his appearance at a specified date and place. In North Carolina, all persons except those charged with a capital crime have a right to be released before trial on bail. The amount of bail must be reasonable and appropriate to the particular case.

**bail bond** — The obligation signed by the accused or his sureties to secure his presence at trial. The bond is subject to forfeiture if the accused does not properly appear for trial.

**beyond a reasonable doubt** — The state must prove a criminal defendant's guilt beyond a reasonable doubt. This means that the jury must be fully satisfied, or satisfied to a moral certainty, as to the truth of the charge before it can convict the defendant.

**bill of particulars** — A written statement specifying the details of the demand set forth in the complaint in a civil action or of the charge set out in the bill of indictment in a criminal action. The purpose of the bill of particulars is to give the defendant more information to better enable him to prepare his answer or defense.

**bind over** — To hold a person for trial on bond (bail) or in jail. If the judicial official conducting a preliminary hearing finds probable cause to believe the accused committed a crime, he will "bind over" the accused, normally by setting bail for his appearance at trial.

**blue sky laws** — State statutes regulating the sale of securities for the protection of investors.

**brief** — A written document prepared by counsel as the basis for argument in a case before a court. It contains a summary of the facts of the case, the pertinent laws and an argument of how the law applies to the facts supporting the attorney's position.

**burden of proof** — The necessity or duty to prove a fact in dispute. It is normally said that one of the parties has the burden of proof in establishing a particular fact. This means it is the duty of that party to introduce evidence to establish the disputed fact.

**burglary** — Breaking and entering into another's house or other building with the intent to commit a felony.

## C

**capias** — An order from the court for the arrest of a defendant. Its purpose is to obtain a party's physical presence before the court. *See warrant of arrest.*

**capital crime** — A crime punishable by death. The only capital crime in North Carolina is first-degree murder.

**caption** — The title or heading of a pleading or other paper connected with a case in court. It contains the names of the parties, the name of the court, the number and type of case and other similar information.

**caveat** — Objection to the probate of a will. The challenging party is contending that the instrument in question is not the true will. It may be filed within three years after a will is offered for probate and is tried as a civil issue of fact in the superior court.

**certiorari** (*ser-she-o-ra-ree*) — A legal writ (order) by which a higher court commands a lower court to certify or to send up a record of a trial or other proceedings in the lower court for the purpose of judicial review. It is within the discretion of the reviewing court to issue or

deny a petition for a writ of certiorari.

**challenge for cause** — An objection to a prospective juror based on bias or prejudice that may prevent him from being fair and impartial in a particular case. If the judge agrees that there is reason to believe that the person challenged for cause will not be a satisfactory juror, he will remove that person from consideration. Each side has an unlimited number of challenges for cause. *See peremptory challenge.*

**challenge to the array** — Questioning the qualifications of an entire jury panel, usually on the grounds of some legal fault in the composition of the panel, i.e., racial discrimination.

**chambers** — Any place where a judge hears motions, signs papers or conducts other business pertaining to his office when he is not presiding over a session of court. This is usually a private room or office of the judge in the courthouse.

**change of venue** — The removal of a suit begun in one county or district to another county or district for trial.

**character evidence** — Testimony of witnesses who know the general character and reputation of a person in the community in which he lives. It may be considered by the jury in a dual respect: (1) as substantive evidence upon the theory that a person of good character and reputation is less likely to commit a crime than one who does not have a good character and reputation, and (2) as corroborative evidence in support of a witness's testimony as bearing upon his credibility.

**circumstantial evidence** — All evidence of an indirect nature. A court or jury may from circumstances (known or proved) infer a principal fact. *See direct evidence.*

**citation** — An order to appear in court at a certain time and place. A citation is not a warrant, and failure to comply with it is not a crime. Citations are issued for most minor traffic offenses; they become warrants after a magistrate takes the law enforcement officer's oath to the offense listed in the citation. *See warrant.*

**class action** — An action where a large group of persons is interested in a matter. One or more may sue or be sued as representatives of the class without the need to join every member of the group.

**clerk of court** — An officer of a court who supervises the court's clerical functions, keeps records, issues process and enters judgments and orders. In North Carolina,

the clerk of superior court has additional duties in the settlement of various special proceedings, such as adoption or condemnation of lands, and as judge of probate. The clerk of superior court is also the clerk of the district court, and he can accept guilty pleas or set bail in certain traffic cases.

**Code of Judicial Standards** — Requires a judge to perform the duties of his office impartially and diligently and sets out standards for meeting those duties, including when a judge should disqualify himself in a proceeding in which his impartiality might be questioned. A judge who violates the code may be subject to disciplinary action by the Judicial Standards Commission.

**Code of Professional Responsibility** — The rules of conduct that govern the legal profession. The N.C. code contains general ethical guidelines and specific rules written by the N.C. State Bar.

**codicil** — A supplement, addition or postscript to a will.

**common law** — The body of legal principles that derives its authority solely from usages and customs of ancient times or from the judgments and decrees of courts recognizing, affirming and enforcing such usages and customs; particularly the ancient unwritten law of England. Common law is to be distinguished from statutory law, which is enacted by a legislative body such as Congress or the General Assembly.

**commutation** — The change of a sentence from a greater to a lesser one, as from death to life imprisonment. In North Carolina, only the governor has power to commute a sentence.

**comparative negligence** — *See contributory negligence.*

**competency** — Legal capacity. *See incompetent.*

**complaint** — The pleading that when filed commences the litigation in a civil case. It contains the allegations and request for relief and/or recovery of money by the plaintiff.

**complainant** — Synonymous with "plaintiff," i.e., the party bringing the action. It is applicable to civil actions only, although in criminal actions the chief or only prosecuting witness may sometimes be referred to loosely as the complainant.

**concurrent jurisdiction** — The power of more than one court to exercise jurisdiction over the same subject matter. The first court that takes the case obtains jurisdiction to the exclusion of the other courts. *See jurisdiction.*



**concurrent sentences** — Sentences for two or more crimes ordered by the judge to be served simultaneously rather than successively.

**condemnation** — The legal process by which private property is taken for public use without the owner's consent upon payment of just compensation.

**consecutive sentences** — Successive sentences imposed against a person convicted of two or more crimes. One sentence begins at the expiration of another.

**contempt of court** — Any act calculated to embarrass, hinder or obstruct a court in the administration of justice or calculated to lessen its authority or dignity. Contempts are of two kinds: direct and indirect. Direct contempts are committed in the immediate presence of the court and may be punished summarily by the court, without a jury trial. Indirect contempt usually embraces a failure or refusal to obey a lawful order of the court.

**continuance** — The postponement to a subsequent time of an action pending in court.

**contributory negligence** — Negligence on the part of the plaintiff who is seeking to recover for injuries sustained as a result of the defendant's negligence. If alleged and proved by the defendant, contributory negligence bars recovery by the plaintiff. This type of negligence is in contrast to comparative negligence, wherein the negligence of the parties is compared and recovery permitted when the negligence of plaintiff is slight and the negligence of defendant is gross.

**corpus delicti** (kor-pus de-lik-ti) — The body (material substance) upon which a crime has been committed, e.g., the corpse of a murdered man or the charred remains of a house burned by an arsonist.

**corroborating evidence** — Evidence supplementary to that already given and tending to strengthen or confirm it.

**costs** — Charges required by law to be paid to the court for the expenses of the litigation. Costs in a criminal case do not constitute part of the sentence or punishment but are in addition to it.

**court of record** — A court in which the proceedings are recorded and maintained as permanent records. Such records are absolute proof of what occurred in that court. In North Carolina, every court is a court of record.

**crime** — Any act that a legislative body declares contrary to law. Usually a punishment is provided, upon conviction. *See felony and misdemeanor.*

**criminal insanity** — The mental condition that makes a person not legally responsible for his acts. In North Carolina, the test used to determine criminal insanity is whether the person can distinguish right from wrong (M'Naghten Rule).

**criminal summons** — An order commanding an accused to appear in court. It may be issued in lieu of an arrest warrant for misdemeanors when the issuing official believes the accused will appear in court without being placed under bail.

**cross-examination** — The questioning of a witness in a trial or other adversary proceeding by the party opposing the one who first called the witness.

## D

**damages** — Pecuniary (monetary) compensation that may be recovered by the plaintiff for injury to his person or loss or damage to his property or rights as a result of the unlawful act or negligence of the defendant.

**de novo** (de no-vo)—Anew, afresh. A "trial de novo" is the retrial of a case, usually as the result of an appeal. The result of the first trial is immaterial.

**declaratory judgment** — A judicial decision that declares the rights of the parties. Such judgments have the force and effect of a final judgment or decree. It is distinguished from the usual form of judgment in that it does not seek execution or performance from anyone.

**decree** — A decision or order of the court. A final decree fully and finally disposes of the litigation, subject only to appeal to an appellate court; an interlocutory decree is provisional or temporary.

**default** — A default occurs when a party fails to plead or to take other required steps within the time allowed or fails to appear at the trial.

**deposition** — The recorded testimony of a person taken under oath before trial for the purpose of discovering facts and information to be used at trial to impeach the testimony of a witness or to be introduced in lieu of a witness's testimony if such witness is absent for an acceptable reason.

**direct evidence** — Evidence that tends directly to prove or disprove a disputed fact, as distinguished from circumstantial evidence from which an inference can be drawn. The best example is the testimony of an "eye witness." *See circumstantial evidence.*

**direct examination** — The interrogation of a witness by the

party who called him to testify.

**directed verdict** — Result decided by the judge when he or she withdraws disputed issues from the jury's consideration. Judgment is entered for the prevailing party.

**discovery** — Pretrial examination of a person or thing on behalf of an adverse party to obtain information relevant to the case.

**dismissal with leave** — Dismissal of criminal action by prosecutor for failure of defendant to appear. The case may be reopened at any time.

**dismissal without prejudice** — A dismissal of a case that permits the complainant to sue again on the same cause of action within a year. Under N.C. Rules of Civil Procedure, a voluntary dismissal will be granted the plaintiff without prejudice; an involuntary dismissal, unless otherwise specified by the court, operates as an adjudication on the merits and bars the right to maintain an action on the same claim or cause. This is often referred to as a dismissal "with prejudice."

**dissent** — Disagreement by one or more judges of an appellate court with the decision of the majority of the court. Dissenting judges often file dissenting opinions in which they explain why they disagree with the majority.

**docket** — A book containing entries of all the important acts done in court in the conduct of each case from its inception to its conclusion. The term "docket" or "trial docket" also refers to the list or calendar of cases to be tried at a specified term. The docket is prepared by the court clerks for use by judges and attorneys.

**double jeopardy** — The constitutional prohibition against a second prosecution of a person for the same crime.

**due process** — The constitutional requirement that law in its regular course of administration through the courts of justice incorporate the essential elements of adequate notice and an opportunity to be present, to be heard and to defend in a fair and orderly proceeding that is adapted to the nature of the case.

## E

**eminent domain** — Power of the government to take private property for public use upon payment of just compensation. *See condemnation.*

**enjoin** — To order a person to perform or to abstain and desist from performing a specified act or course of conduct. *See injunction.*

**entrapment** — The act of officers or agents of a government in inducing a person to commit a crime otherwise not contemplated, for the purpose of instituting a criminal prosecution against that person.

**escheat** (*es-cheet*) — In American law, the right of the state to an estate to which no one is able to make a valid claim. Article IX, Section 10 of the Constitution of North Carolina provides that escheat monies shall be used to assist "worthy and needy" students enrolled in colleges in the state.

**estoppel** — A person's own act or acceptance of facts that precludes his later asserting a contrary circumstance that would be detrimental to another party who relied on the act of acceptance.

**ex contractu** — Arising from a contract.

**ex delicto** (*ex de-lik-to*) — Arising from a wrong. *See tort.*

**ex parte** (*ex par-tay*) — By or for a single party; done for, in behalf of or on the application of one party only, as distinguished from an adversary (contested) proceeding. An ex parte order is an order that is issued without notice to an adversary.

**ex post facto** — After the fact; an act or fact occurring after some previous act or fact and relating thereto. The Constitution prohibits the enactment of ex post facto laws, i.e., laws that permit conviction and punishment for an act performed before the law was passed.

**execute (a judgment or decree)** — To put the final judgment of the court into effect.

**executor (executrix)** — A person named in a will to administer the estate of the testator (deceased person).

**exhibit** — A paper document or other physical object introduced into evidence during a trial or hearing.

**expert evidence** — Testimony relating to scientific, technical or professional matters given by persons (expert witnesses) particularly qualified by reason of their special training, skill or familiarity with the subject.

**extradition** — Surrender by one state of an individual accused or convicted of an offense to another (the receiving) state. When a defendant charged with a felony flees to another state, the district attorney may apply to the governor to "requisition" the accused from the foreign jurisdiction so that he may be tried in North Carolina.

## F

**felony** — A crime that was a felony at common law or is punishable by death or imprisonment in the state's

prison or is made a felony by statute. Any other crime is a misdemeanor.

**fiduciary** — A person having a legal relationship of trust and confidence to another and having a duty to act primarily for the other's benefit, e.g., a guardian, trustee or executor.

**fine** — A monetary penalty imposed in a criminal or civil action.

## G

**garnishment** — A proceeding whereby property, money or credits of a debtor in possession or under control of a third party (the garnishee) are applied to the debts owed by the debtor to the plaintiff (garnishor).

**grand jury** — An 18-member panel having the responsibility to determine whether there is probable cause to try an accused for a serious crime. This process, called "indictment," is a prerequisite to trial in the superior court, unless waived. All federal grand juries and some special state grand juries also have investigative powers.

**guardian ad litem** (ad *li*-tem) — A court-appointed fiduciary charged with representing the interests of a child or incompetent person in a court proceeding. The guardian relationship terminates when the litigation is finally resolved.

## H

**habeas corpus** (*ha*-be-as *kor*-pus) — A writ (order) to bring a person before the court. In most common usage, the writ is directed to a warden or jailer commanding him to produce a prisoner or person detained so that the court may determine whether such person is lawfully confined.

**harmless error** — An error committed by a lower court but determined by an appellate court not to be prejudicial to the rights of the party affected and therefore furnishing no basis for reversal of the lower court's judgment.

**hearsay** — Evidence that is not within the personal knowledge of the witness but was related to the witness by a third party.

**holographic will** — A will written entirely by the testator in his own handwriting.

**hostile witness** — A witness who manifests hostility or prejudice against the party who called him. On direct examination, the calling party may be permitted to

question such a witness as if he had been called by the opposing party.

**hung jury** — A divided jury that cannot agree upon any verdict.

## I

**impeach** — To attack the credibility of a witness by the testimony of other witnesses or by other evidence.

**in camera** — The judge examines evidence in his or her chambers to determine its admissibility in the trial.

**incompetent evidence** — Evidence that is not admissible under the rules of evidence.

**incompetent** — A person lacking the capacity, legal qualification, or fitness to manage his own affairs or to discharge a required duty. A guardian may be appointed to conduct the affairs or protect the interests of an incompetent.

**indemnify** — To make good or compensate or reimburse one for a loss already incurred by him or her.

**indeterminate sentence** — A sentence of imprisonment to a specified minimum and maximum period of time. The commissioner of correction may discharge the prisoner after he has served the minimum term.

**indictment** — A written accusation made by the grand jury charging that a person named therein has committed a crime. In North Carolina, indictment is a prerequisite to trial in the superior court, except on appeal from a lower court, unless waived. *See true bill.*

**information** — An accusation of a criminal offense drawn by the district attorney and similar to an indictment except that it is not presented to the grand jury. It may not be used in a capital case. In a noncapital felony case, when indictment is waived, trial is based on an information.

**infraction** — A noncriminal violation of law not punishable by imprisonment and carrying a penalty of not more than \$100. Minor traffic offenses are generally considered infractions.

**injunction** — A court order directing a person to refrain from doing some act or (occasionally) affirmatively to do an act. *See enjoin.*

**instruction** — A direction given by the judge to the jury concerning the law of the case that the jury is hearing. Also designated a "charge."

**intent, criminal** — Intent in law is the exercise of intelligent will in which the mind is fully aware of the nature and

consequences of the act that is about to be done and, with such knowledge and with full liberty of action, the person willingly elects to do the act. A criminal intent must be accompanied by an overt act or an intentional attempt to constitute a crime.

**interlocutory** (in-ter-loc-u-tor-y) — Provisional; temporary. Often used in reference to a court order that is not final.

**interrogatories** — Written questions prepared by one party and served on an adversary who must provide written answers under oath.

**intervention** — Procedure in a suit or action by which the court permits a third person to intervene and become a party.

**intestate** (in-tes-tate) — Person who dies without having left a valid will.

## J

**jeopardy** — The peril in which an accused is placed when he is properly charged with a crime before a court. Jeopardy normally attaches when the petit jury is impaneled. After such time, the accused may not ordinarily be released and tried at a later date for the same offense. *See double jeopardy.*

**judge's charge** — Summary of the evidence and explanation of the applicable law given by the judge to the jury after the evidence is concluded and the lawyers have finished their arguments. The judge also explains the permissible verdicts that the jury may return. *See instruction.*

**judgment** — In a civil case, the official decision of a court determining the rights of the parties involved. In a criminal case, it includes the pronouncement of guilt and, unless the defendant has been acquitted, the sentence.

**judgment nisi** — A temporary judgment. Unless the defendant appears within a designated period and shows why the judgment should not be made permanent, the judgment will be made absolute.

**judgment suspended** — The judge does not enter sentence, and the defendant may go on his way. During the period of the suspension, the judge may terminate the suspension for a violation of a condition attached to the defendant's release and enter a sentence. This is distinguished from a "suspended sentence" in which sentence is entered but its execution is suspended for a period upon payment of a fine or upon the good

behavior of the defendant or both.

**jurisdiction** — The authority or power of a court to affect the legal interests of persons or things. Jurisdiction over the person involves the geographical relationship of the court to the person and requires proper notice and appearance of the person before the court.

Jurisdiction over the subject matter relates to the authority of the court, as derived from the Constitution and laws, to determine the type of offense being tried or civil matter being litigated and to determine guilt, innocence or other rights of the parties involved.

**jury** — *See grand jury and petit jury.*

**jury commissioner** — A part-time county official having the duty to prepare a list of prospective jurors from which the clerk of court, by lot, draws a jury panel for each jury session of court. There are three jury commissioners in each North Carolina county. They compile the master jury list every two years.

## L

**leading question** — A question so worded that the desired answer is suggested to the witness, particularly when it may be answered by "yes" or "no." Leading questions are proper on cross-examination but normally are prohibited on direct examination unless the witness is hostile.

**levy** — A seizure; the act of appropriating certain property of the debtor for the satisfaction of a judgment for the payment of money.

**lien** — A claim that a person has upon the property of another as security for a debt owed to the lienholder.

**limitation, statute of** — A certain time allowed by statute after an act giving rise to liability in which litigation or prosecution must be started. In civil cases, the allowable period varies, depending on the action or subject involved. In misdemeanor cases, the limit is two years after commission of the act. In felony cases, there is no time limit.

**lis pendens** (lis pen-denz) — A pending suit. A legal notice to all the world that a dispute exists that may affect the title to a certain tract of land.

**locus delicti** (lo-kus de-lik-ti) — The place of the offense.

## M

**magistrate** — An officer of the District Court Division of the General Court of Justice. Magistrates have power

to try certain small-claim actions and are authorized to accept guilty pleas to certain minor traffic and other criminal offenses. Magistrates also issue warrants, set initial bonds and order initial commitments to jail. Magistrates' powers also include various civil functions, e.g., the marriage ceremony.

**mandamus** — A writ issued in the discretion of the court when there is no other adequate remedy. It is designed to enforce clear legal rights or to compel performance of ministerial public or quasi-public duties.

**manslaughter** — The unlawful killing of another without malice; may be either voluntary, upon a sudden impulse, or involuntary, in the commission of some unlawful act.

**mens rea** — Literally, "guilty mind;" the criminal intent to commit an act that is morally wrong, e.g., murder or larceny. It is a prerequisite to conviction for a crime involving a moral wrong, but it is not a prerequisite to conviction for an act that is a crime only because a statute designates it to be a crime, e.g., overtime parking.

**Miranda Rule** — Prior to any questioning initiated by law enforcement officers after a person is taken into custody or otherwise deprived of his freedom, the person must be warned: (1) that he has a right to remain silent; (2) that any statement he does make may be used as evidence against him; (3) that he has a right to the presence of an attorney; (4) that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.

**misdemeanor** — Any crime less serious than a felony. It is punishable by not more than two years' confinement. *See felony.*

**mistrial** — An erroneous, invalid or nugatory trial, so declared by the trial judge when the trial cannot stand due to an incurable error or omission of some fundamental aspect of due process. Examples are an improperly influenced jury, incapacity of the judge or misconduct by the parties or counsel. A mistrial is followed by a completely new trial.

**mitigating circumstance** — One that does not constitute a justification or excuse of an offense but that may be considered as reducing the degree of moral culpability.

**motion to dismiss** — A motion by the defendant that the court dismiss the plaintiff's suit for failure of the plaintiff's complaint to state a claim upon which relief

can be granted. The motion is used in other contexts of litigation as well; for example, for failure of the plaintiff to comply with rules of pleading required by statute or orders of court, a defendant may move for dismissal of an action or claim against him.

**motion to quash** — A motion by the defendant who contends that a warrant or indictment must be dismissed for a fatal defect, e.g., failing to charge a crime or naming the wrong person. If the motion is allowed, the indictment is "quashed," or voided. The accused may (not must) be required to post bond for a later session of court when a new grand jury can correct the defect in the first paper or when a new bill of indictment may be submitted to the grand jury.

**multiplicity of actions** — Two or more separate (and unnecessary) attempts to litigate the same cause of action.

## N

**negligence** — The failure to do something that a reasonable man guided by ordinary considerations would do; or the doing of something that a reasonable and prudent man would not do. To be actionable, such omission or commission must result in harm to another.

**nolle prosequi** (*no-lay pro-sa-kee*) — When the solicitor or prosecutor decides to go no further with prosecution of a particular defendant, he announces a *nolle prosequi*. A "nol. pros." is sometimes taken "with leave" so that the prosecutor may reopen the case against the defendant at a later date. This device may not be used to deny the defendant's constitutional right to a speedy trial. A simple nol. pros. (without leave) usually means the end of the matter because the case cannot be reopened without the judge's permission.

**nolo contendere** (*no-lo kon-ten-de-re*) — A plea of "I will not contest." It is comparable to a plea of guilty in authorizing the court to punish the defendant, but it does not establish guilt for any other purpose. In a civil case, the plea of nolo contendere to an earlier criminal action based on the same facts cannot be admitted in evidence to prove that the defendant committed the act alleged in the warrant or indictment.

**non obstante veredicto** (*ob-stan-te ver-a-dik-to*) (notwithstanding the verdict) — A judgment entered by the judge contrary to a jury's verdict. Under the North Carolina Rules of Civil Procedure, a judgment



“N.O.V.” is the decision of the judge when he considers that the pleadings and evidence indicate that a party was entitled to have his motion for a directed verdict granted; the issue should have never been submitted to the jury. The judge therefore enters a judgment that is required as a matter of law even though contrary to the jury’s verdict.

**not a true bill** — A finding by a grand jury on an indictment that, in the jury’s opinion, the evidence is insufficient to justify trying the defendant for the crime set out in the indictment.

**nuncupative will** — A will made orally by a person who is in his last sickness or in imminent peril of death and does not survive such sickness or peril and declared to be his will before two competent witnesses simultaneously present and requested by him to bear witness thereto.

## O

**objection** — An exception to some statement or procedure during the trial. An attorney objects to call the court’s attention to what he believes is improper evidence or procedure.

**opinion evidence** — What the witness thinks, believes or infers with respect to certain facts, as distinguished from his personal knowledge of the facts.

**overt act** — An act essential to establishing an intent to commit a crime and done to carry out or in furtherance of the intention. It must be an act that would naturally result in the commission of the crime unless prevented by some extraneous circumstances.

## P

**parole** — The conditional release from prison of a convict before the expiration of his sentence. If he observes the stipulated conditions, the parolee (the released person) need not serve the remainder of his sentence. The parolee is under the supervision of a state parole officer during the period of parole.

**parties** — Persons in whose names the prosecution or defense of a legal proceeding is conducted.

**peremptory challenge** — A party is privileged to reject a prospective juror without assigning any cause for the rejection. The number of peremptory challenges is fixed by law according to the nature of the case.

**petit jury** — A jury of 12 persons for the trial of a civil or criminal case. *See grand jury.*

**plaintiff** — A person who initiates an action; the party who complains or sues in a civil action or proceeding.

**pleadings** — Formal written allegations by the parties containing their respective claims and defenses.

**polling the jury** — The procedure of asking the jurors individually whether they concur in the verdict announced by the foreman.

**power of attorney** — An instrument authorizing another to act as one’s agent or attorney.

**preliminary hearing** — The hearing available to a person charged with a crime to determine whether there is enough evidence (probable cause) to hold him for trial. In the district court division, preliminary hearings (examinations) are conducted by district court judges for felonies and by magistrates for misdemeanors.

**presentment** — A written statement from the grand jury to the court, based on its own investigation, that an offense has been committed. It amounts to an instruction to the district attorney to draw a bill of indictment for presentment to the grand jury.

**presumption of innocence** — Every criminal defendant enters a trial presumed in fact to be innocent. This presumption remains with him until the state overcomes the presumption by competent and sufficient evidence of guilt.

**prima facie case** (*pri-ma fa-she*) — The amount of evidence in a civil case sufficient to avoid dismissal of the plaintiff’s suit. A prima facie case will support a jury decision for the plaintiff but does not compel it because credibility of the witnesses is a matter for the jury’s determination.

**probable cause** — The existence of circumstances and facts sufficiently strong to excite a reasonable belief that the person charged with a crime is guilty. Probable cause does not indicate proof of guilt beyond a reasonable doubt but only that sufficient grounds exist to compel the accused to stand trial. If the grand jury or preliminary hearing official does not find probable cause, the accused must be released immediately.

**probate** — The act or process of proving the validity of a will and the judicial supervision of administration pursuant to the will. *See caveat.*

**probation** — A method of suspending a sentence. Rather than imposing an active sentence, the court may hold the sentence in abeyance subject to the good conduct of the defendant. A person on probation

is either supervised by a state probation officer or is unsupervised as the judgment may specify.

**prosecutor** — A trial lawyer representing the state in a criminal case. In North Carolina, the state's elected representative in a criminal case is called the district attorney. Either personally or through assistant district attorneys under his charge, he prosecutes all criminal cases in the courts of his district.

**public defender** — A trial lawyer employed by the state on a full-time basis to represent indigent defendants in criminal cases.

**punitive damages** — Damages awarded to the plaintiff, over and above what will compensate him for ordinary loss, in an effort to punish the defendant or set an example for wrongdoers.

## Q

**quo warranto** — Procedure to try the title to a public office between rival claimants when one is in possession of the office under a claim of office and is performing the duties of the office.

## R

**reasonable doubt** — *See beyond a reasonable doubt.*

**recognizance** — The practice that enables an accused awaiting trial to be released without posting any security other than his promise to appear before the court at a proper time. Failure to appear in court at the proper time is a misdemeanor.

**redirect examination** — Re-examination of a witness by the calling party after cross-examination by the opposing party.

**remand** — The procedure by which a case on appeal is, on decision of the appellate court, sent back to the trial court with instructions as to the proper disposition that the trial court should make.

**remittitur** — Procedural process by which money damages awarded by a judge are diminished.

**removal** — Transfer of a case to another court. *See change of venue.*

**reply** — A written pleading containing the plaintiff's allegations in response to a new matter alleged in the defendant's answer.

**res gestae** — A statement or an act is admissible in evidence as part of the *res gestae* when said or done spontaneously with the act or fact sought to be proved.

It is a spontaneous utterance or act while under the influence of the transaction giving rise to the utterance or act.

**res ipsa loquitur** — "The thing speaks for itself." A rebuttable presumption or inference that the defendant was negligent when the cause of an injury was in the defendant's exclusive control and that the accident was one that ordinarily does not happen in the absence of negligence.

**respondeat superior** — "Let the master answer." A master (employer) may be liable for the wrongful acts of his servant (employee) provided the master owes a duty of care and the failure of the servant to use such care occurred in the course of his employment.

**rest** — A party "rests" or "rests his case" when he indicates that he has produced all the evidence he intends to offer at that stage of the trial, subject to the right to offer rebuttal evidence later.

**robbery** — Felonious taking of another's property from his person or immediate presence and against his will by means of force or fear.

**rule nisi, or rule to show cause** — A court rule (order) commanding a party to show cause why he should not be compelled to do the act required or why the object of the rule should not be enforced.

## S

**scire facias** — Often abbreviated *sci. fa.*, this is a notice to show cause why a certain action should not be taken on an existing record or judgment. If a defendant released on bail fails to appear in court at the proper time, a judgment *nisi* is rendered provisionally forfeiting the bond, and a *sci. fa.* is issued to the defendant and his sureties to show cause why the judgment should not be made absolute (final).

**search warrant** — A written order issued by a judicial official in the name of the state authorizing an officer to search a specific house or other premises for specified evidence, instruments of crime or contraband.

**separation (sequestration) of witnesses** — A discretionary action by the court excluding future witnesses from the courtroom while earlier witnesses are being examined. This prevents a witness from being influenced by testimony of a prior witness.

**special proceeding** — A proceeding within the jurisdiction of the clerk of superior court. Some examples of

special proceedings are probate of wills, settlement of boundary disputes, condemnation, incompetency hearings, hospitalization of the mentally ill and inebriates, etc.

**special venire** (ve-ni-re) — A panel of prospective jurors who are summoned when the lawyers in a case cannot agree on 12 jurors from the regular panel or when the regular panel is insufficient for the court's business. The judge fixes the number of jurors to be summoned for a special venire.

**specific performance** — Court-compelled performance of a contract according to the precise terms agreed upon. Specific performance is usually granted only when damages would be an inadequate remedy.

**stare decisis** (sta-re de-si-sis) — The doctrine that once a principle of law has been determined to be applicable to certain facts that principle will be followed in future cases involving substantially identical facts.

**statute** — A law enacted by the legislative branch of government as distinguished from case law made by courts.

**stay** — An individual order stopping or arresting a judicial proceeding or execution of a judgment. *See arrest of judgment.*

**stipulation** — An agreement by opposing attorneys on any matter pertaining to the proceedings or trial. It is not binding unless assented to by the parties. Most stipulations must be in writing.

**strict liability** — A concept applied by courts in product liability cases in which a seller is liable for any and all defective or hazardous products that unduly threaten a consumer's personal safety.

**subpoena** (su pe-na) — An order to a witness to appear and testify at a specified time and place.

**subpoena duces tecum** (du-kes tay-kum) — A court order commanding a witness to bring certain documents or records to court.

**substantive law** — Law that creates, defines and regulates rights, as opposed to "procedural" law that prescribes the method of enforcing the rights or of obtaining redress for their invasion.

**summary judgment** — Final decision or judgment by the court prior to the trial of a civil case. This occurs when the judge determines that the prevailing party is entitled to judgment as a matter of law either on the pleadings alone or after reviewing the pleadings and

other evidence. Summary judgment is proper only if the court determines that there is no dispute as to the material facts of the case.

**summons** — A writ (order) signed by the clerk of court in the name of the state informing a person named as a defendant in a civil action that such an action has been commenced in a specified court in a specified county against him and directing the defendant to answer the complaint within 30 days.

**supersedeas** (su-per-se-de-as) — A writ issued by an appellate court to preserve the status quo pending review of a judgment or pending other exercise of its jurisdiction.

## T

**temporary restraining order** — An emergency remedy of brief duration that may be issued by the court only in exceptional circumstances and only until the trial court can hear arguments or evidence and determine what relief is appropriate.

**testator** — One who disposes of his property by will. A person who dies without leaving a will is said to die *intestate*.

**third-party plaintiff** — A defendant who causes a summons and complaint to be served upon a person not a party to the action who is, or may be, liable for all or part of the original plaintiff's claim against him. Also, when a counterclaim is asserted against the plaintiff by the defendant, the plaintiff may likewise cause a third party to be brought into the action.

**tort** — A private wrong; an infringement of the rights of an individual not founded on a contract. The most common tort action is a suit for damages sustained in an automobile accident.

**transcript** — The official verbatim record of the testimony adduced in a trial or hearing.

**trial de novo** (de no-vo) — A new trial. A retrial in a higher court rather than review of a lower court action on appeal.

**true bill** — The endorsement made by a grand jury on a bill of indictment when it finds sufficient evidence for trial on the charge alleged in the indictment.

## U

**U.C.C.** — Uniform Commercial Code. A set of statutes that regulates sales and other commercial transactions.

**undue influence** — Whatever destroys free will and causes a person to do an act he would not do if left to himself. It is most frequently alleged in will contests.

**unjust enrichment** — The principle that one person should not be permitted to enrich himself unjustly at the expense of another but should be required to make restitution for the property or benefit received.

## V

**venire** (ve-ni-re) — Technically, a writ summoning prospective jurors; popularly used to designate the panel of persons so summoned.

**venue** (ven-u) — The proper geographical area — county, city or district — in which a court with jurisdiction over the subject matter may hear a case.

**verdict** — The official decision of a petit (12-person) jury as reported to and accepted by the court. In North Carolina, all criminal verdicts must be unanimous; however, in civil cases the parties may agree to a jury of fewer than 12 members and also to a verdict stated by the majority of the jurors. If the parties in civil cases do not make any such agreements, unanimity is required.

**voir dire** (vwor deer) — To speak the truth. Examination of prospective jurors to determine whether they are qualified to sit on the jury in the case being tried. It is also used when the judge excuses the jury and examines a witness outside the jury's hearing. Such an examination is frequently undertaken to determine whether a confession made by a defendant was voluntary.

## W

**waiver** — The intentional and voluntary relinquishment of a legal right.

**wanton** — An act is wanton when it is without any adequate legal provocation and manifests a reckless indifference to the rights and interests of others.

**warrant of arrest** — An order issued by a judicial official requiring a sheriff or other officer to arrest a person named in the warrant and to bring that person before the court to answer a specific charge set out in the warrant. Warrants should be issued only upon showing of existence of probable cause. *See probable cause.*

**willfully** — Intentionally, as distinguished from accidentally, carelessly or inadvertently.

**work-release** — A sentence under which the defendant is im-

prisoned but is released during the daytime to work at a job approved by the Department of Corrections.

**writ** — A court order requiring the performance of a specified act or giving authority to have the act done.

