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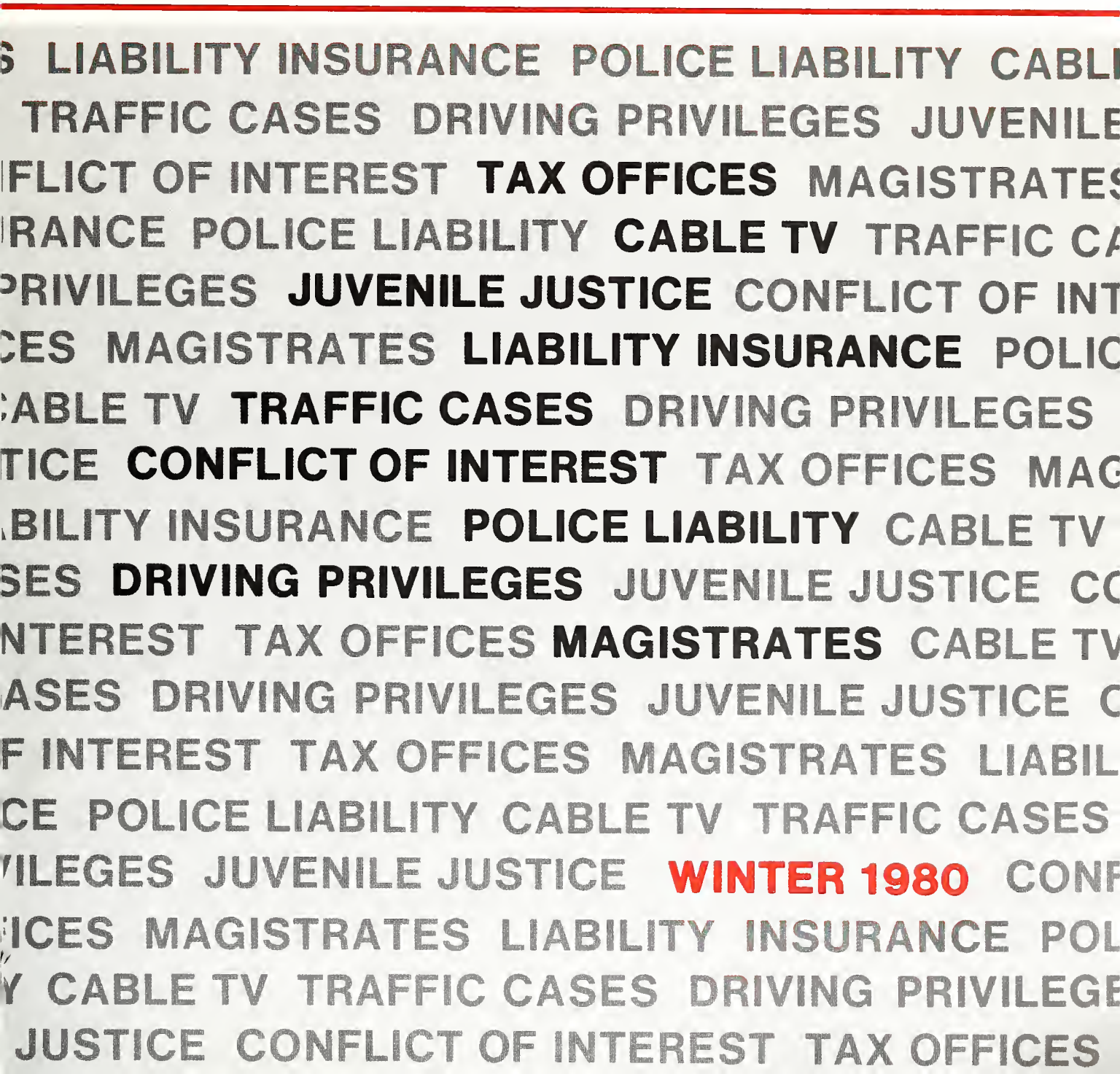

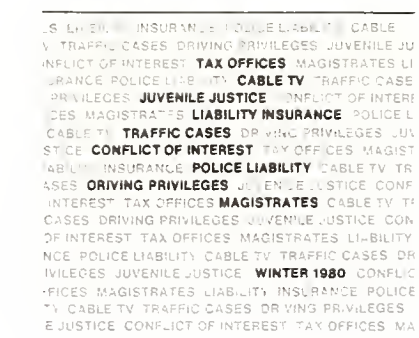

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Franchising Cable TV Today

Grainger R. Barrett

THE RECENT PACE of expansion and deregulation in cable television has been nothing short of breathtaking. The Federal Communications Commission has retreated from most of its rules affecting local governments' power to regulate cable TV through the franchise power,[1] and in April 1979, the U.S. Supreme Court overturned the FCC rules that required cable operators in the larger TV markets to provide at least 20-channel capacity and access channels for local government, educational institutions, and the public.[2]

These legal developments have coincided with tremendous growth in cable TV spurred by satellite technology. The first regular cable programming via satellite was introduced in 1975. Since then the industry has expanded rapidly, and cable TV reaches many North Carolina homes with programming of greater diversity and sophistication than network TV provides.

Many North Carolina communities are now considering cable TV for the first time. Other towns will review their cable TV franchise closely for the first time since the early 1970s. The decisions that result will affect the number of available cable channels in a community, the choice of programming, rates for basic cable service, and access to the cable system by local officials, schools, civic groups, and others. Municipal officials will be dealing with some would-be cable operators who may try to obtain or renew franchises on favorable terms. This article will suggest some things for a community to consider when it contemplates a cable TV franchise.

Local officials should educate themselves about the technology before deciding what they want from cable TV. The Cable Television Information Center of the Urban Institute will provide both information and consulting services to localities. It can advise local officials on ordinance provisions, cable economics and uses, and technical standards. Also, the International City Management Association has published helpful reports on cable TV for municipal officials. The National Cable TV Association is the national trade group for cable TV operators, and it can both provide information on cable TV and put communities in touch with potential cable operators. Finally, the North Carolina League of Municipalities and the Institute of Government can provide legal information about cable TV.[3] Local officials should also conduct a formal or informal survey to find out what people want and expect from cable TV. This can be done by a citizens' committee, a committee of the governing board, or the governing board itself.

Federal regulation of local franchising

Today, the only FCC requirement for local franchising of cable systems limits the fee that a community may charge for the franchise.[4] The FCC regulations still provide that the fee may be no more than 3 per cent of gross subscriber revenues from all cable services in the community. Gross subscriber revenues include regular subscriber service fees, installation fees,

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1. 42 C.F.R. 5246, September 30, 1977.
2. FCC v. Midwest Video Corp., 59 L.Ed.2d 692 (1979).
3. Addresses for these sources of information are: Cable TV Information Center, 2100 M St., N.W., Washington, D.C. 20037; International City Management Association, 1140 Connecticut Ave., N.W., Washington, D.C. 20036; National Cable TV Association, Inc., 918 16th St., N.W., Washington, D.C. 20006; North Carolina League of Municipalities, P.O. Box 3069, Raleigh, N.C. 27602.
4. 47 C.F.R. 76.31.

disconnect and reconnect fees, pay TV, leased-channel revenue, advertising revenues, and any other income from the system. While the usual fee is 3 per cent, the FCC may approve fees up to 5 per cent if the operator and the locality demonstrate that the higher fee is justified in light of the local regulatory program. These fee provisions do not apply to a system franchised or in operation before March 31, 1972, until the end of the franchise or 15 years from the date on which the franchise was granted, whichever is earlier.

The FCC *recommends* other procedures.[5] The cable operator's technical and other qualifications and its construction arrangements should be approved by the governing board as part of a public hearing. The initial franchise period should not exceed 15 years. Any renewal should be for a reasonable period, not to exceed 15 years, and should be granted only after a public hearing. The operator should be required to accomplish significant construction within one year and to extend cable service to a substantial percentage of its franchise area each year. If the franchise will allow less than complete wiring of the franchise area, the policy that permits this partial service also should be adopted only after a full public hearing. The governing board and the operator should agree on procedures regarding customer complaints, and customers should get a statement of these procedures when they subscribe. The operator should maintain a local business office, and a local public official should be responsible for overseeing administration of the franchise and implementation of complaint procedures.

Questions frequently come up concerning "pay TV"—programming for which a customer pays a separate per-channel or per-program charge above the regular monthly cable fee. The FCC has pre-empted price regulation of pay TV, and the Supreme Court refused early in 1979 to review *Brookhaven Cable TV, Inc. v. Kelly*,[6] a case in which a federal court of appeals upheld that pre-emption. This means that localities may not set rates for pay TV even though the FCC has chosen not to regulate these rates. Although the *Brookhaven* case was limited to the issue of *rates,* the FCC also asserts that localities may not prohibit pay TV on their cable systems,[7] but its authority to enforce this assertion is not settled or free from doubt. Even though localities may not set rates for pay TV, they may include revenues from pay TV in "gross subscriber revenues" for purposes of arriving at their 3 per cent franchise fee.

5. *Id.*

6. Brookhaven Cable TV, Inc. v. Kelly, 573 F.2d 765 (1978), *cert. denied* April 16, 1979, No. 77-1845, 60 L.Ed.2d 372 (1979).

7. See Report and Order in Dkt. 21002, F.C.C. 77-520, at 69, n. 21 (1977); Pierson, Ball and Dowd, F.C.C. 71-946, 22 R.R. 2d 949 (1971).

The cable TV ordinance

A municipality (this term includes counties) that has decided to grant a cable TV franchise will invite prospective franchisees to submit proposals for cable service. Before it does so, the governing board should adopt its cable TV ordinance.[8] Potential bidders will want to know what kind of regulation they will be subject to during the term of the franchise.

What does a good cable TV ordinance contain?

Authority granted; length of franchise. After defining certain key terms, the ordinance will deal with the *award and terms* of the franchise itself. It will grant authority to operate a cable TV system (including satellite transmission and interconnection) within the geographical area the franchise is to cover. The ordinance should state the length of the franchise term, whether renewals will be granted, and procedures for renewal. The FCC feels that renewals should not be granted automatically upon the operator's request, but should be a time to evaluate the operator's service. Although the FCC recommends a franchise term of no longer than 15 years, other groups have recommended a ten-year term, arguing that initial capital costs and investment can be recouped in that time.[9] It may also be wise to require reviews of the operator's service every three to five years and give the community a chance to renegotiate key items.

Transfer of franchise. The ordinance should specify the circumstances under which the franchise may be transferred and whether a locality must consent before working control of the franchise changes hands. The right to transfer the franchise should be restricted to avoid trafficking in franchise awards. A good ordinance should provide that the franchise may not be transferred during the first two years of construction and thereafter only with the locality's consent—though perhaps the ordinance might also provide that consent will not be withheld unreasonably. The community should seek to retain the right to choose its franchisee throughout the entire term of the franchise. For this reason, the ordinance should also address involuntary transfers, such as bankruptcies or foreclosures by lenders.

If effective control of a cable TV franchise changes, the locality will find itself dealing with entirely new management. The ordinance should state what will

8. In North Carolina, the grant of the franchise to the successful applicant will also be by ordinance adopted at two regular meetings. N.C. GEN. STAT. § 160A-76(a); *id.* at § 153A-46. There is some question whether an exclusive franchise can be granted under the State Constitution.

9. Center for the Analysis of Public Issues, *Crossed Wires* (Princeton, New Jersey: The Center, 1971), p. 56; Sloan Commission on Cable Communications, *On the Cable: the Television of Abundance,* Report of the Sloan Commission on Cable Communications (New York: McGraw-Hill Book Company, 1971), p. 149.

constitute a change in control; for example, it might state that a change in control has occurred if more than 10 per cent of the stock of a corporation has been acquired by a person or persons acting in concert. To be fair to the operator, the ordinance can provide that a transfer is automatically approved if the governing board takes no action within 60 days of notice of transfer.

Termination of franchise. The ordinance should state the grounds for terminating the franchise. Usually cable franchises can be terminated after notice and a public hearing if (1) the operator has failed to comply with or has violated in any material respect any provision of the ordinance; (2) the operator has knowingly made a materially false statement in its franchise application; (3) the operator, contrary to the public interest, is not providing subscribers with regular, adequate, and proper service; or (4) the installed cable system is unused for a continuous period of 12 months or more. A provision requiring an operator whose franchise is terminated to continue to serve subscribers without interruption until the new operator takes over is helpful.

Extension of service. The ordinance should set the community's guidelines for service coverage and extension. If cable is to be extended to less than all of the community, the operator should be required to offer service to areas that have at least a specified density of homes per street-mile (typically 40 or 50). The ordinance should require construction to begin within a certain time after the franchise is awarded and include a specific timetable for construction in the years that follow.

Franchise fee and cable rates. The ordinance should contain provisions that establish the franchise fee and set initial rates. The fee should be based on gross subscriber revenues—which the FCC defines as including not only regular subscriber service revenue (as the FCC once defined gross revenues) but also all other revenues derived from operation of the cable system. The 3 per cent fee thus applies to basic monthly cable fees, installation fees, disconnect and reconnect fees, pay TV revenues, leased-channel revenues, advertising revenues, and any other revenue derived from operation of the system.

Some localities require a franchise fee even during the initial construction period when little revenue is coming in. Since the operator is already conducting business under the franchise, many of these localities call for a percentage fee or a lump sum, such as $500 per month, whichever is greater. If this lump sum exceeds 3 per cent of gross subscriber revenues, this arrangement would seem to violate the FCC's fee rule unless it is approved by the FCC.

The locality should consider fixing initial rates until construction of the cable system is well under way. Most localities expect that at least half of the franchise territory should be covered within two or three years. After that time, the operator should be required to file proposed rate modifications with the governing board 30 or 60 days before they become effective. The municipality should be aware that if it decides not to regulate rates, it foregoes that power for the life of the franchise. A better practice is to retain the right to approve rate modifications and provide that if the municipality does not act within a 30- or 60- day period, the rate change is deemed approved.

Channel capacity. The community must decide how many channels of cable capacity it wants. Without set-top converters, cable TV has capacity for only twelve channels. Twenty or more channels can be received with a relatively inexpensive converter; more sophisticated equipment can bring in over forty channels. The community should consider whether it wants access channels reserved for government, educational institutions, civic groups, and the general public and should provide for administering these channels—perhaps such as through an advisory committee or cable commission. Some ground rules should be set governing who has access and when and who pays what costs. Other regulations may also be needed, particularly in the area of political broadcasting.

Construction standards, pole use, street work. Most ordinances go into some detail regarding construction standards, installation of poles and lines, conformance with zoning requirements, street and right-of-way excavation and restoration, and similar matters. The construction standards should incorporate national standards, such as the National Electrical Safety Code, by reference, in addition to local electrical and building codes. The town's permission should be required before tree-trimming, and the operator should be required to restore any sidewalks or pavements that are torn up.

The operator typically enters into an agreement separate from the ordinance or the franchise agreement to string cable on municipal or private utility poles. A cable TV ordinance should require that any pole-use agreements between a private utility and the operator be filed with the municipality. Most ordinances require the cable operator to use existing utility poles and permit it to install its own poles only where none now exist. Some localities require that cable lines be placed underground wherever telephone *or* power lines are underground, others require underground cable only if *both* telephone ond power lines are buried, and still others do not specify any practice.

Testing. The ordinance should require periodic testing of the system to insure that technical standards and quality are maintained. Results of system performance and tests, including measurements at the receiving antenna as well as various parts of the system,

should be filed periodically with the municipality. The FCC has set technical standards in the Code of Federal Regulations,[10] but specific standards and descriptions of the system equipment performance can be included in the franchise agreement.

Local business office. A good cable TV ordinance will require the operator to maintain and staff a local office, to adopt specific complaint procedures that include keeping a log of all complaints received, and to provide adequate maintenance crews within the community. The franchise agreement might also require that an adequate supply of spare parts be kept locally to avoid delay in making repairs.

Purchase of system. The community should by ordinance reserve the right to buy the system's assets from the operator at fair value or through arbitration whenever the franchise is terminated. Or to ease the transition when the franchise ends, it can require an operator whose franchise is terminated—either for cause or by nonrenewal—to sell the system's assets to any successor franchisee.

Bonds and indemnity. The ordinance should require the operator to hold the municipality harmless against all claims and actions arising from the franchisee's operation of the cable system. It should further require the operator to obtain liability insurance and to file those certificates with the municipality, sending the municipality copies of all policy changes. Typical coverage ranges from $100,000 to $500,000 per person for bodily injury; $500,000 to $1,000,000 per occurrence for bodily injury; and $300,000 to $500,000 per occurrence for property damage. The ordinance should also require a performance bond at least until all initial construction is finished. More and more, however, localities require a construction bond during that period and an additional performance bond for the duration of the franchise. This requirement will help to insure continuous satisfactory service and prevent financial loss to the locality if the operator should owe it money and should default.

Financial records and reports. The ordinance should provide for the municipality to receive an annual certified audit of the system's finances 90 days or so after the fiscal year ends and for the governing board to have access to all cable system books and records. It should further require the operator to update annually its ownership information and list of major stockholders, which are on file with the municipality. The operator should also be required to send the governing board a copy of all of its communications to the FCC, the Securities and Exchange Commission, or other state and federal regulatory agencies.

10. 47 C.F.R. 601 *et seq.*

Beware the operator-drafted ordinance

Local officials should look particularly hard at proposed ordinances submitted by would-be operators, which will surely favor the operator. A governing board should not accept a draft submitted by a prospective bidder "as is." As an example of an operator-drafted ordinance that would clearly have favored the company and caused the municipality trouble, we might cite the proposal that was submitted last year to a small western North Carolina town by a newly formed cable company (call it ABC Cable Company). If town officials had accepted it as presented, they would have done their community a disservice.

How did ABC Cable Company's draft work in its favor? First, it called for an exclusive franchise—that is, no one else could legally offer cable TV service in this community. Although it may be uneconomic for two companies to run cable down the same street, the municipality is not obliged to grant an exclusive franchise as a matter of law. The threat that the town can grant another franchise if it is seriously dissatisfied with service may stimulate more responsiveness from the operator.

ABC's draft called for a 20-year franchise term with a 20-year renewal period. The FCC recommends no more than a 15-year term with a similar term for renewals; other groups feel that a 10-year term is sufficient. More important, the draft was unclear whether ABC would automatically be entitled to the renewal or whether renewal would depend on agreement by the town. Automatic renewal is not good policy. The town should review its experience with the operator and, if necessary, modify the ordinance or the franchise agreement.

ABC's draft also did not commit the company to a specific schedule for construction. Apparently, service would be provided to areas with a density of 40 homes per street-mile within three years. That schedule ignores the FCC's recommendation that significant construction (such as 20 to 30 per cent of the franchise area) occur the first year and that service be extended to a substantial percentage of the franchise area each year thereafter. Many places also often require that the operator promptly proceed to obtain all necessary permits and that actual construction begin within 90 to 180 days after the franchise is awarded.

ABC gave itself considerable freedom to transfer the franchise: Its proposed ordinance permitted transfer of the franchise freely after cable service reached all areas with a residential density of 40 homes per street-mile and even during the initial construction period with governing board consent. The draft had no clause regarding transfer of control of the entity that holds the franchise. Transfer should be forbidden during the initial construction stage except under ex-

traordinary circumstances and then only with governing board approval. During the rest of the term the governing board should retain the right to approve all transfers or assignments.

ABC Cable Company allowed itself to pledge the franchise as collateral for a bank loan. If the town knows that the applicant will need substantial credit to construct the system, then it should take a careful look at the applicant's finances. Many sound companies will obtain credit to build a cable system; cable TV requires a great deal of capital in the system's early years. Although many companies obtain bank financing on the basis of their credit rating, sometimes the bank requires a cable TV operator to pledge the system's assets in an effort to commit the operator to the franchise's financial success. The danger to the town, however, is that it may have a new partner if the operator defaults—the bank. If the operator can pledge the franchise to obtain financing, the ordinance should state that the bank will not be allowed to control the operations of the system and that any transfer of control still requires the town's approval. The town might also subordinate itself to the operator on any financing. In that case, the town would have the option of paying off any defaulted loan and assuming control of the system itself.

ABC's draft gave the town and its governing board no role in rate-setting. In fact, it did not even specify what initial rates would be. Although local regulation of rates is now optional, complete "marketplace" rate-setting is inadvisable. The governing board should retain some control over the rates to protect the public interest over the years—especially since ABC's franchise might run 40 years. Generally, fair and reasonable rates will be those minimum rates necessary to meet all applicable costs of service—including a fair return on capital invested, assuming efficient and economical management. Even if the town does not approve rates, it should require that all rate changes be filed with it in advance.

Many localities set initial rates when the franchise is awarded and require that they be maintained for two years or until the operator completes the construction scheduled for those two years. One city in North Carolina proposes to set initial rates that will remain in effect for two years. After that, it will allow the marketplace to determine rates but reserve the right to re-enter the rate-setting process at each third year of the 15-year franchise term. If it then chooses to regulate rates, it can do so for the ensuing three years, after which it must re-evaluate its decision.

ABC Cable Company's proposed franchise fee was unusual. The draft ordinance called for a franchise fee of 3 per cent of gross subscriber revenues, payable annually—a provision that sounds perfectly reasonable. But ABC wrote the provision to waive payment for five years of all "franchise taxes and any other type of compensation" for the authority granted in the ordinance. That is, ABC would pay no franchise fee at all for five years; the draft is unclear about whether ABC would pay ad valorem property taxes during that period. Furthermore, after the five-year moratorium the franchise fee would be 3 per cent of gross subscriber revenues *less* ad valorem tax payments from the cable system! Offsetting property taxes against the fee is not justified. The cable system must pay its fair share of the property tax as any other public utility does; otherwise other taxpayers would be subsidizing ABC Cable Company's tax liability. If the fee arrangement was intended as a waiver of property tax obligations, it was illegal; if it was intended simply to yield a smaller fee, then great care was taken to disguise its true amount. Constructed cable systems are almost always profitable; if a cable company argues that it cannot afford the franchise fee and taxes, that admission alone suggests looking to other cable companies.

ABC's fee was calculated as a percentage of gross subscriber revenues. This term was defined to favor ABC—it meant not "gross" revenues at all but something far less that was called gross revenues but defined as "regular subscriber services." Gross subscriber revenues in ABC's draft included only fees from regular subscriber services like installation fees, disconnect and reconnect fees, and basic cable service fees. By narrowly defining gross subscriber revenues, ABC reduced its franchise fee payments. But the FCC now allows localities to calculate their fees on gross revenues per year from *all* cable services in the community, and the revenues excluded by ABC's draft are likely to be profitable under most circumstances. *Basic* cable service during the initial construction period would probably be the only service that would be unprofitable for any period of time.

The performance bond called for by ABC's draft was for only $5,000, dropping to $1,000 after the seventh year, and no bond at all was required once construction was extended to all areas with a residential density of 40 homes per street-mile. This coverage is grossly inadequate. A bond for 5 per cent of total construction costs is now a fairly standard rule of thumb.

ABC Cable Company's draft also fell short in its provisions for customer complaints. It designated the mayor's office as the place that was to receive consumer complaints and required that office to resolve complaints within ten days. ABC neatly transferred the time and cost of dealing with customer complaints, which is a real expense of doing business, to the town. True, the FCC suggests that a city official be designated to implement complaint procedures, but that means only that this official should see that the

(continued on page 18)

Administrative Procedures for Handling Traffic Cases

James C. Drennan

Which of the following statements are true?

1. A person who drives a car that doesn't have a current inspection sticker commits a misdemeanor.
2. A person charged with speeding 70 mph in a 55 mph zone does not have to appear in court to dispose of his case.
3. A clerk of court or magistrate may accept a guilty plea to a minor motor vehicle violation and impose a set penalty.
4. Most of the criminal cases disposed of in the North Carolina court system involve motor vehicle law violations.
5. Most persons who plead not guilty to a traffic misdemeanor do not receive a trial by jury.

If you answered "true" to all the questions, you have a perfect score. If you made a score of 100 per cent or less, you should continue reading to learn more about some of the issues raised by those questions and the proposals suggested for dealing with them.

ADJUDICATING TRAFFIC CASES poses a troublesome problem for any court system. In 1977 almost 700,000 traffic cases were disposed of in North Carolina, while approximately 375,000 nontraffic criminal cases were disposed of in the same year. It is easy to see why a lot of thoughtful people are concerned about the effect of the large number of traffic cases on the court system. In this state all traffic cases are criminal offenses, and persons who are convicted of or plead guilty to traffic offenses are misdemeanants. The number of traffic cases in district court requires a great deal of judicial time and even more clerical time to process the cases. The sheer volume of cases means that many judges must spend relatively little time on each case if they are to finish their daily case load. One result is that many citizens feel that they receive assembly-line justice. Another result is that new judges, clerks, and prosecutors are added in every session of the legislature; traffic cases are only part of the reason for that constant increase, but they do contribute to it. When traffic cases are appealed to superior court (relatively few are) twelve jurors are impaneled to decide the defendant's guilt or innocence; the case could be one in which the issue was whether the defendant's inspection sticker had expired or whether his tire tread was too thin. That fact, plus the procedural requirements imposed by the U.S. Constitution and state statutes for criminal trials, makes it likely that a trial of the simplest traffic case in superior court will take several hours of the judge's, clerk's, prosecutor's, court reporter's, jurors', and defense counsel's time.

For these and probably other reasons, public officials and public interest groups have argued that minor motor vehicle cases should be removed from the criminal courts. In recent years a committee of the North Carolina Bar Association, the Commission on Correctional Programs, several candidates for Governor and Lieutenant Governor, Governor Hunt, and some members of the legislature have publicly supported a study that would be aimed at developing a proposal to remove the cases from the criminal courts.[1] The 1979 session of the General Assembly insured that the problem will be studied: It directed the Courts Commission to "study the processing of minor traffic cases through the court system in this state." The Commission is to direct its effort "toward formulating alternatives to the present system," and to report its findings to the 1981 legislature.[2] This article will briefly summarize the approaches tried in other states, describe North Carolina's approach, and compare the benefits and disadvantages of those alternatives with the North Carolina system.

Administrative adjudication

The system for handling traffic cases that federal agencies and national organizations recommend most frequently is generally classified as the administrative approach to traffic case adjudication. To understand that system,

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1. The proper way to hear traffic cases has been discussed in North Carolina for many years. *See* Johnston, *Plan for the Hearing and Deciding of Traffic Cases,* 33 N.C. Law Rev. 1 (1954).
2. N.C. Sess. Laws 1977, Res. 66.

imagine that you are a resident of New York City and you are stopped there for a traffic violation. Almost all traffic offenses in New York are called infractions, and they are not criminal offenses. Fines, rehabilitation programs, or license suspensions may be used as sanctions, but persons found guilty of infractions cannot be sent to jail. Major offenses (such as driving under the influence, reckless driving, hit and run, etc.) are still criminal offenses tried in the general criminal courts.

In this instance, however, suppose you are stopped for speeding 73 mph in a 55 mph zone and receive a ticket from a police officer. Although you are not charged with a crime, under New York law you must appear before an administrative hearing officer (who is an employee of the state's division of motor vehicles) to have your case disposed of. Minor offenses (such as stop-sign or red-light violations) can be disposed of by mail if the operator pleads guilty (unless he has had another moving violation within the past year). Your speeding charge, however, requires that you appear on the court date that appears on your ticket. Before you appear, you are given an opportunity to plead guilty with or without an explanation. If you plead guilty (by mail or otherwise), you may appear at a time other than the time scheduled by the officer, since his presence is not required when guilty pleas are heard. Suppose you were clocked on radar and want to appear before the hearing officer the next day to plead guilty. You may do so, and your case will be heard on a first-come, first-serve basis after the already-scheduled cases are heard. After you explain your plea, the hearing officer will impose what he thinks is an appropriate sanction.

But perhaps, having read the papers, you know that the reliability of radar has recently been questioned in several courts. If you therefore plead not guilty, you will need to appear at the hearing on the day established by the officer or on some other day that you and the hearing officer have agreed on. At the hearing you will be given an opportunity to present your case, and the officer will tell his side of the story. The hearing will be conducted informally, probably in a room that resembles a meeting room more than a courtroom. The hearing officer will not wear a robe. You may have a lawyer represent you, but no lawyer will represent the state. There will be no jury, and the rules of evidence that apply in a courtroom will not be strictly observed. The state must prove its case, but it need not meet the standard of proof beyond a reasonable doubt—that very strict standard is reserved for criminal cases. The standard is proof by clear and convincing evidence, which is less difficult to meet.

If the hearing officer finds that you did travel 73 mph in a 55 mph zone, he will impose some penalty. He has in the same room (or very close by) a computer link-up with the state driver's license records. Before he imposes a penalty (but after he has made his decision about your guilt), he will examine your previous record. He has the option of fining you, placing you on probation on the condition that you attend a driver-improvement or alcohol-awareness clinic, requiring you to attend a treatment or rehabilitation program, or (in extreme cases) suspending your license. He will have had training in highway safety programs, and his disposition presumably is made with full knowledge of the options available to him. Since the offense is not criminal, jail is not one of the sanctions he will consider. His staff will record his decision in the motor vehicle division's computer system.

If you are not happy with the hearing officer's disposition of your case, you may appeal. The initial appeal is to an administrative appeals board; if you are still unhappy with the result, you may appeal the appeals board's decision to the supreme court, which in New York is a trial court.

That is the procedure you would follow in New York City[3] to have your case disposed of. Rhode Island and the District of Columbia are the only other jurisdictions that follow a purely administrative approach to adjudication of traffic cases.[4] The procedures followed in Rhode Island and the District of Columbia might differ in some detail (particularly in the extent to which they use computers), but the basic scheme is the same.

Modified judicial adjudication

Several other states have recently modified their motor vehicle laws and hearing procedures to make them simpler while retaining the cases in the court system. Many states have decriminalized minor traffic cases, and a few have even decriminalized all first offenses of driving under the influence. Most of these jurisdictions still require contested cases to be heard by a judge. A few allow minor contested cases to be heard by a parajudicial official, usually a magistrate or commissioner, and provide a right of appeal to the court system. A few of these jurisdictions that have decriminalized traffic violations require an appearance in all traffic cases, while most allow guilty pleas and payment of fines by mail for minor cases. Most of them still require proof beyond a reasonable doubt for conviction of the decriminalized offenses.

Seattle is one jurisdiction that has retained the cases in the court system while experimenting with nontraditional procedures for adjudication. With the assistance of large federal grants, the Seattle adjudication system was modified extensively and closely resembles the New York system; one primary difference is that the hearing is conducted by a magistrate hired by and subordinate to local judicial officials. Still, the magistrate, like the New York hearing officer, is trained specifically for that job. Also, the police officer is not present at the hearing; if an officer's presence is required, the case is referred to court for adjudication. Apart from those differences, the Seattle and New York procedures are the same, and the emphasis on highway safety in fashioning an appropriate sanction is the same in each city. The computer link-up with the department of motor vehicles is retained, and the information that comes from the computer concerning the offender's record

3. New York City began using hearing officers in 1970 for parking violations and minor moving violations. Buffalo and Rochester later began using hearing officers in those cases.

4. California has recently completed a feasibility study indicating that an administrative adjudication system could be implemented there. A three-county pilot project was begun last year to test the applicability of administrative adjudication for that state.

is presumably a vital part of the effectiveness of the sanction applied (it also insures that a habitual offender must appear in person to have his case disposed of). The Seattle system has now been permanently adopted there, and federal agencies endorse it as an approach for jurisdictions to consider if they choose not to adopt the administrative approach used in Rhode Island or New York.

North Carolina's approach

To discuss the problems and advantages of applying one of these newer methods of adjudication in North Carolina, it is first necessary to understand the system now used in this state. To use the earlier example, suppose that you are stopped for driving 73 mph in a 55 mph zone. When the police officer stops you, he will probably give you a citation. Because your case involves a charge that is considered serious by the Conference of Chief District Judges, you will be required to appear in district court to answer the charge, even if you want to plead guilty. For a less serious offense, you would have the option of appearing or of settling your case by mail. To settle the case by mail, you must mail the following items to the clerk of court in the county where you were stopped: the prescribed fine indicated on the citation (which is established by the Conference of Chief District Judges), the costs of court ($27 in criminal district court), and your copy of the citation. By mailing in the money and the ticket, you are pleading guilty, and you legally waive your right to a jury trial. The violation is a misdemeanor, and your plea of guilty and your conviction become a permanent part of your criminal record.

In your case, however, you must appear in court—the district court in the county where you were charged. At that session of court, the district attorney's staff prosecutes your case. If you contest the case by pleading not guilty, you (or your lawyer) and the state present evidence. Since your case is a criminal case, which involves a possible jail sentence, you have all the constitutional rights that any other criminal defendant has. You will not receive a trial by jury at the district court, although it is available if you appeal to superior court. Since your case is heard by a judge only, the rules of evidence are not applied as strictly in district court as they are in superior court.

After your case is heard, the judge renders his decision. If he finds you guilty, he can imprison you (unlikely for all but the most serious cases),[5] he can fine you (quite common), or he can place you on probation (either supervised or unsupervised). If he places you on probation, he can include as a condition that you attend driver-improvement or alcohol-awareness schools, that you undergo rehabilitation programs, or that you not drive a motor vehicle for a specified period of time.

The district court judge who hears your case is an elected official; he is probably a lawyer,[6] but it is unlikely that he has received formal orientation in highway safety or driver-retraining programs. He will typically hear traffic cases, general criminal law violations (misdemeanors), juvenile cases, child custody and support cases, divorce cases, and general civil cases involving $5,000 or less. He will also conduct preliminary hearings in felony cases and determine whether persons should be involuntarily committed to mental institutions. Some judges (primarily in urban areas) hear only traffic cases for a specified period—usually a month or two—and then rotate to another kind of case for a specified period. Other judges hear most, if not all, of those kinds of cases each week; and they almost always hear traffic cases and other criminal cases during the same court session.

If you are convicted, the clerk of court must forward a copy of the court record indicating the conviction to the Division of Motor Vehicles (DMV). For certain offenses that require the Division to revoke the offender's license, the clerk must also take the offender's license in court. If the conviction is for a moving offense that does not require the Division to revoke the offender's license, the Division records the conviction and, in certain kinds of cases, has the discretion to revoke the offender's license or place him or probation. With the large volume of cases processed by the courts, some notices get lost in the mail or in the courts' filing systems or DMV, but the Division receives notice of the vast majority of cases, and generally that notice is prompt.

To return to the courtroom, suppose that you are not happy with the district court's disposition of the case or you simply want to have a jury trial. You have the option of appealing your case to superior court for a new trial of the case. If you do that, you will have a trial by jury. In superior court even the simplest case cannot be tried until twelve jurors have been examined and seated.[7] The rules of evidence and criminal procedure apply with the same force as they do in a murder trial. The judge must explain the applicable law and facts to the jury just as he would for a felony. Your case, appealed to superior court, will take several hours of many people's time to complete.

If you have been found guilty by a jury, the superior court judge will then impose sentence. He is even less likely than the district judge to have special training or expertise in highway safety matters. His caseload in criminal matters consists primarily of presiding over felony cases and sentencing those who are convicted or plead guilty. Given the level of responsibility that they assume in such cases, it is not surprising that some superior court judges do not take traffic cases as seriously as they do other cases.

Benefits of modified procedures

The administrative adjudication system, as it is used in New York and Rhode Island, offers several potential benefits, including the following:

Specially trained official. The administrative adjudication system is specifically aimed at improving the

5. For a third offense of driving under the influence committed in a three-year period, the judge must sentence the defendant to at least three days in jail. N.C. Gen. Stat. § 20-179(a)(3).

6. All superior court judges are lawyers; all but 7 district court judges are lawyers. A proposed constitutional amendment to be submitted to the voters in November 1980 would require that all judges be lawyers.

7. N.C. Const. art. I, § 24, and art. IV, § 14 require that a jury trial be held in a criminal case in which a person pleads not guilty in superior court.

highway safety performance of the drivers who are found guilty of a violation. The hearing officer, special magistrate, or commissioner who hears the cases is usually trained in evaluating drivers to see which types of remedial programs are best suited to their needs. That training may enable the official to see that a driver needs a defensive-driving course or that he needs to be punished more directly by placing him on probation with the implied threat of a license revocation if he commits another violation while he is on probation. Sentencing for any violation is an inexact and necessarily speculative job; advocates of the administrative approach hope that it produces better results because the hearing officer has special training in recognizing types of poor driving behavior and in recommending remedial programs. Since he hears only traffic cases, he will have a better opportunity to specialize in and keep up to date on highway safety matters.[8]

Agency coordination. Jurisdictions that use administrative adjudication usually have better coordination among the adjudication and driver-licensing functions than do jurisdictions that use the court system to decide traffic cases. For one thing, the hearing officer and the driver's license officer usually are part of the same agency, and that generally makes coordination more likely because the agency head can take measures that both hearing officers and driver's license officers must follow. Interagency cooperation is not impossible, but when friction develops, it is more difficult to resolve when there is no single superior who can referee the dispute. Having a single superior also can lead to more consistent use of certain effective sanctions and abandonment of ineffective sanctions.

In addition, the use of computers in the field facilitates the transfer of information in states with administrative adjudication. It may reduce the need for reports by mail, and it gives the hearing officer easy access to the driver's record, a very important factor in the officer's decision about the penalty. It is *possible* for two agencies to use the same computer, but the lack of a single superior responsible for both agencies and the sensitive nature of a computer operation make sharing difficult.

Cost. Administrative adjudication can cost less per case than judicial adjudication. The costs are lower because the personnel costs are lower, and facilities are also cheaper to build and maintain in the long run. Personnel savings occur in several areas. First, the hearing officer is likely to have a lower salary than a judge. Most jurisdictions that take the administrative approach use lawyers as hearing officers, but the lawyers are paid substantially less than judges (also, the National Highway Traffic Safety Administration suggests that lawyers are not required if legal advice is available to hearing officers who have problems; nonlawyers as hearing officers could mean even lower salaries.) Second, jurisdictions with administrative adjudication do not use prosecuting attorneys. Third, the need for supporting personnel is reduced, since no jury trial is involved and the hearing is informal.

Facilities should cost less because the case is heard in an informal office-like setting instead of a courtroom. If courtrooms are not used in traffic cases, present courtrooms and courthouses should meet future needs for a longer period of time and future courthouse building or expansion can be deferred. It should be noted, however, that while this savings could be available over the long run, facility cost might be high at first because hearing rooms would have to be constructed or existing facilities modified.

Efficient use of time. Administrative adjudication will free law enforcement officers and prosecutors for more important jobs. Since prosecutors are not required at trials of traffic cases, they are free to perform other duties. The amount of time law enforcement officers spend in court primarily depends on how well the court docket is scheduled; well-run courts may schedule all of an officer's cases in one morning session every two weeks, while other courts may require three or four appearances in the same two-week period to dispose of an equivalent number of cases. Well-managed dockets are not unique to administrative or to nonadministrative jurisdictions, although the computer capability of an administrative system, plus the system's single purpose of trying traffic cases, might make it easier to keep police appearances to a minimum. But there is one clear benefit for the police in administrative adjudication jurisdictions. The officer is not needed if the motorist pleads guilty or guilty with an explanation, and this is known in advance since the offender is usually required to register his plea by mail or in person before he appears.

Convenience for the citizen. Administrative adjudication can be more convenient for the motorist who wishes to contest or explain his case. For minor offenses in which the motorist pleads guilty, there is no more convenient way to handle the case than the North Carolina system of paying the fine and costs by mail. It is the motorist who *must* appear because of the seriousness of the offense or the motorist who chooses to appear who faces an inconvenience under the present system. In jurisdictions with administrative adjudication, the motorist probably has a more convenient forum because he has more flexibility in having his case heard. If he wants to plead guilty with an explanation, he can go to a hearing officer at his convenience (within limits) and give his explanation, if he does so before his scheduled appearance date. That appearance might occur the day he is stopped, especially if he is from out of town and it would be inconvenient for him to return. Under the procedure used in North Carolina,

8. The highway safety record of administrative adjudication states is just beginning to come in. In its 1977 report to Congress, the National Highway Traffic Safety Administration notes that the best data available are from the Seattle pilot project. In that project specially trained magistrates heard some cases, judges heard others, and the rest were handled by pleas through the mail. The time between the initial citation and the next citation was slightly better for those who had a hearing before the magistrate than for others. The evaluation conducted for that report, while it may suggest that the approach experimented with in Seattle may have some impact on future driving habits, is not based firmly enough on data to support any firm conclusions, as the NHTSA report points out. U.S. Department of Transportation, National Highway Traffic Safety Administration, Supplement to the 1976 Report on Administrative Adjudication of Traffic Infractions 33-37 (March 1977).

the motorist must appear on the date scheduled by the officer (or at a later date agreed on by him and the prosecutor) if he intends to plead guilty with an explanation; his only other option (other than mailing in the prescribed fine and costs) is to waive his trial and plead guilty before a magistrate or clerk, and those officials have no choice but to impose the prescribed fine.

Decriminalizing traffic violations. The administrative adjudication system requires that the offenses adjudicated in that system be decriminalized.[9] Decriminalization is necessary to achieve the benefits of informality that administrative adjudication promises (i.e., no prosecutor, no trial by jury, relaxed rules of evidence, etc.). But reduced costs and greater informality are not the only benefits that could accrue from decriminalization.[10] For one thing, if traffic offenses were decriminalized, a citizen who commits a minor moving violation would no longer be a misdemeanant. Most people who commit only traffic offenses are probably not bothered by that designation, but some people are offended by it, and decriminalization would calm their feelings.

In addition, decriminalization would slow the legislature's tendency to deal with any activity that disrupts the normal, calm flow of society by making it a crime. Many of these activities are not generally considered immoral, and many do not involve any intent to break the law. But they do run counter to generally accepted notions of what is appropriate behavior. Included in this category are hunting and game offenses, weight and equipment restrictions on motor vehicles, and motor vehicle moving violations. Classifying those offenses as criminal is the easy thing to do, and there is an existing criminal court mechanism to enforce the proscription. Using the criminal sanction in that manner, however, can also dilute the effect of classifying other "immoral" acts as crimes. Decriminalizing minor motor vehicle offenses would make that dilution less of a problem and would save the criminal label for offenses that are greater threats to society.

The pressure on judges. If traffic offenses were handled through administrative adjudication, district judges would no longer be subject to the current pressure that occurs when they render a decision that allows or requires DMV to revoke a driver's license. District judges do many things that adversely affect people: They send some defendants to jail; they decide civil cases that may result in one party's having to pay another; they decide which parent should obtain custody of a child or pay child support. But none of those things appear to cause the district court judges as much trouble as making a decision that means revocation of the defendant's driver's license. All reported cases in which the Judicial Standards Commission has publicly recommended action against a judge have involved improprieties by district judges in hearing or deciding traffic cases.

There are many possible explanations for this pressure. The importance of a driver's license in today's society is obvious. Loss of a license frequently means loss of a job, and the driver and his family suffer thereby. Even if a driver's license is not involved, insurance rates are raised substantially for motor vehicle convictions. Judges feel pressure partly because they are elected officials, and the defendants are constituents. The largest number of cases heard by district judges are traffic cases, and most defendants will find it easier to blame someone else for their behavior. So in the eyes of a defendant constituent, it is the judge who *takes* his driver's license. It is no consolation to a judge voted out of office that he merely enforced laws that the legislature enacted.

If a DMV hearing officer hears the same case, he could be subject to similar pressure. The difference is that he is not elected and his superiors are not elected. His ultimate superior, the Governor, is elected, but the chain of command from the Governor to the hearing officer has several links. Thus shifting the adjudication of traffic cases to the hearing officer could make the district court judge's job less subject to pressure (depending on how many traffic violations are retained as crimes)—and thereby make the district court judgeships more attractive to the best-qualified prospective candidates.

The court caseload. Administrative adjudication would reduce the number of cases heard in district and superior court and relieve the existing congestion in those courts. Although no accurate figures are available to indicate the number or kind of traffic cases heard in superior court, it is commonly believed that motor vehicle cases constitute a substantial portion of the court's misdemeanor caseload, which averages about 40-45 per cent of the total superior court criminal docket. Having most of those cases transferred to another forum would free the superior courts to hear criminal cases more quickly (which will be even more important when the 90-day speedy-trial law becomes effective in October 1980) and to hear more civil cases (which are being delayed as courts strive to meet the speedy-trial-law requirements). In the district court, statistics show that disposition time is also a problem.[11] One cause is the volume of cases; even with the relatively long disposition time, relatively little time is available for each case that is heard in district court. Reducing the caseload could allow more time for each case and shorten case-disposition time, which would significantly improve the district court's public image. In addition, if the district court is ever to become a court of record in criminal cases and require trial by jury, as a practical matter traffic cases cannot be included among the cases to be heard by the jury.

Applying an administrative approach in North Carolina

Given all of these possible benefits, the obvious question is why has an ad-

9. Decriminalization is a separate issue from administrative adjudication. Many jurisdictions have decriminalized minor traffic cases and have kept them within the court system. The critical point is that decriminalization is a prerequisite to administrative adjudication.

10. For more thorough discussion of this issue, see Gill, *The Use of the Criminal Sanction*, 40 Popular Government 1-5, 15 (Fall 1974).

11. In its annual report for 1977, the Administrative Office of the Courts notes than on December 31, 1977, a total of 17,971 motor vehicle cases plus 16,194 other criminal cases had been pending in district courts for more than 180 days.

ministrative approach not been tried here? Probably because North Carolina is different from New York or Rhode Island—in cultural, legal, and geographical composition. What works there will not necessarily work here. But the more important question is whether such a system *could* work here. Some factors that would have to be considered in proposing the administrative approach for this state are discussed below.

Personnel. Administrative adjudication, while it might generally cost less per case than judicial adjudication because of lower salaries for hearing officers and the elimination of prosecutors, might not have a lower total cost in North Carolina because personnel already in place would have to be paid even if their workload did not include traffic cases. This difficulty in using existing personnel goes to the heart of the problem of implementing a statewide administrative adjudication system. To understand the problem, it is instructive to consider what might happen to judges, magistrates, and hearing officers under the new system.

Judges. There are 136 district court judges in North Carolina. They generally hold court in every county in their judicial district on a regular basis (some districts have only one county; others have up to seven). In every district, traffic cases make up a large portion of the criminal docket. In 1977 the district court (excluding cases in which a magistrate or clerk accepted a guilty plea) heard 282,000 traffic cases, and 311,000 other criminal cases. In regard to the 282,000 traffic cases, some of the offenses with which the defendants were charged (for example, driving under the influence and driving while the license is revoked) would probably be retained as crimes even if decriminalization and administrative adjudication were adopted. But if half of that number were offenses retained as crimes, decriminalizing the other half could remove approximately 140,000 cases from the district court caseload.

Even if a large number of traffic cases are removed, however, the legislature is not likely to reduce the number of district court judgeships. With their reduced workloads, the district court judges would be more available to preside over misdemeanor cases with a jury (thus abolishing the de novo appeal to superior court), and that is likely to enhance the district court's image among the public and the lawyers of this state. If that step is not taken (and it would be a radical step), there are still other benefits: The judges would have more time to prepare for juvenile and civil court, two areas of district court jurisdiction that are particularly troubling for some judges.

If the district court "lost" traffic cases, who would hear them? A new agency could be created to handle traffic cases, or magistrates or DMV hearing officers could hear them. Any of these alternatives would have a substantial effect on the magisterial system.

Magistrates. Over 500 magistrates are now employed by the Administrative Office of the Courts. Nearly every city and town has a magistrate's office, and in most places a magistrate is either on call or on duty at all times. Magistrates hear requests for and issue search and arrest warrants; they conduct preliminary proceedings in involuntary commitments, accept guilty pleas in minor criminal cases (up to $50 fine or 30 days in jail) and in minor traffic cases, conduct initial appearances when people are arrested (and they usually set bail), and hear small claims in civil actions. In 1977 magistrates (and clerks of superior court) accepted guilty pleas in 414,000 traffic cases.

How would a shift to an administrative adjudication system affect magistrates? For one thing, they and the clerks would not receive those 414,000 guilty pleas, which would obviously lessen their workload. But the number of magistrates probably would not be substantially reduced because they must still be available at any time for their other functions. If the cost factor did require a reduction in the number of magistrates, then the convenience afforded to citizens and police officers by the new system would be correspondingly decreased. Either choice presents difficulties.

Retaining the magistrate's jurisdiction to hear guilty pleas and adding the responsibility for hearing minor traffic cases would have an equally substantial impact. Clearly the existing force of magistrates could not handle that kind of increased workload.

Even if more magistrates are hired to handle the work, allowing magistrates to hear contested traffic cases would require a major shift in policy. The only type of contested criminal case a magistrate may hear under present law is a worthless-check case involving a check written for $400 or less, and that jurisdiction must be specifically delegated to a district's magistrates by the chief district judge in that district. In no other case does the magistrate have power to resolve guilt or innocence. That policy was made deliberately, taking into account the education and training requirements (high school plus an 80-hour training course), the salary ($8,592 to $13,308), and the state's unsatisfactory past experience with justices of the peace.

A few magistrates might be hired and trained especially to hear traffic cases, but that raises the same questions of reduced convenience to the motorist and increased costs that are raised by hiring new hearing officers in DMV or any new agency.

Hearing officers. About twenty hearing officers are now employed by the Division of Motor Vehicles. They hear cases in which the DMV is authorized to revoke a driver's license or place him on probation for his past driving record, or revoke his license for refusing to take a breathalyzer test. They could not handle the job of adjudicating contested traffic cases or accepting guilty pleas without major additions of personnel, facilities, and supporting staff. Even if the work force were expanded, a traffic violator who wanted to plead guilty probably would face greater inconvenience than under the present system. For those who seek a hearing, a new system might be just as convenient as a hearing before a district judge in urban areas where court dockets are congested, but in rural counties hearing officers would not be as available as district judges are. In addition, since there would probably be fewer hearing officers than there are district judges, the hearing officer would probably have to travel more, which would add to the cost and to the difficulty of recruiting good people. A new agency created to hear the cases would face the same issues.

In terms of salaries, hearing officers (employed by DMV or some new agency) would likely cost less per

person than judges but more than magistrates, and they would probably be less available than either judges or magistrates because there would be fewer of them. They would be correctly characterized as a "new bureaucracy." They would, however, be trained in the highway safety aspects of the sanctions they would impose, and as a result they would have whatever benefits result from specialization.

Computers and cost. Computers are essential to achieve the benefits of administrative adjudication, and making the equipment available in many rural areas would be costly. Computers are used in jurisdictions like New York, Washington, D.C., and Rhode Island to schedule cases so that an officer's court time is shortened; to require appearances by offenders who, because of their prior record, are not allowed to plead guilty; to provide easy, accurate access to the offender's driving record; to remind hearing officers automatically when various danger signals appear in a driver's record; and to keep track of how the system is functioning so that it may be evaluated. All of those benefits are substantial. They also cost a lot of money and are dependent on having computer terminals in every hearing room. That is simply not practical unless the project can be implemented over several years and can have an extensive equipment and training budget for computers. The economies of scale that are present in major cities like New York, Washington, and Seattle or in a compact urban state like Rhode Island are not easily transferred to North Carolina's rural East or West, where the volume of cases is relatively low. As a result, the per-unit cost of the computer system could be high in many counties, and the problems of training computer operators and keeping equipment in working order could be substantial.

Fines and court costs. Some provision would have to be made for replacing the money lost by the county school funds. Article IX, Section 7, of the State Constitution directs that money collected as fines and forfeitures go to the local school fund. If traffic cases are decriminalized, the monetary penalties would not be fines. If the statute mandated that the civil penalty go the school fund, that would lessen the possible impact on school finances. The impact would still be cognizable, however, because a full-fledged administrative jurisdiction would probably rely less on monetary penalties and more on probation and driver-improvement clinics than judicial adjudication jurisdictions do. Even if a hearing officer required an offender to pay as much cash to the state as he might have to pay under the present system, much of the money might be used to pay a tuition fee at a driver-improvement clinic instead of as a fine.

The disposition of court costs would also have to be considered. Under present law, the criminal costs in district court are $27. Every person who is convicted or pleads guilty pays those costs unless the judge remits them or gives the person an active jail sentence. From this $27, a $2 arrest fee goes to the county or city where the arrest was made; a $3 facility fee goes to the county or city to help defray the cost of providing courtrooms and office facilities for judges and clerks; a $3 fee goes to the law enforcement officers' retirement fund; and the remaining $19 goes to the state. The manner of handling fees in administrative adjudication, especially if the state provides the facilities (as most administrative adjudications do) would have significant impact on localities that rely on the facilities fee to provide courtrooms. One answer is to use existing courtrooms and pay rent to the locality, but using the courtroom would negate one benefit of administrative adjudication —the informality of the surroundings. Finally, the legislature might need to decide the appropriateness of assessing a fee to benefit the law enforcement retirement fund for violations that are not criminal.

Statutory and constitutional questions. Shifting to an administrative adjudication system would require substantial revisions of several chapters of the General Statutes and to be done properly would probably require a constitutional amendment. Decriminalization would require that G.S. Ch. 20, the motor vehicle law, be revised. Changes in the jurisdiction of judges and magistrates and in the fee structure would require major changes in G.S. Ch. 7A, the judicial administration laws, and a procedure for the new type of adjudication would have to be included somewhere in the statutes. Statutes are written and rewritten by the legislature every year. These changes would merely be more extensive than most. Still, it would not be the sort of drafting job that can be done quickly.

The prospect of administrative adjudication also raises constitutional issues. Among them are (1) the requirement for a uniform court system, and (2) the application of the separation-of-powers doctrine.

The uniformity of the system becomes a problem if pilot projects of the sort tried in New York City and Seattle are considered for North Carolina. Pilot projects are very useful in determining whether an idea is appropriate for statewide use. They avoid mistakes on a big scale, and they allow time to improve and adjust an idea before the government bears the full cost of implementation. If money is a factor, it also allows the costs to be spread out. Given those advantages, it seems useful to consider the constitutional issues of uniformity.

The North Carolina court system was completely reorganized in the 1960s to make it unified and uniform. The system is limited to an appellate division, a superior court division, and a district court division. Article 10, section I, of the State Constitution prohibits the legislature from creating any new courts. The superior and district courts (including magistrates) are to have "such jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable in every county of the state."[12]

All of these constitutional provisions could be violated by a statute that sets up a pilot program in a few counties to experiment with administrative adjudication. If the experiment used magistrates or a new class of judicial employee to hear contested cases, one could argue that a new kind of court was being created. Further, a pilot program would have to establish different jurisdictional provisions applic-

12. N.C. Const. art. IV, § 12(3). The quoted portion comes from a section that deals only with superior courts, but similar provisions apply to the district court's jurisdiction.

able in the pilot counties because different kinds of officials would be hearing the same type of case, depending on whether the county was a pilot county. Also, if the program involved nonjudicial employees, it would require that certain offenses be decriminalized, thus removing them from the jurisdiction of the district courts in those counties.

In addition to the "uniformity" principle, another state constitutional principle might be violated by a pilot program. Article 1, section 32, provides that "no person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public service." The North Carolina Supreme Court has interpreted that section as requiring that "general laws applicable to the whole state shall operate uniformly upon persons . . . , giving to all under like circumstances equal protection and security and neither laying burdens nor conferring privileges upon any person that are not laid or conferred upon others under the same circumstances or conditions."[13] Without careful research, it is not possible to say whether pilot programs in which only a few counties decriminalize motor vehicle offenses are consistent with that rule; the question would have to be considered in proposing such a program.

Even if there were no pilot projects, the administrative adjudication approach would raise two other constitutional issues. The first is the basic question of separation of powers, embodied in Article 1, section 6, of the State Constitution. The attempt to shift the job of adjudicating, which has always been considered a judicial function, to the executive branch of government might violate that basic principle. (An attempt to set up an administrative type of court in the court system also might be construed as establishing a new court, again in violation of the Constitution.) Other states have adopted administrative adjudication systems without running afoul of their constitutions, but each state's constitution is unique, and North Carolina's attempt to transfer that portion of the judiciary's job would have to be examined by a North Carolina court if the issue is raised in litigation.

Article IV, section 3, of the Constitution deals with the issue more specifically: "[T]he General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice." That provision has been interpreted by the North Carolina Supreme Court to prohibit the Commissioner of Insurance from assessing a civil penalty against an agent who was violating several provisions of the insurance laws. According to the Court, the power to assess penalties was not "reasonably necessary" to accomplish the purpose for which the Department was created—the "effective policing of the activities of . . . agents so as to protect the public from fraud . . . ."[14] The principles of this case suggest that unless the Constitution is amended to allow administrative adjudications, an agency that is given the responsibility of adjudicating traffic cases must have its purposes clearly defined by statute, and one of those purposes must include the disposition of traffic cases.

Conclusion

This article does not advocate an administrative adjudication of traffic cases for North Carolina; such matters are best decided by groups like the Courts Commission and the General Assembly. But it has sought to highlight some of the issues that must be confronted in changing the present system.

Complex legal problems are involved in shifting to an administrative adjudication system. Legal problems can be resolved, however, with new laws. There are also practical problems. One of them is a lack of information about the present system. Before any significant changes should be suggested, a great deal more about the nature and number of cases heard in district and superior court must be known. Another problem is the geographic and cultural diversity of this state: An administrative adjudication system must be adaptable to both large metropolitan counties and small rural counties.

These problems are serious, but the most serious issue is money. Are the costs worth the benefits? Administrative adjudication will cost the state money for new personnel, computers, and facilities. That new money might bring with it better methods of deciding traffic cases, and the disposition of those cases might also improve highway safety. In addition, the time that is gained in the trial courts by reducing their caseloads would have the added benefit of allowing the legislature to reallocate their workload by transferring some of the superior court workload to the district court (e.g., abolition of de novo trials, letting district court hear guilty pleas in felonies, placing habeas corpus motions in district court, or increasing district court civil jurisdiction). Administrative adjudication, of course, should not be recommended solely for that reason (simply adding more court personnel could accomplish the same result), but if it is not recommended, the recommendation, because of the substantial impact it has on the court system, should at the same time consider the structure and workload of the trial courts, the clerks of court, and the magistrates. □

13. State v. Fowler, 193 N.C. 290, 292 (1927). In that case, the Supreme Court invalidated a local act that prescribed a lesser punishment in five counties for a violation of a particular liquor law violation that applied in the remaining counties.

14. State *ex rel.* Lanier v. Vines, 274 N.C. 486, 497 (1968).

The State's Limited Driving Privileges Law Provokes Some Questions

James C. Drennan

DRIVER'S LICENSES, like a lot of other important things, are taken for granted until they are lost. Only then does the person who has lost the driving privilege realize how important it is. A driver's license is a crucial link in the typical North Carolinian's transportation plans. The traditional reliance in this country on the automobile and the relatively rural character of this state—both of which make it difficult to develop public transportation here—mean that most people find that access to a private automobile is necessary to get to work, shopping, church, school, and nearly every other activity.

Most adult North Carolinians have driver's licenses. A few, however, have lost their license—either temporarily or permanently—because of their (a) demonstrated poor driving behavior as shown in their record of traffic convictions, (b) medical condition, (c) refusal to comply with this state's implied-consent laws regarding chemical testing for alcohol, (d) failure to comply with this state's responsibility laws, or (e) failure to comply with an out-of-state court summons or citation. For those people, getting to a job, to school, or anywhere else is much more difficult than for the rest of us. This article will examine one mechanism developed by the legislature to ease that difficulty for those who have lost their license—the limited driving privilege. It will focus on two problems that the limited privileges raise—equity and enforceability—and it will examine other mechanisms that North Carolina and other states use to soften the effect of a revoked license on a driver's job and family.

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Existing law

Under current North Carolina statutes, convictions for motor vehicle moving violations are reported to and recorded by the Division of Motor Vehicles (DMV). In certain circumstances the DMV revokes a license because of the conviction. Some convictions or combinations of convictions authorize, but do not require, the DMV to revoke a person's license—for example, revocations under the point system or for two convictions in a year of speeding over 55 mph. Other convictions or combinations *require* the DMV to revoke the person's license. In two of those instances, the General Assembly has authorized trial judges to issue a judgment that allows a defendant to drive even though his license is revoked. That judgment is called a limited driving privilege.

The two instances in which limited driving privileges can be issued are set out in the General Statutes. The most commonly used limited privilege is for first offenders under the driving-under-the-influence (DUI) law. The driver who may be granted this privilege has been convicted of a violation of G.S. 20-138 or -139 (driving under the influence of intoxicating liquor or drugs or driving with a blood alcohol content of 0.10 per cent or higher) and he must have no convictions for *any* of those offenses in the preceding seven years.

Limited privileges may also be issued for first offenses of certain speeding offenses. To qualify, the driver must have been convicted of a first offense (that is, no similar convictions within the preceding ten years) of driving at a speed that is over 55 mph and also 15 mph above the speed limit. A conviction for that offense requires DMV to revoke the person's license for 30 days, and the limited privilege is good for up to 30 days. Several other statutes authorize DMV to re-

voke a convicted speeder's license, however, and for revocations under these laws, a judge may not issue a limited privilege. For example, a person who is convicted of driving 76 mph in a 55 zone would lose his license for 30 days under the "over 15 mph over the limit and over 55 mph" rule and, if he is otherwise eligible, could get a limited privilege for that 30 days. But he could also lose his license for up to one year under another statute that authorizes the DMV to revoke for convictions in which the defendant drives over 75 mph. If the DMV revoked the person's license under that statute, the judge could not issue a limited privilege for that revocation.

The following statistics put in perspective the extent to which the limited driving privilege is used. In 1978 DMV revoked approximately 132,000 drivers' licenses. Of that total, 61,000 cases involved revocations in which it had the discretion not to revoke; the rest were mandatory revocations. Of the mandatory revocations, 44,723 were for driving under the influence or driving with a blood alcohol level of 0.10 per cent or higher. Another 7,866 were for refusals to take a breath or blood test to determine blood alcohol content. The remainder were for other moving offenses, such as driving while license revoked. Discretionary revocations included, for example, failure to comply with the financial responsibility laws, suspensions for medical reasons, violations of the speeding laws, and suspensions under the point system. Among those revocations, 14,775 limited driving privileges were issued for revocations under the DUI law, and 1,177 privileges were issued for revocations under the speeding law.

Those statistics suggest that the limited driving privilege is available to a relatively small percentage of drivers whose licenses are revoked. For the rest of the drivers with revoked licenses, no similar provisions allow them to drive during the revocation period.

Problems in administering the statute

Equity. The problem of equity may be characterized as follows: It is inequitable for persons convicted of one of the most serious offenses—driving under the influence—to receive a limited privilege when thousands of other persons who have committed violations that are no more serious have no such device by which they may continue to drive. Speeding or reckless-driving revocations are the ones most commonly mentioned when this argument is made. Every recent session of the legislature has produced bills to allow limited privileges for more revocations (and in 1979 one such bill was approved by a House Judiciary Committee). The fact that such bills continue to be introduced suggests that some legislators consider the limited driving privilege law to be inequitable. If that is true, either of two approaches might be taken: The law can be broadened to include other revocations, or it can be repealed so that no one with a revoked license receives a limited privilege. So far all legislative attempts to resolve the equity issue have favored broadening the law's coverage.

If the law is expanded to include other revocations, one issue that will arise is whether limited privileges should be allowed for discretionary revocations; they occur only after DMV has examined a driver's record and, in most cases, after it has given him a hearing. In general DMV engages in the same sort of inquiry in deciding whether to invoke a discretionary revocation as a judge does in deciding whether to issue a limited privilege. If DMV is exercising its discretion properly, there is little need to allow a judge to second-guess DMV's judgment by issuing a limited privilege. If DMV is not exercising its discretion properly, then legislative action (to reduce the discretion or shift it to judges) or executive action (to change the manner in which it exercises discretion) is needed to correct the problem. Putting the limited driving privilege law on top of the existing structure of discretionary revocations would probably lead to duplication of effort. Anyone who loses his license by DMV action would probably then ask the judge to issue a limited privilege. As a by-product, the defendant would be required to make extra appearances in court to apply for limited privileges, after he has already unsuccessfully argued his case before DMV.

But not all revocations are discretionary. Certain offenses like speeding plus reckless driving, prearranged racing, death by vehicle, driving while license revoked, two reckless-driving convictions in a year, assault with a motor vehicle, or speeding while eluding arrest require that DMV revoke the license of the person convicted—usually for at least a year. In the abstract it is difficult to say whether these offenses are more or less worthy of limited privileges than is DUI; but to someone who has lost his license because he has two reckless-driving convictions for offenses committed eleven months apart while his neighbor, convicted of DUI, continues to drive on a limited privilege, the question is not abstract and the answer is clear. Since DUI occurs so much more often than other offenses, the number of people adversely affected is not as large as it would be if the reverse were true, but the issue is still troublesome.

Enforceability. A limited driving privilege is a judgment of a court. It is issued by an individual judge and contains whatever conditions the judge thinks are appropriate. The limited driving privilege laws state that the privilege should be limited to use for purposes "reasonably" or "directly" connected with the health, education, and welfare of the convicted person and his family. That language is obviously very broad, and the

136 district court and 66 superior court judges apply it very differently. Yet despite the extensive differences between the judgments issued by the judges, no reported appellate cases have discussed what kinds of conditions are reasonably or directly related to those purposes. At this time those statutes mean literally what the trial judge says they mean.[1]

There is a great deal of confusion over the kinds of conditions that judges impose in the privileges. Law enforcement officers tend to believe that most judges do not impose significant limitations on the privilege, while convicted drivers frequently feel that the restrictions are severe. To judges, who must balance society's need to be protected against the defendants' need to continue driving, the limited privilege represents a finely balanced judgment. In an effort to see which of those perceptions was correct, I examined the limited privileges issued in September 1977 that were received by the DMV. That examination makes it clear that limited driving privileges can be found to support all three perceptions. Some privileges impose no restrictions; others are extraordinarily severe; but most seem to strike a balance somewhere in between.

Almost all of the limited privileges contain some kind of restrictions, which vary widely among judges and defendants. While that lack of uniformity makes it difficult to generalize, the following statements seem safe:

—Almost all judges imposed restrictions as to the time a defendant could drive. Most of them limited the defendant to driving shortly before work, shortly after work, and during work hours. A substantial minority allowed the defendants to drive at times that were substantially beyond the hours necessary to get to and from work, but they generally excluded late nights and weekends.

—Almost all judges placed geographic limits on where the defendant could drive. Some limited the defendant to a specific route while most simply specified that he must be going to and from a specific place or kind of place. Almost all limited the defendant to driving in a part of North Carolina, but a few allowed driving outside the state—although the privilege is of doubtful validity outside the state.

—A large majority of the privileges issued to those convicted of alcohol-related offenses[2] contained restrictions related to alcohol. The most common restrictions prohibit the defendant from driving when he has an odor of alcohol on his breath, and they require him to take a breath test on request of an officer who smells alcohol on his breath. Other, less common ones, are more restrictive—e.g., that the defendant not drink for a year; that he not drive within three days (or 12 or 24 hours) of drinking any alcoholic beverages; that he attend sessions held at the local mental health clinic for drinking drivers; and that he allow his car to be searched for intoxicants.

Other kinds of restrictions appeared occasionally but do not fall into any neat category. For instance: driving only for personal necessities; driving only in valid emergency situations; not driving for recreational purposes; surrendering the license to the court if arrested for another traffic offense; bearing the burden of proving compliance with the privilege; driving no more than 40 mph; not driving when anyone other than family members is in vehicle; and specifying that violation of privilege may result in a $500 fine and six months in jail, with a possible further suspension of driving privileges by DMV for up to four years.

The conditions imposed suggest a couple of observations. First, the conditions imposed by the judge should be sufficiently clear that a law enforcement officer (or the defendant) can reasonably ascertain whether a defendant has violated the conditions. For example, driving for "personal necessities," or for the "good of his household" is a vague condition, and an officer would have difficulty in determining whether the defendant is in compliance. Other types of conditions that place specific geographic or time limitations are more easily enforced, but some of them also can cause difficulty. For example, the condition that a defendant drive only from one hour before his shift begins to one hour after it ends requires verification of the defendant's employment and shift assignment—information that is often not readily available. Judges know that the judgments they write are enforced initially by law enforcement officers, and they generally try to impose conditions that restrict the defendant to important, nonsocial driving but are not so specific that he must return to court two or three times for amendments to conform the privilege to work changes, such as a new shift or overtime work. Thus, the need to make conditions specific enough to be enforceable is substantial, but the obvious way to do that—making the conditions more concrete and particular concerning work hours or routes to work—can also cause problems by forcing defendants back to court for modifications.

1. The 1979 General Assembly amended the DUI limited privilege statute to require that judges who issue limited privileges under that law require, as a condition of the limited privilege, that the defendant complete an alcohol-driving-awareness school. (The law provides three instances in which this condition is not required: when no school is reasonably available, when the defendant's drug-alcohol history suggests the course would not benefit him, or when other specific circumstances make it likely the defendant will not benefit from the course.) This is the only condition *required* when limited privileges are issued. No conditions are required when a limited privilege is issued under the speeding statute.

2. N.C. Gen. Stat. § 20-138(a) or (b).

Many of the conditions may be particular enough but are not carefully worded so that their meaning is clear. For example, many judgments impose restrictions concerning the consumption of alcohol that are more strict than the controls generally created in the motor vehicle and alcohol beverage control laws. Most of those conditions specify that a person not drive for a certain length of time after he consumes "alcoholic beverages." The problem arises when that term must be interpreted. In the ABC law, "alcoholic beverages" are those that contain more than 14 per cent alcohol by volume; the motor vehicle law does not define the term. A conscientious driver who likes beer, which for ABC purposes is not an alcoholic beverage, might conclude that drinking beer and then driving is not prohibited by his driving privilege; a judge, on the other hand, if the person is caught driving and drinking beer or admits drinking beer immediately before driving, might conclude otherwise. The point is that the term is not used in G.S. Ch. 20 and confusion is nearly inevitable. Other examples of possible confusion in limited driving privileges:

—"No odor of alcohol on person, breath, or vehicle while operating." Does this mean that a passenger in the defendant's vehicle who has the odor of alcohol about him creates grounds for revoking the privilege?
—"[S]hall not drive after consuming any quantity of intoxicating beverage." No time limit at all is set on that prohibition. How long does it apply?
—"[I]f stopped and given an opportunity, he shall submit to a breathalyzer test and if it registers, he will surrender his license." What does "if it registers" mean? Does "surrender his license" mean that any blood alcohol content is grounds for revoking the privilege only, or does violating that condition also constitute driving while license revoked?[3]
—"Hours of Restriction: 7 a.m.-7 p.m." Does this mean that he may drive only during that period or that he may not drive during that period?
—"[W]ill obey all the laws of the State of N.C." Does this mean that violation of the income tax or other noncriminal law is grounds to revoke the privilege?

In all of these examples, it is generally easy to guess what the judge meant by the condition, but many of them are worded very broadly to include prohibitions that were probably not part of the judge's intent. Others (like the use of "alcoholic beverages") may not be as broad as the judge intended, and others simply make it difficult for the defendant to understand the judgment. When conditions are too broad, a defendant who assumes that he knew what the judge meant may unintentionally violate a condition. When conditions are not as broad as the judge intended, proof of violations beyond a reasonable doubt will be difficult.

In any event, the limited privilege should be worded as precisely as possible. At the least, it should be precise enough to give the defendant and the law enforcement officer a clear understanding of what is and is not allowed.

Approaches used in other states

Thirty-nine states and the District of Columbia have provisions that moderate the impact of driver's license revocations. Many use limited or restricted driving privileges or licenses for this purpose, but the majority use "occupational licenses." Nearly all provide that the "license" is issued by the department of motor vehicles. In most of the states, the department makes the decision to issue the special licenses, but a significant number require that the department consider or follow the recommendation of a judge. Most of the states allow the department to establish the restrictions on the person's driving. Almost all require a showing of hardship by the defendant—usually relating to his employment—and most states require that his driving be job related. Some states, like North Carolina, limit their statute's application to one or two offenses, while others limit the application to a class of drivers (chauffeurs or commercial drivers), but most states allow the restricted license for most revocations.

As suggested above, North Carolina's approach is in the minority in several respects—particularly in the type of restrictions imposed. Most states offer more guidance than does North Carolina about the kinds of conditions that should be imposed. Their statutes usually specify that restricted licenses are to be given only when the defendant proves that his regular livelihood requires operation of a motor vehicle. The department then may issue a license limited solely to enable the defendant to work at his job, and the numerous other purposes that North Carolina judges allow limited privileges to be used for are simply not available to the department. No other conditions—dealing with a defendant's drinking habits, for example—are used; the defendant is subject to the general criminal law in that regard but no special conditions concerning alcohol are placed in his driving privilege. Since some judges impose those alcohol-related conditions and others do not, present law probably causes resentment by some defendants who feel that others are treated more leniently than they are.

Because in most states restricted licenses also are issued by the department of motor vehicles instead of

3. Both limited privilege statutes provide that failure to comply with a condition of a privilege constitutes the offense of driving while license is revoked. N.C. Gen. Stat. § 20-179(b)(5); -16.1(b)(4). The only exception to this rule is that failure to complete an alcohol-awareness school does not constitute driving while license revoked but is grounds to revoke the limited privilege. N.C. Gen. Stat. § 20-179(b)(5).

the court, the department has central control over the process, which means that it is easier to maintain accurate records. It is also more convenient for the public to deal with only one entity concerning their driving privilege. A most important benefit is that the department can standardize the license restrictions, which would probably make it easier to enforce the law and eliminate resentment. On the other side, however, standardized conditions would probably eliminate the judge's ability under present law to tailor the privilege for a defendant who is not employed but who has a compelling reason to drive.

Conclusion

The two major issues raised by North Carolina's present limited privilege statute are equity and enforceability. To address the equity problem, the statutes can be made more inclusive or they can be eliminated. All attempts so far have aimed at broadening the law, and recent political history suggests that, if the equity problem deserves to be addressed, broadening the law is the most practical way to proceed. Equity between holders of limited privileges can be achieved if judges are more consistent in imposing conditions, if the legislature limits the judges' discretion in imposing conditions, or if the job of imposing conditions is shifted to the Division of Motor Vehicles.

Enforceability of limited privileges can also be addressed by judges, if they write conditions more precisely, or by the legislature, if it mandates certain conditions and only those conditions, or if it shifts the responsibility to DMV.

All of these issues are important and deserve the careful attention of judges, law enforcement officers, and legislators. The ultimate goal—to protect the motoring public without unduly interfering with the individual's need to get to work—is worth vigorous pursuit. Is it time to re-examine whether we have chosen the most appropriate means to reach that goal? □

Cable TV *(continued from page 5)*

operator's complaint procedures are put into practice. Those procedures should also require that a copy of all complaints received by the company be kept with the other franchise records available for town inspection.

ABC's draft provided for a local business office with a telephone answering machine that would receive service calls on a 24-hour basis, but little else was said about service. A locality should require around-the-clock, seven-days-a-week repair crews that are available to answer service calls, and many ordinances require that repair crews be capable of responding to complaints within 24 hours.

Nothing in ABC's draft spoke to ownership of the system's assets if the franchise ended, which means that they would belong to ABC. This fact might complicate orderly transfer of operations to another cable company. The new operator might have to reconstruct the system at great expense. Many communities' ordinances provide that, when the franchise ends, the community may buy these assets or require the old operator to sell the assets directly to the new operator.

Last but not least, ABC Cable Company's draft provided for a public hearing to insure effectively that it got the franchise: No more than 28 days would elapse from the time the cable TV ordinance was adopted until the franchise was awarded. A notice soliciting proposals was to be published within two weeks after the ordinance was adopted, and proposals were required to be submitted within two weeks after the notice inviting proposals was published. This is an extraordinarily compressed time schedule. It guarantees that only a group on the scene that has inside information has a chance of submitting a well-thought-out proposal in time. No out-of-town cable company would have been able to survey the market, identify consumer preferences and community needs, spot potential operating problems, determine the financial needs, and pinpoint other considerations within four weeks and still submit a responsible proposal. A diligent board will make its intention to award a cable TV franchise widely known, including to the National Cable TV Association, and it will allow several months for preparation of proposals.

Conclusion

The introduction of cable TV can be an exciting event in a municipality's history. The rewards to the whole community will be much greater if its leaders do their homework thoroughly, if local officials and the unit's attorney prepare an ordinance that protects the community over the life of the franchise, and if a fair agreement is reached with the cable operator. North Carolina communities should keep up with the fast-paced changes in the cable environment. How cable TV develops in our communities and how it affects them will depend in large part on decisions that local officials are now making. □

Juvenile Justice in North Carolina—Issues for the Eighties

Mason P. Thomas, Jr.

THE DECADE OF THE 1970s has been a period of change in juvenile justice in North Carolina. This change began with the North Carolina Bar Association Penal System Study Committee's report entitled *As The Twig Is Bent,* published in May 1972. This report dealt with the committee's exhaustive study of the state's juvenile justice system, and it contained some startling findings. For example, it noted that North Carolina was committing a higher percentage of its young people to juvenile training schools than any other state. The report concluded that half of the 2,400 children then confined in juvenile training schools should never have been sent there, and it stated that training schools were being used as a "dumping ground" for "the mentally retarded, the uneducable, the runaways, pregnant girls, the neglected and, in many instances, simply the unwanted child. The only offense that many of the students have committed is that they do not like or cannot adjust to school." The report went on to recommend seventeen changes in the system to upgrade juvenile services. The basic recommendation was that North Carolina should develop community-based alternatives to training school so that juvenile offenders who did not need to be in training school could be provided appropriate services or care in their home community.

Actions of the past decade

Since the Bar Association's report was released, each session of the North Carolina General Assembly has enacted legislation or provided funding to implement the recommendation for developing community-based alternatives to training school. The 1973 General Assembly rewrote G.S. 7A-286 to establish a state policy that judges must consider in cases involving juvenile offenders. This policy stressed working with the child in his own home and arranging for community-level services where possible; it discouraged committing a child to training school for unlawful absence from school and stated that training school commitment was inappropriate for children younger than ten. To implement the policy, G.S. 7A-286 established criteria for committing a child to training school: A judge who is considering such a commitment must find that the child meets four specified criteria; among other things, community-based resources must have been exhausted in his behalf, and his behavior must constitute some threat to persons or property in the community. In 1974 the General Assembly reorganized juvenile probation and after-care services in the Juvenile Services Division of the Administrative Office of the Courts; intake services were provided to divert selected juvenile offenders from the juvenile system to appropriate community services—such as mental health facilities or the county social services department. The 1975 General Assembly enacted legislation that established a unit within the Department of Human Resources to help local communities assess youth needs and to provide technical assistance, planning, and access to funding so that counties could develop community-based alternatives to training school. This legislation also provided that "status offenders" (undisciplined children who have not committed a crime) may not be committed to training school after July 1, 1978.

The 1977 General Assembly created the Governor's Crime Commission, which includes four representatives of the juvenile justice system, to coordinate criminal justice planning and allocate federal funds for the state's criminal justice programs. It also created two adjunct committees of the Crime Commission that affect juvenile justice: (1) The Juvenile Justice Planning

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Committee is responsible for planning in the area of juvenile justice and recommends juvenile justice programs for federal funding to the Crime Commission. (2) The fourteen-member Juvenile Code Revision Committee was created to study juvenile justice agencies and to recommend a new juvenile code for North Carolina; this committee was terminated when it completed its assignment in January 1979.

The Juvenile Code Revision Committee issued a 428-page report that contained two basic recommendations with proposed legislation to implement these two changes. It proposed a new juvenile code for North Carolina that was adopted by the 1979 General Assembly and became effective on January 1, 1980. It also recommended that a new agency to be called the Office of Juvenile Justice be created as an independent office equal in stature to the Administrative Office of the Courts and located under the Chief Justice of the North Carolina Supreme Court. Although the report proposed legislation to implement the single agency, the legislation was never introduced in the 1979 General Assembly.

Fragmentation within the juvenile justice system. Both the 1972 Bar Association and the 1979 Code Revision Committee studies pointed to fragmentation of juvenile services and poor coordination within the juvenile justice system. The 1972 report states: "Organization and coordination must be brought to a system which has grown disorganized and uncoordinated. We must establish a continuity of care that begins when a child is arrested and continues through and beyond his incarceration until all reasonable steps have been taken to assure his rehabilitation." The 1979 report states: "The juvenile justice system is disorganized, lacking in coordination and a systematic approach to service delivery .... The juvenile may cross a number of administrative lines as he progresses through the juvenile justice system. There is a lack of communication between those components concerning the juvenile's treatment needs .... Currently juvenile justice cannot be managed as it should be .... The separate agencies which compose the juvenile justice system do not coordinate their planning activities, projections of future workloads, budgeting activities, and legislative requests."

When juvenile justice professionals speak of the "fragmentation" of juvenile services, they are referring to the fact that administrative responsibility for juvenile services at the state and local levels includes several separate agencies. For example, screening of juvenile cases ("intake"), supervision of juveniles on probation, and supervision of juveniles who have been released from state training schools ("aftercare") are the responsibilities of the court counselor staff of the Juvenile Services Division of the Administrative Office of the Courts. The responsibility for operating the state training school rests with the Division of Youth Services within the Department of Human Resources (DHR). The Division of Youth Services also is responsible for working with local communities in relation to developing community-based services and providing approved detention care for juveniles who need secure custody before or after the juvenile hearing.

"Fragmentation" also means that some parts of the juvenile justice system are not available in every county. For example, seven urban counties (Buncombe, Durham, Forsyth, Guilford, Mecklenburg, New Hanover, Wake) operate juvenile detention homes, the counterpart of the jail in the adult system. In rural counties, juveniles who require secure custody are held in separate cells in local jails. In addition to the seven county facilities, the state operates one model juvenile detention home in Cumberland County. Some communities have specialized law enforcement services for juveniles through city police departments or county sheriffs' offices. Thus what happens to a juvenile offender in North Carolina is still very much affected by geography.

Need for further study and action. During the 1970s, North Carolina has made progress in a number of areas affecting the juvenile justice system. The number of juvenile offenders committed to state training schools has been reduced, partly because of the availability of some community-based alternatives. The new juvenile code provides a higher quality of procedural due process for juvenile offenders than did the former statutes governing the district court's juvenile jurisdiction. Also, it continues the former law's policy that only juveniles who have committed crimes may be committed to training school, and only after all community services have been exhausted. Funding for juvenile services and for alternatives to state training schools from federal, state, and local sources has gradually increased. Still, a number of problems that affect juvenile justice in North Carolina will require further study and action during the 1980s:

(1) Should there be a state-level single agency that is responsible for the continuum of juvenile services that includes intake, juvenile detention, juvenile probation, training schools, aftercare and community-based programs? If so, how will it be organized—as a new major department in the executive branch that is responsible for juvenile services, as a division or unit within the present umbrella state agency responsible for human services (DHR), or as a part of the judicial branch?

(2) The new juvenile code became effective on January 1, 1980, but its goals and purposes will not automatically be achieved. How effectively will the new code be implemented?

(3) What about the future of community-based alternatives to training school? Are we planning ade-

quately for the future? What about evaluation of these programs? Will there be funds to continue these programs?

(4) Are state training schools adequate for the needs of the delinquent juveniles who will be committed there? Do we need to provide more secure custody facilities in these schools?

(5) Should North Carolina be thinking more seriously about a comprehensive approach to delinquency prevention at the state and local levels?

(6) How will we get as much of the available federal funding for juvenile services as possible and at the same time plan for state and local funding to replace reduced or terminated federal funds?

Concerns for the next decade

Proposed single agency. During the 1970s two major studies of juvenile justice in North Carolina have pointed to the fragmentation of services and to the need for a single agency to be responsible for intake, juvenile detention, juvenile probation, training schools, aftercare, and community-based programs. It seems likely that this issue will surface again in the 1980s. If it does, a number of problems will need to be faced before these services can be consolidated into a single agency.

One serious problem is lack of understanding of how the juvenile justice system operates and whether it achieves its purposes. One reason for this is that the children in the system generally come from poor and powerless families who are unable to influence the system to provide for their children's needs. Furthermore, the system tries to protect the identity of individual children and families involved in juvenile court proceedings through private hearings and confidential juvenile records. Therefore, there is little opportunity for either public understanding of what is happening or independent outside evaluation of the system.

If professionals and judges agree that there should be a single juvenile agency, they disagree seriously over its organizational location. Some feel that juvenile services should be consolidated in the court system as recommended by the Juvenile Code Revision Committee. Others advocate placing all juvenile services within the umbrella DHR, which is responsible for other human services such as mental health, social services, and other youth services. Others boldly recommend that a new agency, comparable in stature with DHR, be created; under the existing organizational plan for state government, such a move would involve establishing a new position that might be called Secretary of Juvenile Justice. These organizational issues can become emotional, partly because professionals in existing departments often fear that organizational change will mean loss of status, power, or position.

Another problem might be classified as a political problem (often the case with organizational changes in state government). Some juvenile justice professionals and legislators opposed the single-agency idea and its proposed location in the judicial branch. Three members of the Juvenile Code Revision Committee served in the 1979 General Assembly and agreed that legislation to establish the proposed Office of Juvenile Justice should not be introduced in the 1979 session because of the political problems and because the Governor would not support the proposed single agency.

Implementation of the new juvenile code. The new code went into effect on January 1, 1980, and primarily affects what happens in juvenile hearings in district courts across the state. The code also rewrites the child-abuse reporting law so that anyone who suspects that a child is being abused and neglected must report his suspicion; under the former law, only professionals were required to report suspected cases. This new code will have a significant effect at the local level on reporting and on the provision of protective services for children.

The new code involves massive changes in court procedures for juvenile offenders, for neglected and abused children, and to some extent for parents. The intake or screening process for juvenile offenders has been more carefully spelled out in that follow-up is required in order to determine whether juvenile offenders actually contact the community resource to which they are referred when they are diverted from court proceedings. Certain serious felony offenses like murder, rape, arson, and felony drug offenses must go to court if there are reasonable grounds to believe that the juvenile has committed these specified offenses.

The new code involves the district attorney in dealing with complaints about screening of juvenile offenders or neglected or abused children. The definition of reportable abuse has been expanded to include emotional abuse as defined in the statute. The code expands the authority of a law enforcement officer, court counselor, or social services worker to take a juvenile into temporary custody without a court order for up to 12 hours in specified circumstances. It expands the due process protections given to juvenile offenders in court in that every child alleged to be delinquent must have an attorney, and he will not be allowed to waive his right to counsel. A guardian ad litem, who is an attorney, must be appointed to represent an abused or neglected child in a judicial proceeding and must be compensated from state funds. In a proceeding that involves a child who is alleged to be abused, neglected, or dependent in which the parents may lose custody, the parents now have a right to counsel at state expense if they are indigent and unable to afford their own attorney.

For the first time, the code spells out specified law enforcement procedures; these include notifying a child of his rights when he is taken into custody, including the right to have his parents present before he is questioned. If he is less than fourteen, no admission or confession to a law enforcement officer after he is taken into custody may be admitted into court unless it was made in the presence of his parents, guardian, custodian, or attorney. The code limits the use of nontestimonial identification procedures on juvenile offenders, such as fingerprinting or photographing, unless authorized by court order. It also specifies new discovery procedures that allow a child to obtain certain information about his case that may be in the possession of the person or law enforcement officer who petitioned him to court. If a juvenile admits the offense in court, the judge must examine the circumstances of the admission to be sure that the child understands his rights and the consequences of the admission. Certain types of juvenile hearings must be recorded.

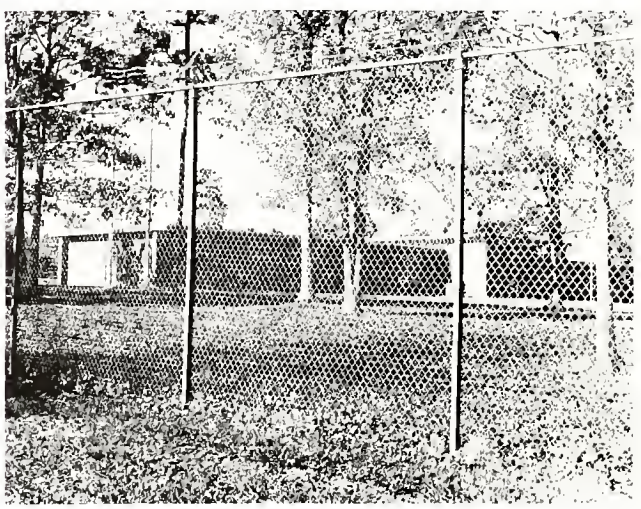
The code expands the dispositional alternatives available, particularly for juvenile offenders. It specifies limited new authority of the court over parents whose children are involved in juvenile cases. It also structures a more careful judicial review process over children in foster homes who have been placed in the custody of county social services departments. The code makes five types of juvenile records or social reports in various agencies confidential, and it provides a new process for expunging a juvenile's record if the child maintains good behavior after his sixteenth birthday. The code contains a new emancipation procedure that allows a 16- or 17-year-old to be responsible for himself and to contract as an adult. And it provides for obtaining court approval for emergency medical care when the parents will not consent.

Clearly, the changes involved in the new code are so massive that effective implementation will require extensive education and training of law enforcement personnel, detention staff, probation staff, judges, and institutional personnel. Also, it is important to note that implementation of the new code will neither affect coordination of services nor provide for adequacy of services or funding for services.

Contining development, funding, and evaluation of community-based services. Early in the twentieth century, in an effort to remove children from North Carolina prisons, reformers in this state advocated juvenile training schools. They believed that in separating juvenile offenders from inadequate families and putting them in isolated rural institutions where they could learn religion, middle-class values, and the work ethic, the crime problem in North Carolina would be solved. While the reformer's intentions were good, their assumptions about crime and delinquency now seem a bit simplistic. Today we know that training school commitment may frequently do more harm than good to a juvenile offender and that many children graduate from juvenile probation or training schools into adult criminal courts and penal facilities. But in the first half of the twentieth century, the panacea was juvenile training schools.

The panacea of the 1980s may be community-based alternatives to training schools—group homes, youth services bureaus, alternative schools, specialized foster care, therapeutic camping, and other programs. North Carolina is now beginning to develop these alternative resources. The state funding for them increased from $1 million for one year in 1977 to $7 million in 1979 for the 1979-81 biennium. It seems clear that community-based services must be carefully organized in relation to documented local needs. Further, we need to look carefully at what type of juvenile offenders go to community-based programs and what happens to them after they receive services in such a program. In other words, careful follow-up studies and evaluations should be made of these community-based programs that we are establishing. Programs that help child offenders to straighten themselves out without becoming enmeshed in the juvenile justice system should be replicated. Thus careful planning, secure funding, and sound evaluation will be significant issues for the 1980s.

Use of training schools. The records of the Division of Youth Services document the fact that training school populations have declined since 1972. For example, the average total daily population in the state training schools in August 1978 was 958 children. That figure in August 1979 was 620. It seems likely that the development of community-based alternatives and the statutory requirements that a child fit certain



C. A. Dillon School. This is the only juvenile facility in the state that is considered secure. Other training schools are open institutions.

criteria before he may be committed have both contributed to this decline.

Some juvenile delinquents' behavior is so serious that they need care in an institution where they can have a structured program that (in the ideal) is related to their individual needs. Yet children who are committed to training school tend to be out of sight and out of mind, and in general the state has been unwilling to appropriate adequate funds to provide appropriate programs and facilities for these children.

One major issue for the 1980s is which delinquents should go to training school. The children now being committed tend to be the more serious and aggressive offenders, and it is not clear whether we know how to provide a program of rehabilitation and treatment for them.

Another issue for the next decade concerns the type of physical facilities that should be available for state training schools. Many of the physical facilities at state training schools are obsolete and inadequate. For example, many cottages at Stonewall Jackson School were designed in the early part of the twentieth century according to the "cottage plan." Each cottage was designed to be a separate family unit, staffed by cottage parents (usually a married couple) who lived in the cottage and were available around the clock as parents are. It had its own kitchen and dining facilities, and the children lived dormitory style on the top floor. These Victorian-style buildings are in poor repair, and their design is not suitable for the program that is now operating at Jackson. The cottage parents work on eight-hour shifts and no longer live in. The staff and children eat in a central dining facility. Another question is whether training schools should provide more secure custody. At present, most juvenile training schools are open institutions. Only Dillon School is considered a secure facility, and children are able to climb over its fence and run away.

"Cottage" unit at Stonewall Jackson School, originally designed to be a complete family unit.

Thus in the next decade juvenile correctional leaders, the legislature, and the public must face a series of complex and confusing issues that relate to physical facilities. Do we need more institutions? What type of physical facilities are appropriate? Should we close some training schools in view of the declining population? Can we convert existing training school or physical facilities so that they will be appropriate to contemporary programs?

Other significant programming issues must also be faced in the next ten years. Many professionals feel that the state is doing little more than providing custodial care to delinquents committed to training school. What types of professionals do we need for an adquate program? How does one design a program for dealing effectively with seriously delinquent juveniles in institutions? Should we provide more professionals in the treatment fields like psychiatry, psychology, and social work?

Delinquency prevention. Many professionals agree that one effective way to reduce crime would be to develop an effective delinquency prevention program. North Carolina now has certain local prevention programs, but it has no statewide, comprehensive approach to prevention that involves such agencies as public education, churches, recreation, existing social services programs, family counseling resources, and others. Everybody seems to agree that delinquency prevention is important, but few agree about strategy or effective techniques for achieving it. Perhaps a study group should be created and charged with formulating an effective statewide delinquency prevention program.

The Governor proposed and the 1979 General Assembly enacted legislation to create a state-level New Generation Interagency Committee to strengthen North Carolina families and to improve services to families and children. The legislation also authorized (but does not require) the creation of county-level New Generation Interagency Committees by any board of county commissioners. While the legislation does not require emphasis on delinquency prevention at the state or county level, the powers and duties of such a committee at the state or county level are so broad that the New Generation program could certainly include delinquency prevention.

Funding. The federal Juvenile Justice and Delinquency Prevention Act of 1974 as amended (JJDP) offers federal funds for juvenile justice programs to those states that meet specified conditions contained in federal law. One requirement is that status offenders (who are known as "undisciplined" children in North Carolina) should not be placed or confined in detention or correctional facilities. In North Carolina this

means that status offenders should not be in local jails, juvenile detention homes, or training schools. Another federal requirement is that in secure custody facilities like local jails, juvenile and adult offenders must be separated. A participating state has five years to comply with these federal requirements, but 75 per cent compliance is required within three years after the state begins to participate. North Carolina's plan for participation was approved in 1978; therefore this state must be in full compliance by 1983.

To some extent the development of the new juvenile code was influenced by the requirements of JJDP. Under the code, status offenders are not subject to commitment to state training schools; only delinquents who meet certain statutory criteria may be committed to training school. Under the code, jail detention of juveniles is not allowed after July 1, 1983—the year that North Carolina must be in full compliance with federal law. The federal regulations developed to implement JJDP interpret the federal law to mean that detention of a status offender for less than 24 hours does not constitute a violation of federal law. North Carolina's code authorizes secure custody or detention of "undisciplined juveniles" for up to 24 hours to allow time for a mental health evaluation if the child has attempted self-inflicted injury or if he is a runaway and the 24-hour detention is needed to reunite him with his family or to evaluate his need for medical or psychiatric treatment.

During 1978 some 2,700 juveniles were jailed in North Carolina. The Division of Youth Services estimates that 35 per cent of them were status offenders. The available information indicates that most were released from jail to return home or to be placed in a foster home or some other nonsecure facility. The question arises why so many were detained in jails in the first place. If judges and local officials continue to detain status offenders in local jails or juvenile detention homes, such practices will violate the federal requirements in the JJDP program and could jeopardize this state's federal funding. It seems clear that increased state funding for juvenile detention facilities for delinquents and nonsecure placements (like shelter facilities or emergency foster homes) for juvenile offenders will be an important issue for the 1980s.

North Carolina was reluctant to participate in the JJDP program for fear that the state could not meet the required conditions and might be forced to repay federal funds. It began receiving $1.5 million per year in 1978 and began spending it in 1979, primarily on new programs that provided alternatives to training school. The level of funding under the JJDP program is uncertain for the 1980s.

Another significant source of federal funds for juvenile justice programs is the Law Enforcement Assistance Administration (LEAA). In recent years North Carolina has received $1.6 to $1.8 million per year through LEAA in block grants for juvenile justice programs.

Funding of juvenile justice programs, including state training schools and community-based alternatives, will continue to be an important issue in the 1980s. At the state level, difficult questions will arise on priorities as community-based programs and state training schools compete for state funding. The planning and coordination of state funding for juvenile justice programs is the responsibility of the Juvenile Justice Planning Committee, which recommends programs for funding to the Governor's Crime Commission. The future availability of federal funds is not clear. One approach to funding may be for the state to participate as fully as possible in both LEAA and JJDP programs in order to get the maximum benefit from available federal funds. LEAA funds are "seed" money meant to foster new programs, and federal funding is usually limited to two years. JJDP funds are not required to be "seed" money, and they may be used by a state or local program over a longer term, depending on how North Carolina decides to allocate its JJDP funds.

It seems likely that continuity of programs will depend on increased state funding, since federal law provides that programs funded with JJDP funds must eventually be picked up by state or local funds.

Thus the Juvenile Justice Planning Committee must plan effectively to maximize federal funds available under both JJDP and LEAA—an important task for the 1980s.

Conclusion

The six juvenile justice issues or areas of concern for the 1980s seem overwhelming. Yet it is important to note that North Carolina has made significant strides during the 1970s in improving the quality of juvenile justice. Progress can continue during the 1980s, depending on a number of variables. Two primary needs are effective leadership for continuing program development and changes in organization to provide a coordinated system of services to juvenile offenders and their families. Leadership must come in part from the political arena—from the Governor and the General Assembly. And it must also come from professionals in juvenile justice who have disagreed over program issues and proposed organizational changes. If these professionals could agree on future directions, perhaps the political leadership could be more comfortable in implementing the necessary changes. □

City-County Tax Collection Offices

William A. Campbell

IN MOST NORTH CAROLINA counties and municipalities, at one time or another, someone—usually a newspaper editorial writer—has suggested that the city and county property tax collection functions ought to be combined. Proponents of combination usually maintain that a single collection office would be cheaper to operate than two separate offices. One office is not always cheaper, but even if it were, there may be good reasons for operating separate offices.

Some often-mentioned advantages of a combined collection office are: (1) more economical use can be made of data-processing equipment and office personnel; (2) a single bill can be used, which will save postage and supplies; (3) members of the public who wish to pay taxes in person or check on the status of taxes (such as title examiners) need go to only one office; and (4) for some units, especially smaller ones, the larger staff in the combined office and a more vigorous use of enforced collection remedies will lead to a higher percentage of taxes collected.

Frequently mentioned disadvantages of a combined office are: (1) taxpayers no longer have the choice of paying one unit's taxes early—for example, in September—and the other unit's taxes late, say in December, though partial payments could still be made of the combined bill; (2) the unit of government that gives up its tax collection function loses control over collection policy and decisions on the use of enforcement remedies; and (3) some units, especially cities, may fear that their collection percentage will decline if the county assumes responsibility for collections (more about this later).

The purpose of this article is not, however, to advocate joint collection arrangements or to defend separate offices, but rather to provide information about the eighteen county tax collectors' offices that are currently collecting property taxes for one or more of the municipalities in the county.

Local governments are authorized by G.S. 160A-461 to enter into contracts for the joint collection of taxes. At first thought it might appear logical for a county to contract with a city to collect both city and county taxes, rather than the other way round. G.S. 160A-461 and the following statutes clearly contain adequate legal authority for such an arrangement, and the typical larger city has a more varied collection experience than the typical county because it collects not only property taxes but also privilege license taxes, assessments, utility bills, and numerous miscellaneous charges, while the county may collect only a few privilege license taxes in addition to property taxes. Nevertheless, in every joint collection undertaking it is the county that collects for the city. My guess is that there are two reasons for the joint collection office's being lodged with the county. The first is that since the county tax supervisor is doing the listing and appraising of property, it is thought that it would simply be more convenient to have the county do the collecting as well. The second is the feeling that there is something untoward about having a city collect taxes outside its geographical limits. Neither of these reasons is compelling, for a city collection office could prepare the receipts and handle the billing, once given the listing and appraisal information, just as easily as could a county office, and under an intergovernmental contract pursuant to G.S. 160A-461 a city collection office would have legal authority to perform all tasks necessary to collect taxes in areas of the county outside the city limits. When a municipality contracts with a county for the collection of its taxes, it gives up virtually all authority over the tax collection function; the county tax collector answers to the county commissioners only

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and treats the municipal taxes the same as county taxes. The reverse would, of course, be true if a city collected for the county.

The principal elements in any contract for operating a joint office are (1) the amount or formula for compensating the collecting unit for collecting the additional taxes; (2) the placement of collection office personnel of the unit that is giving up the collection function; (3) whether the joint collection office is to collect any items, such as privilege license taxes, in addition to property taxes; (4) the policies on separating the amounts collected and depositing those sums; and (5) policies on foreclosure.

The table below shows the many different methods chosen for compensating the collecting unit. Usually, collection office personnel of the unit that is giving up the collection function can be integrated satisfactorily into the combined collection office, although occasionally differences in retirement, promotion, or leave policies have been substantial stumbling blocks. Several units have found it prudent to wait until the city collector was about to retire before negotiating for a

City-County Combined Tax Collection Offices

County and Municipalities	Total Receipts	Mun. Receipts	Amount or Method of Charge	Other Items Collected	Computer Use	Collection Percentage (1977 Taxes)
Alamance: Haw River	51,515	Combined	$1,000 flat fee	None	Preparation of receipts	99.78%
Beaufort: Aurora, Bath, Belhaven, Chocowinity, Pantego, Washington, Washington Park	30,000	Combined	2% of municipal levy	None	Preparation of receipts	94.99
Buncombe: Asheville	115,000	Combined	City pays 35% of tax office's budget	None	Preparation of receipts (on-line being developed)	94.75
Cleveland: Boiling Springs, Grover, Lattimore, Shelby	42,000	Combined	2% of municipal collections	None	Preparation of receipts	97.72
Cumberland: Fayetteville, Hope Mills, Linden, Stedman, Wade	87,000	Combined	6% per receipt for Stedman, Wade, and Linden; 1% of collection for Hope Mills and Fayetteville	None	Preparation of receipts	96.05
Davidson: Lexington and Thomasville	65,000	Combined	$2 per receipt carrying municipal taxes	None	None	97.65
Forsyth: Rural Hall and Winston-Salem	136,000	Combined	$500 minimum or 1% of municipal collections	None	Preparation of receipts	94.38
Guilford: High Point	150,000	Combined	45% of budget for High Point office	None	Preparation of receipts	98.80
Haywood: Maggie Valley	41,000	Separate receipts	No charge	None	None	95.27
Mecklenburg: Charlotte	245,000	Combined	Percentage of tax collector's budget based on ratio of municipal receipts to total receipts; city currently pays 40% of budget.	Privilege license, assessments, beer and wine, parking violations, ambulance	On-line	97.75

combined office. Most combined offices—in part because the county is doing the collecting—collect only municipal property taxes and not privilege license taxes and other municipal charges. The major exception is Mecklenburg, which collects a full range of city taxes. This reluctance to collect items other than property taxes can constitute an obstacle to combining the offices, especially in those cities where nonproperty tax items constitute 50 per cent, or more, of the total collections. Most combined offices try to separate the amounts collected for each unit and to deposit them to each unit's account as soon as possible after collection; this process is greatly aided by the use of data-processing equipment. Combined units frequently can pursue a more vigorous foreclosure policy than separate offices because the larger number of foreclosures usually means that the unit can adequately compensate its attorney for the work involved, or even hire a special tax attorney.

The contract should require a review of the method for compensating the collecting unit after the first year and a review of the entire operation after the first

City-County Combined Tax Collection Offices

County and Municipalities	Total Receipts	Mun. Receipts	Amount or Method of Charge	Other Items Collected	Computer Use	Collection Percentage (1977 Taxes)
New Hanover: Carolina, Kure and Wrightsville Beaches, Wilmington	65,000	Combined	1½% collections	None	Preparation of receipts	97.42
Orange: Carrboro, Chapel Hill, and Hillsborough	37,000	Combined	Percentage of tax collector's budget based on both ratio of municipal receipts to total receipts and municipal taxes collected to total taxes collected	None	On-line	95.68
Rowan: East Spencer, Salisbury	65,000	Combined	Percentage of tax collector's budget based on ratio of municipal receipts to total receipts.	None	Preparation of receipts (on-line being developed)	96.74
Surry: Dobson	36,000	Separate receipts	$1,200 flat fee	None	Preparation of receipts	96.19
Transylvania: Brevard, Rosman	15,000	Combined	5% of collections	None	Preparation of receipts	96.72
Wake: Raleigh, Wake Forest, Wendell	182,000	Combined	$1.25 per receipt first year; $.75 each succeeding year, based on cost of billing to county	None	On-line	97.07
Wayne: Goldsboro and Mount Olive	40,000	Combined	Costs of collector's and tax attorney's office, ratio of city's receipts to total is percentage of tax collection budget paid by city.	None	Preparation of receipts	96.48
Wilson: Saratoga and Wilson	30,000	Combined	1% of the collections	None	On-line	98.60

three or four years. Once units have negotiated a satisfactory contract and made whatever adjustments are necessary after the first couple of years, they almost always continue with the joint operation; one rarely hears of a city and county that operate a joint tax collection office suing for divorce.

The table lists the counties that collect for one or more municipalities and the names of the municipalities. It also includes the following information concerning these offices: the total number of tax receipts handled each year by the collection office; whether municipal taxes are combined with the county taxes on a single receipt or shown on a separate receipt; the amount or method by which the county charges the municipality for collecting municipal taxes; municipal items other than property taxes that are collected by the county; the collection official's use of a computer; and the county's percentage of 1977 taxes collected by June 30, 1978, as reported in Local Government Commission Memorandum Number 489, dated November 30, 1978.

A note of caution should be added about comparing the collection percentages of combined units with those of cities and counties that operate separate offices. For reasons that are not entirely clear, collection percentages for cities above 10,000 population are usually higher than those of counties. But one should not therefore conclude that when a county begins operating a combined office, the city's collection percentage will always drop to the level of the county's; it may be that city residents are more able and willing to pay their taxes than county residents and the collection percentage for the combined office will therefore even out at a level approaching the city's. On the other hand, if the disparity in the two collection percentages results from relaxed collection practices by the county, the collection percentage for the combined office will almost certainly be lower than the city's.

The table contains three statements about the use of computers. "None" means that no computer is used; "preparation of receipts" means that the listing and appraisal information from the tax supervisor's office is entered in a computer and the computer then prepares the receipts using this information; and "on-line" means that the collection office has available a data-processing terminal on which it may inquire at any time about the status of taxes and update tax accounts as they are paid. □

Magistrates' small-claims courts were established to permit the settlement of controversies involving relatively small amounts of money without the need for an attorney. Are they being used that way? And what kinds of civil cases are being brought before the magistrate?

North Carolina's Small-Claims Courts

Joan G. Brannon

WHEN THE JUDICIAL SYSTEM of North Carolina was completely reorganized in 1965, the office of magistrate was created within the District Court Division to replace the old office of the justice of the peace. Magistrates perform many criminal duties—among them issuing arrest warrants and search warrants; setting bail; accepting guilty pleas in minor misdemeanor cases, in minor traffic offenses, and in worthless-check cases in which the check was for $400 or less. Magistrates perform marriages; in fact, they are the only officials other than ministers who can marry people in North Carolina. Magistrates also have jurisdiction to hear civil disputes in which $800 or less is at issue. (Before October 1, 1979, the magistrates' jurisdiction was to hear cases of $500 or less.)

This article is about magistrates' civil courts, which are called small-claims courts. Small-claims courts were set up so that citizens would have available a court to hear their minor civil grievances in an informal setting, generally without attorneys. The kinds of cases heard in small-claims courts include:

1. Actions on accounts for goods or services sold—that is, actions brought to collect a debt that is not secured by collateral in property or represented by a negotiable instrument. For example, suits to collect on debts owed on a retail store account or for medical or dental services fall within this category.
2. Actions to collect on a promissory note.
3. Actions to collect on a check.
4. Actions for summary ejectment—that is, actions brought by a landlord to oust his tenant from rental premises.
5. Actions to repossess secured property—that is, actions brought by a creditor to repossess property given as collateral under a security agreement when the debtor defaults on his payments.
6. Actions to recover a deficiency under the Uniform Commercial Code—that is, actions brought by a secured creditor to recover the amount still owed on the debt after the secured property has been repossessed and sold.
7. Actions for conversion or to recover possession of personal property when the plaintiff is not a secured party—that is, disputes about personal property being wrongfully taken.
8. Actions to recover for injury to a person or damage to property.
9. Actions to enforce motor vehicle liens.

Recently the Institute of Government surveyed magistrates who hold small-claims court to determine what kinds of cases they are hearing, the disposition of the cases assigned to small-claims courts, how often attorneys are appearing, and whether these matters are uniform thoughout the state.

In April 1979, each magistrate in North Carolina (560) was mailed a questionnaire about handling small claims. In addition to ten questions about their courts, the questionnaires asked magistrates who try small-claims cases to keep records on all cases set before them for May 1979.[1] Two

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1. Two surveys were made in 1969 and 1974 by the Institute of Government. Their findings corresponded to the 1979 findings. However, this article will not compare the statistical results of those earlier surveys and the most recent one because no significant trends were uncovered. Moreover, in the earlier surveys magistrates were asked to give estimates in their responses rather than keep specific records of the cases before them.

Table 1

Kinds of Cases Heard
(as Percentage of Total Number of Cases Docketed)

Kind of Case	State-wide	Group A Pop. under 20,000	Group B Pop. 20,000-40,000	Group C Pop. 40,000-80,000	Group D Pop. 80,000-120,000	Group E Pop. over 120,000
On account for goods or services sold	56.1%	75.8%	76.8%	70.5%	59.0%	37.3%
Summary ejectment	26.7	4.3	5.5	11.4	20.6	47.8
Repossession of secured property	11.2	12.9	14.1	12.5	14.0	8.1
Repossession of property when plaintiff is not secured party	2.0	1.2	1.2	1.7	1.6	2.6
Injury to person or property	1.4	.5	.4	1.2	1.7	1.8
Collect on promissory note	1.2	3.0	1.1	1.1	1.1	1.2
Recover deficiency under UCC	.6	.9	.2	.8	1.4	.3
Recover on check	.4	1.2	.3	.2	.3	.6
Enforce motor vehicle lien	.2	.2	.4	.3	.3	.1
Conversion	.2	.0	.0	.3	.0	.2
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

hundred thirty-three magistrates returned the questionnaire; of these, 105 indicated that they handled criminal matters only and not small claims. The 128 responses from magistrates who handle small claims were then broken down into five groups on the basis of the 1979 estimated population of the magistrate's county as follows: Group A—26 responses from counties with populations under 20,000; Group B—29 responses from counties with populations of 20,000 to 40,000; Group C—43 responses from counties with populations of 40,000 to 80,000; Group D—19 responses from counties with populations from 80,000 to 120,000; and Group E—11 responses from counties with a population over 120,000.

The responses indicate that the average number of cases on the docket increases as the county's population increases. The statewide average number of cases on the docket for May 1979 was 99 cases. The average number of cases on the docket for Group A was 22; for Group B, 59 cases; for Group C, 75 cases; for Group D, 101 cases; and for Group E, 475 cases. Magistrates in Group E are full-time small-claims magistrates. Those in the other groups handle criminal duties as well as small claims.

Kinds of cases

Statewide, the most common type of case to be handled in small-claims courts is actions on accounts—56.1 per cent of all small-claims cases. These actions make up a higher percentage of the cases handled in less populous counties than in more populous ones. On the other hand, the responses indicated that as county population increases, the percentage of summary ejectment actions increases. In fact, in counties with populations of more than 120,000, summary ejectment cases constitute the largest percentage of cases heard (47.8 per cent). Although the actual numbers of these cases are small, an action to collect damages for injury to person or property is more likely to be filed in the more populous counties than in the less populous ones. Table 1 indicates the kinds of cases handled by magistrates.

Disposition of cases

Magistrates were asked to indicate by type of case the number of cases dismissed without trial and the number that went to trial. Generally, the responses indicate that the less frequently heard cases—such as cases to recover a deficiency under the Uniform Commercial Code, actions to enforce motor vehicle liens, and actions for conversion—are more likely to have a higher percentage of cases tried and a lower percentage of cases dismissed. The lowest percentage of cases tried are actions on accounts, and conversely those actions have the highest percentage of dismissals. Table 2 gives the breakdown of responses on dismissal or trial as a percentage of total cases in each category that were on the docket. The total of cases dismissed and cases that went to trial is not always 100 per cent. Generally, cases that were continued to a later date or returned to the clerk of court for lack of jurisdiction account for the difference, which is listed under "other handling." The most common reason for a case to be dismissed without trial, according to 90.8 per cent of the respondents, is that the plaintiff requests dismissal. The second most likely reason for dismissal is that neither party comes to court. The third is that the defendant has never been served a summons. (A case cannot be tried unless the defendant has been served. A summons is good for 30 days, and the plaintiff can keep a lawsuit alive by reissuing the summons every thirty days. The case is dismissed if the plaintiff fails to reissue the summons.) And the least likely reason for

Table 2
Disposition of Cases
(as Percentage of Total Number of Cases Docketed)

Kind of Case	Statewide			Group A			Group B			Group C			Group D			Group E		
	Dismissed without Trial	Went to Trial	Other Handling	Dismissed without Trial	Went to Trial	Other Handling	Dismissed without Trial	Went to Trial	Other Handling	Dismissed without Trial	Went to Trial	Other Handling	Dismissed without Trial	Went to Trial	Other Handling	Dismissed without Trial	Went to Trial	Other Handling
On account for goods or services sold	41.2%	51.4%	7.4%	41.3%	51.3%	7.4%	39.5%	50.1%	10.4%	44.0%	48.4%	7.6%	43.5%	48.6%	7.9%	37.8%	57.3%	4.9%
Summary ejectment	27.0	70.5	2.5	16.7	54.2	28.7	31.9	47.9	20.2	44.0	56.0	.0	35.6	53.5	10.9	23.0	76.4	.6
Repossession of secured property	36.0	53.0	11.0	35.6	47.9	16.5	38.1	51.0	10.9	33.8	49.5	16.7	37.9	49.1	13.0	35.7	60.8	3.5
Repossession of property when plaintiff is not secured party	17.3	73.1	9.6	.0	71.4	28.6	20.0	45.0	35.0	23.6	70.9	5.5	10.0	76.7	13.3	16.8	77.4	5.8
Injury to person or property	16.9	73.8	9.3	66.7	33.3	.0	14.3	85.7	.0	10.8	75.7	13.5	21.9	65.6	12.5	16.1	76.3	7.6
Collect on promissory note	30.5	56.5	13.0	64.7	29.4	5.9	15.8	52.6	31.6	37.1	42.9	20.0	13.6	68.2	18.2	27.9	68.9	3.2
Recover deficiency under UCC	9.9	82.7	7.4	.0	80.0	20.0	.0	75.0	25.0	14.8	77.8	7.4	11.1	85.2	3.7	5.6	88.9	5.5
Recover on check	18.5	74.1	7.4	14.3	85.7	.0	.0	100.0	.0	28.6	71.4	.0	20.0	40.0	40.0	20.0	73.3	6.7
Enforce motor vehicle lien	7.4	85.2	7.4	.0	100.0	.0	.0	100.0	.0	11.1	77.8	11.1	.0	100.0	.0	20.0	60.0	20.0
Conversion	21.1	78.9	.0	—	—	—	—	—	—	30.0	70.0	.0	—	—	—	11.1	88.9	.0
Total of all cases	35.5	57.9	6.6	39.0	51.2	9.8	37.9	50.6	11.5	41.5	50.5	8.0	39.2	51.3	9.5	35.5	57.9	6.6

cases to be dismissed is that the defendant appears for trial but the plaintiff does not.

The plaintiff wins a very high percentage of the cases that do go to trial—87.8 per cent. For only two categories of cases did the percentage drop below 80 per cent—the plaintiff won 63.7 per cent of the actions to recover property when the plaintiff is not a secured party and 68.5 per cent of the trials for injury to persons or property. The plaintiff wins over 90 per cent of the cases that arise out of commercial transactions (situations in which a consumer has borrowed money or bought goods on credit or had services performed and then does not pay his debt). Table 3 sets out the percentage of cases tried that were won by the plaintiff. It is not at all uncommon for a defendant not to appear when his case is tried in small-claims court. In 56.9 per cent of the cases tried, the defendant did not appear. This failure to appear does not vary much by population group but does seem to vary with the kind of case being tried: The defendant seems least likely to appear in a summary ejectment case (failed to appear in 66.2 per cent of the trials) and most likely to appear in a case arising out of injury to persons or property—failed to appear in 13.4 per cent of trials. Table 4 sets out the percentage of cases in which the defendant did not appear for trial of his case. In small-claims court, the plaintiff is not allowed to get a default judgment when the defendant does not appear. He must always present enough evidence under oath to prove his case. This requirement should certainly be continued, since such large numbers of defendants do not appear for trial.

Representation by attorneys

Another question asked how often the plaintiff or the defendant is represented by an attorney at the trial. Unlike some other states, North Carolina has not prohibited attorneys from appearing in small-claims court; still, one purpose for these courts is to provide a forum where attorneys are not needed. Clearly, the courts are working as intended, because lawyers do not often appear in them. The plaintiff was represented by an attorney at 7.4 per cent of the trials and the defendant at 3.4

Table 3

Plaintiff Won Case
(Percentage of Total Number of Cases That Went to Trial)

Kind of Case	Statewide	Group A	Group B	Group C	Group D	Group E
On account for goods or services sold	90.7%	86.8%	96.1%	87.6%	95.6%	89.1%
Summary ejectment	84.0	100.0	95.6	89.8	95.8	81.6
Repossession of secured property	94.4	91.4	98.4	99.5	93.9	89.2
Repossession of property when plaintiff is not secured party	63.7	80.0	66.7	74.4	91.3	87.5
Injury to person or property	68.5	100.0	50.0	89.3	85.7	56.3
Collect on promissory note	93.1	80.0	100.0	100.0	100.0	88.1
Recover deficiency under UCC	88.1	100.0	100.0	100.0	69.6	93.8
Recover on check	87.5	100.0	100.0	80.0	100.0	81.8
Enforce motor vehicle lien	95.7	100.0	100.0	100.0	80.0	100.0
Conversion	86.7	—	—	85.7	—	87.5
Total cases tried	87.8	88.3	95.9	89.3	94.5	83.3

Table 4

Defendant Did Not Appear at Trial
(Percentage of Cases That Went to Trial)

Kind of Case	Statewide	Group A	Group B	Group C	Group D	Group E
On account for goods or services sold	55.5%	59.5%	56.8%	56.0%	64.4%	49.0%
Summary ejectment	66.2	69.2	37.8	71.2	78.3	65.1
Repossession of secured property	53.6	60.0	48.0	58.8	56.1	50.2
Repossession of property when plaintiff is not secured party	24.7	20.0	.0	64.1	21.7	13.2
Injury to person or property	13.4	.0	16.7	17.9	23.8	8.5
Collect on promissory note	47.1	60.0	10.0	40.0	53.3	54.8
Recover deficiency under UCC	41.8	20.0	33.3	52.4	43.5	25.0
Recover on check	45.0	50.0	40.0	40.0	.0	50.0
Enforce motor vehicle lien	47.8	.0	.0	42.9	100.0	100.0
Conversion	40.0	—	—	71.4	—	12.5
Total cases tried	56.9	58.6	52.5	57.5	63.8	55.8

per cent. Both parties are more likely to be represented by an attorney at a trial for injury to persons or property than any other type of case, and least likely in an action to enforce a motor vehicle lien (.0%). Defendants are rarely represented by a lawyer in summary ejectment cases. Table 5 gives the percentage of cases in which the plaintiff or defendant was represented by counsel at trial. One matter that should be watched is whether the recent increase in small-claims jurisdiction (from $500 to $800) results in a significant increase in representation by attorneys. If that occurs, the nature of small-claims courts would be changed, and consideration might be given to prohibiting representation by attorneys in these courts.

Each magistrate was also asked to indicate whether a legal aid clinic, which gives free representation to poor people in civil cases, was set up in his county and, if so, to estimate the percentage of cases in which the plaintiff or the defendant was either represented by or received legal advice from a legal aid attorney. Twenty-five magistrates indicated that they had legal aid clinics in their county. With regard to plaintiffs in the cases that came to trial, sixteen of those magistrates indicated that 1 per cent of plaintiffs or fewer received legal advice from a legal aid attorney; six said that from 2 to 5 per cent of plaintiffs had received legal aid, while three magistrates estimated that 10 per cent of plaintiffs had received such help. With regard to defendants in cases that came to trial, 11 magistrates indicated that only 1 per cent of defendants or fewer had received help from legal aid counsel; 10 said that from 2 to 10 per cent of defendants had received this help; and two magistrates said that 15 per cent of defendants had received it.

Appeal

A party who is unhappy with the magistrate's judgment may appeal his case to district court, where he will receive a new trial as if the magistrate had never heard the matter. One indication of how well the small-claims court is functioning may be how often parties are dissatisfied enough with the results to appeal to district court. (Appeal rates do not indicate dissatisfaction with complete accuracy since some dissatis-

Table 5
Parties Represented by Attorney at Trial
(Percentage of Total Cases That Went to Trial)

Kind of Case	Statewide		Group A		Group B		Group C		Group D		Group E	
	Plaintiff Had Attorney	Defendant Had Attorney	Plaintiff Had Attorney	Defendant Had Attorney	Plaintiff Had Attorney	Defendant Had Attorney	Plaintiff Had Attorney	Defendant Had Attorney	Plaintiff Had Attorney	Defendant Had Attorney	Plaintiff Had Attorney	Defendant Had Attorney
On account for goods or services sold	10.8%	3.2%	2.3%	1.4%	8.9%	.9%	11.6%	3.9%	7.6%	4.2%	14.3%	3.7%
Summary ejectment	3.1	1.7	7.7	7.7	13.3	4.4	11.2	6.3	3.8	1.9	1.9	1.0
Repossession of secured property	2.3	2.3	.0	.0	2.4	.8	.5	1.0	2.3	3.8	3.9	3.5
Repossession of property when plaintiff is not secured party	5.5	8.2	.0	20.0	11.1	11.1	10.3	12.8	.0	8.7	4.7	5.7
Injury to person or property	26.0	33.1	.0	.0	66.7	33.3	28.6	32.1	9.5	19.0	26.8	38.0
Collect on promissory note	10.3	2.3	.0	.0	.0	.0	.0	6.7	20.0	6.7	14.3	.0
Recover deficiency under UCC	6.3	11.9	.0	.0	.0	.0	9.5	14.3	.0	8.7	12.5	18.8
Recover on check	2.5	5.0	.0	.0	.0	.0	.0	.0	.0	.0	14.3	.0
Enforce motor vehicle lien	.0	.0	.0	.0	.0	.0	.0	.0	.0	.0	.0	.0
Conversion	6.7	13.3	.0	.0	.0	.0	14.3	28.6	.0	.0	.0	.0
Total cases tried	7.4	3.4	2.1	1.7	8.4	1.4	10.2	4.8	5.9	4.2	6.8	3.1

fied parties might not appeal their cases because of cost, time, or other factors.) Magistrates were asked to estimate what percentage of losing plaintiffs and defendants appealed. The responses indicated that the appeal rate was small. Over 90 per cent of the respondents estimated that only 5 per cent or fewer of parties appeal. The highest estimated percentage of losing plaintiffs who appeal was 30 per cent, and the highest estimate for defendants was 25 per cent. Magistrates indicated that a losing defendant is slightly more likely to appeal than is a losing plaintiff. Table 6 sets out the responses on appeal rate.

Table 6
Percentage of Appeals by Losing Parties

Percentage of Cases Appealed	Plaintiff Appeals	Defendant Appeals
Less than 1%	49.2%	34.2%
1% - 5%	45.8	58.3
5.1% - 10%	3.3	4.2
More than 10%	1.7	3.3
Total	100.0%	100.0%

Conclusion

The survey has produced some useful information about what goes on in small-claims court. The numbers and kinds of cases heard vary with county population, but disposition of cases does not vary a great deal with population. Cases involving injury to persons or property are most likely to be contested and to have attorneys involved. The plaintiff is less likely to win in a case involving injury to persons or property than in others, which is logical since those cases are most likely to be contested vigorously by defendants.

The survey indicates that small-claims courts are used primarily by merchants, lending institutions, and landlords. Attorneys rarely appear in these courts. From all indications, small-claims courts are functioning adequately. Future surveys should watch for any changes in the system, particularly with regard to representation by attorneys and case load of magistrates. □

After a century and a half in which it has strictly prohibited a public official from dealing as a private vendor with the unit he serves, North Carolina law now makes certain careful exemptions to this well-established principle.

Conflict of Interest and Self-Dealing in North Carolina

Warren J. Wicker

FOR MORE THAN 150 YEARS, recognizing the principle that no person can serve two masters, North Carolina law has expressly prohibited self-dealing by public officials. It thus conforms with the teaching of St. Matthew and longstanding principles of common law.[1]

The General Assembly first enacted the statute in 1825.[2] The key language is now the first sentence of G.S. 14-234, and it has been in its present form for almost 100 years.[3] (See the text of the statute on the next page.) The statute refers to a person appointed or elected a "commissioner or director" to discharge a public trust. The term "commissioner or director" has long been understood to cover any public officer or employee who "under [the] authority" of his public post is authorized to commit the unit or agency with which he is connected.[4] It is not necessary that he have the title of "commissioner" or "director" to be covered.

In the first case to reach the North Carolina Supreme Court under this statute, the Court said:[5]

> This law was enacted to enforce a well-recognized and salutary principle, both of the moral law and public policy, that he who is entrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself.

A county purchasing agent, acting under proper authorization, who issues a county purchase order to a store that he owns is as guilty of violating the statute as a county commissioner would be if the order were placed with a business owned by the commissioner. It seems beyond doubt that the prohibition extends to any person who, while exercising a public trust for the unit or agency that he serves, makes a contract with himself in his private capacity for his private financial benefit.[6]

How much private financial interest must the public officer or employee have in order to be covered? The statute's language suggests that any interest would be adequate, however small. It is generally agreed, however, that remote and exceedingly small financial interests would not invoke the statute. Thus, for example, his ownership of one share of IBM stock would probably not be sufficient to convict a city councilman who voted to purchase an IBM typewriter from a local distributor.[7] North Carolina's Supreme Court has never ruled on this question, but in *State v. Williams,* which involved the president of a private firm, it suggested the possibility of an answer by saying, "We are not prepared now to hold, nor is it necessary to decide, that the statute would cover the case of a mere stockholder in a corporation . . . ."[8] The safe course for a public official, however, is to assume that any interest is enough to invoke the statute.

Purchasing and construction contracts

The cases that have arisen under this statute have involved purchasing or construction contracts and additional-

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1. Matthew 6:24; Davidson v. Guilford, 152 N.C. 437 (1910).

2. C. 1269, P.R.

3. The evolution of the basic language is of some interest. The original statute referred only to "appointed" persons and arrangements involving "state" interest. Slight changes in the wording were made in the 1837 Revision (Ch. 34, § 39) and again in the 1854 Revised Code (Ch. 34, § 38). Battle's 1873 Revision (Ch. 32, § 40) continued the existing statute without significant change.

The Code of 1883, however, brought two interesting changes. First, this was the first code to provide section heads rather than marginal notes. The section head (Ch. 25, § 1011) read: "Director, commissioner and other public officer forbidden to become contractor." Second, the text was modified expressly to cover elected as well as appointed officials and public interests involving "any county, city or town" as well as the state.

4. See note 3 above. The 1883 Revision that for the first time expressly included elected officials and officials of counties, cities, and towns used the words "and other public officers" in the section head, suggesting that the statute was not restricted in its coverage to those whose titles were "commissioner" or "director."

5. State v. Williams, 153 N.C. 599, 68 S.E. 904 (1910).

6. The statute refers only to "benefit." Self-dealing and conflict-of-interest statutes have traditionally been concerned principally with contracts or actions that provide the public officials with private financial gain. Other statutes usually cover improper political rewards, nepotism, and other non-financial benefits.

7. Codes of ethics and self-dealing statutes often expressly leave out minor interests. For example, a code of ethics adopted by the Charlotte City Council in 1978 requires that a council member disclose his financial interests only when his ownership in the firm in question is 5 per cent or more of its capital stock.

8. 153 N.C. 595, 599, 68 S.E. 900, 904 (1910).

The Conflict-of-Interest Statute

§ 14-234. **Director of public trust contracting for his own benefit; participation in business transaction involving public funds.**—(a) If any person appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city or town may be in any manner interested shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor. Provided, that this section shall not apply to public officials transacting business with banks or banking institutions or savings and loan associations or public utilities regulated under the provisions of Chapter 62 of the General Statutes in regular course of business: Provided further, that such undertaking or contracting shall be authorized by said governing board by specific resolution on which such public official shall not vote.

(b) Nothing in this section nor in any general principle of common law shall render unlawful the acceptance of remuneration from a governmental board, agency or commission for services, facilities, or supplies furnished directly to needy individuals by a member of said board, agency or commission under any program of direct public assistance being rendered under the laws of this State or the United States to needy persons administered in whole or in part by such board, agency or commission; provided, however, that such programs of public assistance to needy persons are open to general participation on a nondiscriminatory basis to the practitioners of any given profession, professions or occupation; and provided further that the board, agency or commission, nor any of its employees or agents, shall have no control over who, among licensed or qualified providers, shall be selected by the beneficiaries of the assistance, and that the remuneration for such services, facilities or supplies shall be in the same amount as would be paid to any other provider; and provided further that, although the board, agency or commission member may participate in making determinations of eligibility of needy persons to receive the assistance, he shall take no part in approving his own bill or claim for remuneration.

(c) No director, board member, commissioner, or employee of any State department, agency, or institution shall directly or indirectly enter into or otherwise participate in any business transaction involving public funds with any firm, corporation, partnership, person or association which at any time during the preceding two-year period employed or otherwise had a financial association with such director, board member, commissioner or employee.

(d) The provisions of subsection (c) shall not apply to any transactions meeting the requirements of Article 3, Chapter 143 of the General Statutes or any other transaction specifically authorized by the Advisory Budget Commission.

(e) The first sentence of subsection (a) shall not apply to (i) any elected official or person appointed to fill an elective office of a village, town, or city having a population of no more than 7,500 according to the most recent official federal census, (ii) any elected official or person appointed to fill an elective office of a county within which there is located no village, town, or city with a population of more than 7,500 according to the most recent official federal census, and (iii) any physician, pharmacist, or dentist appointed to a county social services board, local health board, or area mental health board serving one or more counties within which there is located no village, town, or city with a population of more than 7,500 according to the most recent official federal census if:

(1) the undertaking or contract or series of undertakings or contracts between the village, town, city, county, county social services board, local health board or area mental health board and one of its officials is approved by specific resolution of the governing body adopted in an open and public meeting, and recorded in its minutes and the amount does not exceed ten thousand dollars ($10,000) for medically related services and five thousand dollars ($5,000) for other goods or services within a 12-month period; and

(2) the official entering into the contract or undertaking with the unit or agency does not in his official capacity participate in any way or vote; and

(3) the total annual amount of undertakings or contracts with each official, shall be specifically noted in the audited annual financial statement of the village, town, city, or county; and

(4) the governing board of any village, town, city, county, county social services board, local health board, or area mental health board which undertakes or contracts with any of the officials of their governmental unit shall post in a conspicuous place in its village, town, or city hall, or courthouse, as the case may be, a list of all such officials with whom such undertakings or contracts have been made, briefly describing the subject matter of the undertakings or contracts and showing their total amounts: this list shall cover the preceding 12 months and shall be brought up-to-date at least quarterly.

(f) Anyone violating this section shall be guilty of a misdemeanor.

compensation contracts. Together they illustrate how the statute applies.

The first case to reach the North Carolina Supreme Court under this statute was *State v. Williams.*[9] Williams was a member of New Bern's board of aldermen; he was also president of and a major stockholder in a firm from which the city made a purchase. His firm was the only one in New Bern from which the item could be bought. The decision to make the purchase (involving only $75.63) was made by the city's utilities committee without Williams' knowledge, and it was delivered without his knowledge. He first knew of the transaction when the bill for the goods was presented to the city board for approval—a common practice at that time in many cities. Williams asked to be excused from voting; the remaining members excused him and approved the bill for payment.

Williams was indicted, found guilty, and fined $1 and costs. On appeal, the Supreme Court upheld his conviction. Williams claimed that he should not be found guilty because he did not know about the order or the delivery and had not taken any part in approving the bill for payment. Thus he had no part in making the contract. The Court agreed that there was "no evidence of moral turpitude" but then declared that "[w]hether the defendant had actual knowledge of the transaction is immaterial." Further, it said, "The fact that he retired from the meeting when the board of aldermen audited and paid the bill does not change the character of the transaction." The offices Williams held with the city and with the firm were sufficient to bring him under the statute's terms.

For purposes of the self-dealing statute, the key holdings in *Williams* are that (1) members of local governing boards are parties to all contracts of their unit, and (2) the president of a corporation is a party to all contracts of the firm.

But what if Williams had been merely an employee of the firm rather than its president? Would simple employment have invoked the statute?

A case involving this question also arose in New Bern in the same year as *Williams—State v. Weddell.*[10] In *Weddell* the Court found the employee/alderman not guilty. Weddell was employed as timekeeper and office man for a firm that held a street construction contract with the City of New Bern. Shortly after taking this job, Weddell was elected to the city's board of aldermen. A few weeks later, after advertising for bids, the city awarded another contract to the same firm, the low bidder. As an alderman, Weddell moved and voted to award the contract to his employer. The superior court jury rendered a special verdict. It found that Weddell was paid a straight salary that did not change during any of the contracts, that he did not supervise the work for the firm or inspect the work for the city, and that his bookkeeping duties involved other contracts held by the firm. Both the trial court and the Supreme Court agreed that Weddell had not violated the self-dealing statute. He was only the firm's employee and had not acted for it in submitting the bid or in making the contract. (Chief Justice Clark, however, noted that Weddell's conduct was "not altogether seemly" and was "not to be commended.")

"[H]e who is entrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself."

Nineteen years later in *State v. Debnam*[11] a trial jury found that the manager of an automotive firm (wholly owned by his wife) who served as chairman on a school board had no financial interest in a contract made by two of the firm's sales representatives with the school board. The fact that he was paid a straight salary and received no commission on the sales convinced the jury that he was, with respect to the contract in question, an ordinary employee. The superior court held Debnam not guilty of having a financial interest in light of these facts found by the jury in a special verdict. While the Supreme Court found no error when the case was appealed, it was not necessary for the Court to decide whether the jury's findings were correct, and it could well be that in another case a manager or someone in a position between a mere employee and the presidency would be found to have sufficient interest to bring him under the statute's prohibitions—especially if he acted for the private firm (which was not charged in the *Debnam* case).

The most recent construction-contract case, *Lexington Insulation Company v. Davidson County,*[12] reached the Supreme Court in 1955. The chairman of the Davidson County Board of Commissioners was secretary-treasurer and bookkeeper of the insulation company and owned one-third of its stock. In 1951 the county manager, who was also county accountant, executed a contract with the company for insulation work to be done on the county home and courthouse at a cost of $2,777.32. The chairman served as agent for the company in making the contract and signed a voucher to pay the company before work began. The manager-accountant certified that funds for the payment had been properly appropriated. This was not, in fact, the case. No appropriation had been made, and the other commissioners had no knowledge of the contract.

Soon after the work started, another commissioner learned of the arrangement and immediately called a board meeting. The board demanded that the work stop and the payment be returned. The chairman returned the money, and the firm brought suit to recover the value of the work that had been performed.

In superior court the jury awarded the firm $1,000. The county appealed this decision, claiming that its motion for nonsuit should have been sustained since the contract was clearly void (which the plaintiff admitted) and no compensation should have been allowed for the work. The Supreme Court noted that the contract clearly violated the provisions of G.S. 14-234, which prohibit an officer who exercises a public trust from making a contract for his own benefit. And as to the firm's right to recover for the value of the work done, the Court stated:[13]

9. *Id.*

10. 153 N.C. 587, 68 S.E. 897 (1910).

11. 196 N.C. 740, 146 S.E. 857 (1929).

12. 243 N.C. 252, 90 S.E. 496 (1955).

13. 243 N.C. 255, 90 S.E. 499 (1955).

> No man ought to be heard in any court of justice who seeks to reap the benefits of a transaction which is founded on or arises out of a criminal misconduct and which is in direct contravention of the public policy of the State.
>
> Public office is a public trust, and this Court will not countenance the subversion thereof for private gain. Not only will it declare void and unenforceable any contract between a public official, or a board of which he is a member, and himself, or a company in which he is financially interested, whereby he stands to gain by the transaction, but it will also deny recovery on a *quantum meruit* basis.[14]

The Court in this case followed the decision in *Williams,* holding that the chairman acted for the county in making the contract and was a party to the contract even though the contract was signed by the manager-accountant. The private interest in this case was not that of a firm's president but of its secretary-treasurer, who was a major stockholder—an interest the Court found sufficient to invoke coverage of G.S. 14-234.

Additional-compensation contracts

A second group of decisions involves situations in which governing board members have contracted to perform extra or special services for the unit they serve. The Court has uniformly held that these violate the conflict-of-interest statute.

Snipes v. Winston was the first such case to arise.[15] Snipes was a member of the Winston board of aldermen before the town merged with Salem to form Winston-Salem. He joined with the other aldermen to elect himself "street boss" to supervise work on Winston's streets and sewers for six months. He was to receive $50 a month in addition to his compensation as alderman. Two months after he started this job, a new board was elected and refused to continue the arrangement and Snipes's pay. He then brought suit for the additional four months' pay due under the contract. Both the lower court and the Supreme Court found the arrangement to be contrary to long-standing public policy and denied recovery:

> It is against public policy to permit such contracts to be enforced. It would be unsafe to permit the plaintiff, acting as employer, to become himself by the same bargain, employee.

Citing with approval the rule that no man can serve two masters whose interests are in conflict, the Court held that the contract was void and unenforceable.

While this case did not arise under the statute now codified as G.S. 14-234, the decision is based on the principle embodied in that statute. It seems clear that had Snipes been indicted under the criminal statute, the Court would have upheld his conviction.

Ten years later, in two Guilford County cases, the Court expressly said that a person who contracts for service with a board on which he serves violates the law.[16] In the first case Davidson, a member of the Guilford County Board of Commissioners, had been directed by his board to inspect a certain bridge. He did so and submitted a bill of $3 for the day's work plus mileage of 80 cents. The board denied payment, and both the lower and Supreme courts upheld its action.

The Supreme Court first noted that by a special act of the legislature, the Guilford county commissioners were to receive $3 a day for their services plus 5 cents per mile each way as travel allowance in attending meetings of the board and that "this shall be full compensation of said board for all services whatsoever." Noting that G.S. 14-234 made it a misdemeanor for any county commissioner to make a contract "for his own benefit" with the county he serves, the Court then stated:

> It follows, therefore, that if the plaintiff in discharging [the work in question] acted as a county commissioner, he was forbidden to receive any compensation other than that [prescribed by law]. And if he acted by virtue of a contract, either express or implied, with the board, it was an indictable offense, and he is not entitled to recover anything. This has already been decided in this State in *Snipes v. Winston,* 126 N.C. 375.
>
> Independently of any statute or precedent, upon the general principles of law and morality a member of an official board cannot contract with the body of which he is a member. To permit it would open the door wide to fraud and corruption. The other members of the board in allowing compensation thus to one of their members would be aware that each of them in turn might receive contracts and good compensation, and thus public office, instead of being a public trust, would become, in the language of the day, "a private snap."
>
> In this particular case there is no reason to suppose that the slightest wrong was intended or that the compensation was excessive, but it is a principle that is at stake. Such conduct cannot be recognized or permitted.[17]

The second case, *King v. Guilford,*[18] also involved a claim for one day's pay of $3. The situation was identical to the one in *Davidson* except that King was chairman of the county board of highway commissioners—and the Court reached the same decision for the same reasons.

The most recent case of this type is *Carolina Beach v. Mintz.*[19] In the early 1930s Carolina Beach had the commission form of government. Mintz was elected to the town board as finance commissioner. He had general supervision over all town financial matters. The town's charter provided that the finance commissioner should receive $25 a year as compensation. While he served on the board, the board contracted to pay Mintz also for service as town clerk. Later the town brought ac-

14. Cases arising under the conflict-of-interest statutes must be distinguished from those that are void and unenforceable for other reasons and when moral turpitude is not involved. When the contract is void because of failure to advertise properly or because a proper appropriation was not made, the contractor may usually recover from the governmental unit for the just and reasonable value of the goods and services rendered. *See* Realty Company v. Charlotte, 198 N.C. 564, 152 S.E.2d 686 (1930); Hawkins v. Dallas, 229 N.C. 561, 50 S.E.2d 561 (1948); Manufacturing Company v. Charlotte, 242 N.C. 189, 87 S.E.2d 204 (1955).

15. 126 N.C. 374, 35 S.E. 610 (1900).

16. Davidson v. Guilford, 152 N.C. 436, 67 S.E. 918 (1910).

17. *Id.* at 437.

18. 152 N.C. 438, 67 S.E. 919 (1910).

19. 212 N.C. 578, 194 S.E. 309 (1937).

tion to recover the $807.75 extra salary that had been paid Mintz. Mintz, in turn, made a counterclaim for $819.65 to cover expenses and services for which the town had not paid him.

The Court pointed to its decisions in the *Snipes* and *Davidson* cases and held that the agreement with Mintz for extra service violated the self-dealing statute and Mintz should repay the sums he had received. Since the contract violated the criminal statute, the Court would not allow Mintz recovery under the principle of *quantum meruit* for the value of his services as town clerk.[20]

Prohibitions of financial interest

G.S. 14-234 is broad in its coverage and applies to self-dealing by all public officers and employees. But it does not cover "conflicts" of employees or officers (except for members of the unit's governing body) who may contract with the unit they serve when they do not act for the unit. For example, a sanitation superintendent could sell his city a typewriter from his office equipment store without violating this statute if he did not act for the city in making the contract.

Concerned that public officers and employees of the state's educational, charitable, and penal institutions could, even indirectly, profit from their public positions, the legislature in 1897 imposed special restrictions on their financial interests in contracts with the public agencies they served. The legislation, entitled "An act for the protection of educational and other institutions," is now codified as G.S. 14-236. It reads as follows:

> *Acting as agent for those furnishing supplies for schools and other State institutions.*—If any member of any board of directors, board of managers, board of trustees of any of the educational, charitable, eleemosynary or penal institutions of the State, or any member of any board of education, or any county or district superintendent or examiner of teachers, or any trustee of any school or other institution supported in whole or in part from any of the public funds of the State, or any officer, agent, manager, teacher or employee of such boards,
>
> shall have any pecuniary interest, either directly or indirectly, proximately or remotely in supplying any goods, wares or merchandise of any nature or kind whatsoever for any of said institutions or schools; or if any of such officers, agents, managers, teachers or employees of such institution or school or *State or county officer* (emphasis added),
>
> shall act as agent for any manufacturer, merchant, dealer, publisher or author for any article of merchandise to be used by any of said institutions or schools; or
>
> shall receive, directly or indirectly, any gift, emolument, reward or promise of reward for his influence in recommending or procuring the use of any manufactured article, goods, wares or merchandise of any nature or kind whatsoever by any of such institutions or schools, he shall be forthwith removed from his position in the public service, and shall upon conviction be deemed guilty of a misdemeanor and fined not less than fifty dollars nor more than five hundred dollars and be imprisoned, in the discretion of the court.

Those covered by the statute are prohibited from (1) having a financial interest in supplying goods, wares, or merchandise to schools and institutions; (2) acting as an agent for those supplying merchandise; and (3) receiving a reward for influencing the possible use of goods, wares, merchandise, or manufactured articles. The statute is thus quite broad. For example, the following persons would appear to be in violation under the circumstances described: (1) a public school music teacher owns a music store and sells instruments to her employer, the school board; (2) a guard in a prison camp owns a farm and sells fresh vegetables to the prison superintendent for use in the prison mess; or (3) a state university professor recommends buying a certain publisher's books for the university's library and receives a gift from that publisher as a reward.

Not many people seem to know that this statute exists. Apparently only one case arising under it has reached the North Carolina Supreme Court—the *Debnam* case discussed above. Newspaper accounts indicate occasional violations or criticisms of officers and employees who have been publicly charged with having an interest in contracts with the schools or institutions that they serve, but criminal indictments under G.S. 14-236 appear to be rare.

All state and county officers are prohibited from serving as agents for firms that deal with schools and institutions—a fact that also seems to be overlooked. For example, a member of the State Board of Agriculture who represents a firm that sells tractors to the state for use at prison farms would appear to be violating the statute. And so would a county commissioner who represents a publisher in selling books to a state university library. On the other hand, it would appear that the Board of Agriculture member and the county commissioner would not violate the statute by representing their firms in selling the same merchandise to the Departments of Administration or Transportation.

Members of county boards of education and school committees face even greater penalties when school supplies are purchased from one of their members. G.S. 14-237 states:

> *Buying school supplies from interested officer.*—If any county board of education or school committee shall buy school supplies in which any member has a pecuniary interest, the members of such board shall be removed from their positions in the public service and shall, upon conviction, be deemed guilty of a misdemeanor.

The 1943 recodification of the statutes modified the language in the above statute to require removal of all members of a school board or committee that buys supplies from one of its members. From 1901—when the statute was originally enacted—until the recodification, only the member who sold the supplies was subject to removal.

20. Additional-compensation cases are less likely to arise today. In all of the cases discussed here the salaries of the board members involved had been set by statute in language that established those salaries as total compensation. The statutes now authorize city and county governing boards to set their own salaries, to revise them, and to recognize in the salaries additional duties or responsibilities that may be imposed on members. See G.S. 153A-28 covering county commissioners and G.S. 160A-64 applying to city officers.

Growth of exceptions

The general principles underlying the prohibitions against self-dealing and conflicts of interest are widely approved and supported. But the prohibitions may at times impose hardships for some governmental units and agencies—especially in small governmental units where only one merchant in the community may distribute an item needed by the local government. The prohibitions often mean barring some people from local office or denying the local government convenient purchase of goods and services. Officials frequently ask whether it makes sense to buy from a distant vendor at greater cost. Transactions with governing board members who are local vendors often have involved no question of moral turpitude—as several of the above cases show. Informal reports indicate that local governing board members have often made sales to their city or county at prices lower than those offered to other customers.

Many students of public procurement and ethics have concluded that a strict prohibition against self-dealing is not necessary to protect the public interest and prevent public officials and emloyees from feathering their own nests. They suggest that if all transactions with public officers and employees were openly authorized and publicized, the openness of the transactions would afford adequate public protection—and often reduce public expenses.[21]

These considerations have led the legislature to write several exceptions into the North Carolina statute.

Banking. The first exception came in 1929, over 100 years after the statute was enacted. The law was amended to except public officials who transact business with banks or banking institutions if the transaction is authorized by a specific resolution of the governing body and if the governing body member with the banking interest does not vote.[22] In the late 1920s many small towns and counties had a single bank, and this legislation permitted using the local bank without losing the benefit of public service by its owners and officials.

Serving needy persons. With the advent of extensive state and federal programs to aid needy persons, many local officials—especially those associated with county government —were faced with possible conflicts under the statute. In 1969 the statute was amended again to authorize members of governmental boards, agencies, and commissions to accept remuneration from the public board, agency, or commission for services, facilities, or supplies furnished directly to needy persons under state or federal programs to aid needy persons.[23] If this exception is to be available to a public official, it is necessary that participation in the program as a provider be open on a nondiscriminatory basis to all practitioners in the profession or occupation, that the needy person be able to select the provider from among all those available, that the remuneration be at standard rates, and that the member involved take no part in approving his own bill or claim.

Savings and loan associations. In 1975 the banking exception was modified to include transactions with savings and loan associations.[24]

Public utilities. Two years later the banking exception was again amended to include regular business transactions with public utilities regulated by the State Utilities Commission with the same conditions that apply to banking transactions.[25] This amendment, for example, removed the possibility of a criminal charge against a city council member who was a major stockholder in a power company from which the city bought electricity.

Governing bodies in small cities and counties. The broadest exemption to the general coverage of G.S. 14-234 came in 1979, when most of the elected officials of the state's cities and counties were given a limited exemption—as were certain members of social services, health, and area mental health boards.[26] It is codified as paragraph "e" in the statute (see the boxed text on page 35).

The following local *elected* officials are exempted to some extent, and subject to the conditions described later: (1) those who hold an elective office "*of a* village, town, or city having a population of no more than 7,500 according to the most recent official federal census ..." (emphasis added); and (2) those who hold an elected office "*of a* county within which there is located no village, town, or city with a population of more than 7,500 according to the most recent official federal census ..." (emphasis added).

Members of county boards of education and school committees face even greater penalties when school supplies are purchased from one of their members.

North Carolina has 455 active cities and towns; in 1970 only 45 had populations of more than 7,500. Assuming an average governing body of five members plus a mayor, about 2,400 of the state's 2,700 municipal officials come within the exception.

According to the 1970 census, 61 counties have no incorporated place of 7,500 or more. The typical board of county commissioners has five members. This means that some 300 of the state's 500 county commissioners may take advantage of the exemption, in addition to 61 sheriffs and 61 registers of deeds and a few coroners—a total of approximately 425 county elected officials.

Do elected members of sanitary district governing boards and county boards of education come within the exemption? The answer to this question is not completely clear, but the weight of interpretation suggests that they do not. First, the statute's language covers officials *of a* county rather than those who serve *within* a county's geographical area. Second, if this latter interpretation were assumed, the express listing of village, town, and city officials

21. See, for example, Art. 12, "Ethics in Public Contracting," in the MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS approved by the American Bar Association on February 13, 1979.

22. N.C. Sess. Laws 1929, Ch. 19, § 1.

23. N.C. Sess. Laws 1969, Ch. 1027.

24. N.C. Sess. Laws 1975, Ch. 409.

25. N.C. Sess. Laws 1977, Ch. 24.

26. N.C. Sess. Laws 1979, Ch. 720.

has no meaning, since all municipal officers serve within some county. Moreover, if service *within* a county is assumed as the correct interpretation, not only county school officials and sanitary district board members would be covered but perhaps also clerks of court, city school board members, judicial officials, soil conservation district officials, and others.

Whatever the correct interpretation may be, the wise course for officials who are not directly associated with the general county government is to assume that the exemption does not apply to them.

A second set of exempted officials are physicians, pharmacists, and dentists who hold appointed offices as members of county social services boards, local boards of health, and area mental health boards in a county or counties within which there is no incorporated place of more than 7,500 population. The population standard brings within the exception 61 social services boards, county and district health boards serving 50 counties, and eight area mental health boards serving 24 counties. It is not known how many members of the three professions serve on the three types of boards that come within the exception. Given the boards' typical composition, it is estimated that 25 social services board members, 150 health board members, and 25 area mental health board members fall within the exception.

(1) The official entering into the contract with his unit does not in any manner in his official capacity participate in making the contract.

(2) The contract or undertaking is authorized in an open meeting and recorded in the minutes by a specific resolution of the governing body concerned.

(3) The amount involved in the undertaking or contract or series of undertakings or contracts does not exceed within any 12-month period
—$10,000 for medically related services, and
—$5,000 for other goods or services.
(The limit for some individuals could be $15,000.)

In addition, all such undertakings or contracts and their amounts must be reported in the unit's annual financial audit, and the unit's governing board must keep posted at all times a current listing of all undertakings or contracts made with any of the officials subject to this exemption during the preceding 12 months.

The procedures built into the exemption require all actions to be taken in open, public meetings, with no official participation by the interested board member or officer and with extensive requirements designed to make the arrangements fully known.

Newspaper stories in recent years have highlighted cases involving self-dealing in small towns by governing board members who did not know the law. In most cases the transactions involved small sums and covered simple purchases of goods and services.

The prohibitions often mean barring some people from local office or denying the local government convenient purchase of goods and services. Transactions with governing board members who are local vendors often have involved no question of moral turpitude . . . .

Approximately 4,500 local officials are within the classes of elected and appointed officials to whom the 1979 amendment can apply. Of these, about 3,100 serve in units with no city of 7,500 population or more and thus are actually exempted. This means that some 70 per cent of the officials in the basic classes may now do business with the units they serve if the other conditions outlined below are also observed.

Paragraph (e) of G.S. 14-234 exempts the above officials from the statute's first sentence if three key limitations are observed:

The dollar limitations on the value of annual contracts or undertakings with officials who come within the exemption apply only to those for "medically related services" and those for "other goods or services." Contracts and undertakings not involving goods or services have no dollar limits. Thus, for example, officials within the classes covered by the exemption may contract with their boards for constructing buildings, purchasing land, leasing real property, or buying liability insurance without limit as to the value of the contracts.[27]

The exemption could also result in somewhat anomalous situations. For example, an area mental health board whose members come within the exemption might legally buy carbon paper from a member who is a pharmacist but not from a member who operates a stationery store. In a like manner, the board could lease office space from a physician member but not from a realtor member.

The arrangements followed by social services boards suggest that few contracts or agreements are authorized by these boards—the county government usually contracts for supplies and space for social services programs, and the social services board has no role in planning or executing them. Under these circumstances, for example, a county social services director, with proper authorization from the county commissioners or county manager, might order office supplies from a store owned by one of the social services board members without violation of the statute by that board member.

Many transactions involving health and area mental health programs appear to follow the same pattern as most of those relating to social services. In some cases, however, responsibility for proposing or recommending arrangements for services or the acquisition of goods is with these boards, and in a few cases they are authorized to make contracts on behalf of the agencies or the counties they serve. In these cases, the transactions would come within the statute.

A final group of exemptions, or attempted exemptions, should be noted. The Hospital Facilities Finance Act,[28] the Health Care Facilities Finance Act,[29] the Hospital Authorities Act,[30]

27. Informal reports from those who followed the 1979 act through the legislative process suggest that legislators probably intended the $5,000 limit (a) to apply to all contracts and not just to contracts for goods and services, and (b) to authorize self-dealing under the safeguards of the legislation only for transactions involving goods and services. The language of the exemption, however, does not seem this restrictive.

28. N.C. Gen. Stat. § 131-159.

29. N.C. Gen. Stat. § 131A-22.

30. N.C. Gen. Stat. § 131-95.

The exemptions . . . could potentially permit over 80 per cent of all elected city and county officials . . . to enter into contracts with the units they serve.

the County Hospital Act,[31] the Industrial Facilities and Pollution Control Facilities Financing Act,[32] and the Parking Authority Act[33] all contain language that prohibits officers and employees from having any financial interest in contracts with their agencies and requires that they disclose interests in property or transactions involving the authority. The intent, it appears, is to allow the transactions after proper disclosure and, it would also appear, without violating G.S. 14-234. (If this is not the purpose of these statutes, they are redundant.) It is not clear, however, that the statutes achieve this result. Their exact effect is thus open to question.

Summary and conclusion

Self-dealing and conflict of interest prohibitions in North Carolina may be summarized with substantial accuracy as follows:

1. All state and local governmental officers and employees are prohibited from making any contracts or undertakings for the units they serve with themselves or with firms in which they have a financial interest except when the private interest (a) involves a bank or banking institution, a savings and loan association, or a regulated utility; or (b) provides supplies, services, or facilities to needy persons under state and federal aid programs.

2. *Elected* officers of city and county governments within whose jurisdiction there is no place with a population of 7,500 or more may, in their private capacity, supply goods and services to the unit they serve without violating the self-dealing statute if the procedures for exemption are properly followed. These agreements or contracts with any single individual may not exceed $5,000 to $15,000 a year, depending on the goods or services provided.

3. Elected officials of city and county governments may enter into contracts or agreements with the units they serve in any amount for the sale of land, for construction, or for purposes other than supplying goods and services if the statutory procedures are properly followed.

4. Physicians, dentists, and pharmacists who are appointed officials of social services boards, local health boards, and area mental health boards in jurisdictions with no incorporated place of 7,500 or more may enter into contracts to supply their units with goods and services at an annual value of $5,000 to $15,000 without violating the self-dealing statute if the statutory procedures for coming within the exemption are properly followed. These health practitioners may also enter into contracts or agreements with the units they serve in any amount for the sale of land, for construction, or for purposes other than supplying goods and services if the statutory procedures are properly followed.

5. All other *appointed* officers and employees of city and county governments are prohibited from making any contracts for their units with themselves or with firms in which they have a private financial interest except when the private interest (a) involves a bank or banking institution, a savings and loan association, or a regulated public utility; or (b) provides supplies, services, or facilities to needy persons under state or federally financed aid programs.

6. Officers and employees of all other local governmental units—sanitary districts, fire districts, school boards, and the like—are prohibited from making any contracts for their units with themselves or with firms in which they have a financial interest except when the private interest (a) involves a bank or banking institution, a savings and loan association, or a regulated public utility; or (b) provides supplies, services, or facilities to needy persons under state or federally financed aid programs.

7. Persons associated in any capacity with educational, charitable, eleemosynary, or penal institutions supported at least in part from public funds are prohibited from (a) having any pecuniary interest in supplying goods, wares, or merchandise to the institutions; (b) representing vendors in supplying such items to the institutions; or (c) receiving gifts or rewards for recommending the use of such items by the institutions. The prohibition applies even if the person does not have the capacity to act for the unit he serves.

8. State or county *officers*–even if not associated with state-supported educational, charitable, eleemosynary, or penal institutions—are prohibited from serving as an agent for any vendor in selling merchandise to such institutions.

9. The exemptions authorized by the 1979 legislation could potentially permit over 80 per cent of all elected city and county officials—plus a number of physicians, dentists, and pharmacists who serve in local appointed posts—to enter into contracts with the units they serve. Early newspaper reports indicate that some local governing bodies have acted under the exemption to allow one or more of their members to do business with the unit. In a few cases, the bodies have authorized such contracts for all the members of the body who have the capacity to supply the unit with goods or services. Experience with the new legislation is too brief to determine whether the benefits will be significant or whether abuses will develop. □

31. N.C. Gen. Stat. § 131-28.12.
32. N.C. Gen. Stat. § 159C-16.
33. N.C. Gen. Stat. § 160-480.

Civil Liability for Police Activities

Michael R. Smith

It behooves the officers of the law to be very careful that they do not misbehave themselves in the discharge of their duty, for if they do they may forfeit its special protection.

————Sossaman *v.* Cruse, 133 N.C. 470, 477 (1903).

IN THE PAST FEW YEARS there has been a significant increase in the number of lawsuits against police officers. These suits have sought to collect damages from individual officers and their local governments for harm allegedly caused by the officers' wrongful or careless discharge of their duties. Enormous damage awards have been entered against police officers in a few highly publicized cases across the country, though not yet in North Carolina, where a number of low but significant damage awards have been returned. The vast majority of lawsuits filed against police officers, however, are frivolous and are dismissed before trial without a finding of liability. Nevertheless, a fear of personal liability among police officers lowers department morale and may result in a tentative approach to law enforcement.

This so-called civil liability revolution has prompted police officers and their legal advisers to seek a way to avoid lawsuits that allege police misconduct. One positive reaction to the perception of skyrocketing police liability has been a renewed emphasis on training. While increased police training may avoid mistakes and prevent actual damage, it cannot stem the tide of hopeful lawsuits. There is nothing to prevent a disgruntled citizen from filing a lawsuit against an officer, even if the allegations are entirely untrue. To a large extent a failure to recognize the basic distinction between *being sued* and *being found liable to pay damages* has left police officers with a distorted picture of their potential liability. Every lawsuit that alleges police misconduct is front-page news, but the local media rarely mention the court's later dismissal of the case after finding that the allegations are totally unsupported by the evidence. The fact is that a police officer will generally have to pay money damages to injured persons only if his conduct was clearly unreasonable under the circumstances. This article will examine some of the more common situations that give rise to allegations of police misconduct and perhaps will alleviate unnecessary anxiety about the risk of liability facing law enforcement officers and their governmental units.

The abstract legal principles that determine the outcome of lawsuits against police officers and their governments are more easily understood when illustrated by realistic examples. This article will therefore consist of several hypothetical situations followed by legal explanations of potential civil liability problems. Since North Carolina courts have not addressed many of the important civil liability problems discussed, the legal explanations that follow the examples are based on commonly accepted legal principles established in cases decided elsewhere.

General principles of civil liability

A police officer may be sued in a *North Carolina court* and found liable if his intentional wrongful acts or failure to exercise reasonable care under the circumstances (negligence) cause personal injury or property damage. If a court finds that a police officer wrongfully caused harm to another, it may require him to compensate the injured person for his loss through a payment of money damages. If the officer's conduct was malicious or especially outrageous, the court may punish him by requiring that he pay the injured person a sum of money (punitive damages) in excess of the amount needed to compensate that person. Similarly, a *federal court* may hold a police officer liable under a federal statute, 42 U.S.C. § 1983, for official conduct that causes a person to be deprived of any constitutional right. Compensatory and punitive damages may also be awarded against the misbehaving officer in a lawsuit based on Section 1983.

We have, then, a framework consisting of two separate sets of rules—state and federal—prescribing acceptable forms of official contact between police officers and the public. A limited amount of overlap between the state and federal rules means that certain police behavior may violate both sets of rules and expose the officer to potential liability in both state and federal court. Usually a lawsuit will be filed in either state or federal court and that court will decide all state and federal law claims of liability made against the officer. Of course, the person who brings the lawsuit may be compensated only once for his injuries even if an officer violated rules of conduct under both state and federal law. The hypothetical cases and explanations that follow will illustrate the specific legal rules and the extent to which they permit recovery against individual officers and the governmental unit.

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Example 1. Heavenly Valley is a fictitious North Carolina manufacturing community. Chief Moody has the sole authority to hire and fire for the Heavenly Valley Police Department. He recently hired two officers, Manson and Bloom, on the basis of a two-page application and a twenty-minute interview with each. Manson and Bloom each told Chief Moody that he was an experienced officer with a police department in a neighboring state. Chief Moody, eager to leave on a well-deserved vacation, did not check the information provided by either applicant. He issued each officer a badge, a service revolver, a nightstick, and a can of Mace. When asked whether there were any further training requirements, Chief Moody told them that there was mandatory firing-range practice every six months and a comprehensive training program was being developed. He then slapped them on the back and told them not to worry because "nothing ever happens in Heavenly Valley."

Returning from his vacation, Chief Moody immediately encountered angry complaints from citizens that Officer Manson had been harassing innocent citizens and using "heavy-handed" investigation techniques. When Officer Manson was confronted with the complaints, he promised Chief Moody that it would never happen again. Chief Moody conducted no further investigation. The next afternoon while on patrol Officer Manson pulled his revolver on a suspected shoplifter; the gun discharged, seriously wounding the person. Officer Manson explained to Chief Moody that he approached all suspects with his revolver drawn and the safety off as a routine precaution. The Chief then decided to look into Manson's record. He found that Manson had been dismissed from a Tennessee police department for accidentally shooting an innocent bystander while chasing a shoplifter down a crowded street. After his dismissal Manson had been involved in a tavern brawl and convicted of assault with a deadly weapon; he had lied in his application by declaring that he had never been convicted of a crime. Chief Moody then dismissed Officer Manson from the Heavenly Valley Police Department.

The wounded shoplifter sued the Town of Heavenly Valley, Chief Moody, and Officer Manson for damages in state court alleging that the negligent and careless hiring, training, and supervison of Officer Manson caused his injury.

Liability of a local government in state court

The traditional legal rule is that an employer may be held responsible in damages for any harm caused by his agent or employee in the course of his employment. The doctrine of governmental immunity, however, intervenes to provide that a city, town, or county may not be held liable in state court for damages caused by the intentional or negligent acts of its officers engaged in performing a governmental function. The immunity doctrine developed out of a fear that assessing liability for harm caused by governmental activities would somehow bankrupt and destroy local governments. Moreover, the doctrine represents a feeling that innocent taxpayers should not be responsible for losses caused by government employees. North Carolina courts have unanimously declared that law enforcement is a governmental function, and that cities and counties may not be required to pay damages for harm that results from law enforcement activities. Although the rule of immunity is old and much criticized, it is often invoked to prevent persons who complain of police abuse from recovering money damages from local treasuries.

In the hypothetical Heavenly Valley case, governmental immunity would operate to bar a recovery of damages against the town. Officer Manson shot the shoplifter while attempting to enforce a law, a governmental function, and the city is immune from liability. The result would be the same even if the mayor and town council had known that Officer Manson was unfit and had negligently refused to discharge him.

The rule of governmental immunity is absolute and has been construed broadly to avoid liability. North Carolina's Supreme Court has ruled that a city is immune from liability for damages caused by the false arrest and assault of an innocent citizen by one of its police officers. A town would also be immune from liability if one of its officers struck a pedestrian while negligently operating his police cruiser during patrol. Furthermore, if a prisoner is injured by an officer, the local unit is not liable for damages in state court because the operation of a jail is also a governmental function.

The rule of governmental immunity has been criticized for denying injured citizens compensation for damages caused by governmental officers and employees who have insufficient financial resources to pay a court-ordered judgment. Consequently, the General Assembly has authorized cities and counties to waive their immunity from liability for governmental activities by purchasing liability insurance. (The city pays a fixed premium to the insurance company and the company pays any damages awarded against the

city.) If the Town of Heavenly Valley had purchased liability insurance to cover injuries caused by the negligence of its police officers, the wounded shoplifter could have sued and recovered. However, governmental immunity is waived and recovery may be had against the local treasury only to the extent of insurance coverage, even if the shoplifter's damages exceed the limits of the insurance policy. Local governments are nevertheless able to assure their citizens of some recovery for employee misconduct by paying a fixed premium that transfers the risk of liability to an insurance company.

A local government may, however, be held liable under certain circumstances in a Section 1983 federal lawsuit for violating a person's constitutional rights. (City or county liability in federal court under Section 1983 will be discussed later.)

Liability of supervisors and administrators

Many courts have declared that police administrators must exercise reasonable care in hiring, training, and retaining police officers. The city or county as employer cannot be held liable for damages that new police officers cause in the course of performing their duties. But a police administrator may be required to pay for damages directly caused by another officer if the administrator's failure to hire, train, or supervise that officer with care is the ultimate cause of the harm. In other words, a police chief may be liable to an injured citizen if it could reasonably have been foreseen that his failure to use ordinary care in selecting, training, or retaining a particular officer would eventually lead to police error or misconduct.

Although courts typically award damages against police administrators only in cases that involve recklessness, Chief Moody's irresponsible personnel practices may be sufficient to justify holding him liable for damages. First, his lack of care in hiring Officer Manson was an indirect but ultimate cause of the shoplifter's injury. A routine background investigation would have revealed that Officer Manson had carelessly shot a bystander and had been convicted of assault with a deadly weapon. Police officers have extensive powers and must be carefully selected to assure that they benefit rather than harm a community. Several courts in other states have required a police chief to pay damages to a person injured by an officer for whom the chief had conducted virtually no preemployment investigation, especially if a cursory inquiry would have revealed that the applicant was not suited to be a police officer. A North Carolina court would probably apply the same legal principles and reach the same result in a similar case—especially if the alleged police misconduct was similar to an instance of past misconduct that would have surfaced during a simple check.

Even if Chief Moody had carefully investigated Officer Manson before hiring him, a court might find that his negligent failure to train Manson was the ultimate cause of the shooting and require him to pay damages to the wounded shoplifter. A police administrator has a duty to the community not to give a police officer a deadly weapon unless the officer has received classroom instruction in its use and demonstrated a minimum level of competence on a firing range. A court could require Chief Moody to compensate the shoplifter if it found that his careless failure to provide firearms training was the ultimate reason that Officer Manson's gun accidentally discharged. Chief Moody's liability would be based on the fact that he should reasonably have foreseen that giving Officer Manson a service revolver without any firearms training would sooner or later result in someone's being injured. While the courts have never specified what amount of training is necessary for police administrators to avoid liability for the subsequent misconduct of their officers, failure to provide any training is negligence and is likely to result in liability. Notably, police officers in North Carolina must satisfactorily complete a 240-hour basic training course that includes both legal and firearms training within one year of being employed. A police officer's satisfactory completion of that course should be sufficient to prevent recovery in a lawsuit that alleges injury because a police administrator was negligent in not training the officer. Officers should have some *initial* training, however, to avoid liability between the time that they are hired and the time they complete the basic training course.

Finally, police administrators have also been required to compensate injured persons for damages caused by unfit and dangerous police officers who were carelessly kept on the job. If a police officer engages in a pattern of misconduct and becomes a threat to community safety, then a police administrator with the authority must fire the officer in order to prevent future misconduct and damage. It is not clear how much and what sort of police misconduct requires a dismissal instead of a reprimand in order to avoid liability: One or two reports of excessive force may not require dismissal, but a deliberate and vicious shooting would. Liability of a police administrator for negligence in retaining an officer is a question for a jury to decide in each case. The only knowledge that Chief Moody had of Officer Manson's misconduct consisted of a few general complaints about Manson's verbal and physical harassment of criminal suspects. He could not reasonably have anticipated that retaining Officer Manson after a couple of harassment complaints would lead to an accidental shooting, and he should not be required to compensate the wounded shoplifter on that ground. Any damages awarded against Chief Moody for the shoplifter's injuries

should be based on the separate and independent grounds of negligent hiring or failure to train.

In addition to being sued in state court for negligently causing the shoplifter to be wounded, Chief Moody might also be sued in federal court under Section 1983 for causing a violation of the shoplifter's constitutional rights. Some federal courts have ruled that a police officer who uses excessive force during an arrest violates a person's Fourth Amendment right to be free from unreasonable seizures. These courts have ruled that a police administrator whose negligence in hiring, training, or retaining a police officer ultimately causes an arrestee to be subjected to excessive force may be required to pay damages in a lawsuit brought under Section 1983. But other federal courts have declared that a person can be liable for damages in a Section 1983 lawsuit only if he intentionally—not negligently or accidentally—violates another's constitutional rights. The United States Supreme Court has never decided the issue. Because of this difference of opinion in the federal courts and because a Section 1983 lawsuit alleging negligent employment practices in a federal court requires virtually the same proof as a suit in state court alleging negligence, most claims of this sort are brought in state court.

Liability of sheriffs

Sheriffs are independent constitutional officers and historically have had the right to appoint deputies. A deputy is the sheriff's personal representative, not employee, and he acts exclusively in the name of the appointing sheriff. As a result, North Carolina law has traditionally treated a sheriff and his deputy as one person and has held the sheriff strictly accountable for his deputies' acts. A police chief, on the other hand, is employed by the local government and is not responsible for the independent acts of a subordinate officer who is also employed by the local unit. Consequently, sheriffs and police chiefs are subject to a different rule with regard to personal liability for the wrongful acts of their subordinates. A sheriff may be held civilly liable in money damages for any harm or injury that his deputies may do in performing their official duties. This harsh rule of liability applies even if a sheriff acted reasonably under the circumstances and was totally unaware of a deputy's particular misconduct and, further, even if he issued an order prohibiting such conduct. Police chiefs, however, may be required to pay damages only if their own negligence or carelessness was the ultimate cause of a subordinate officer's misconduct. If the hypothetical case had involved *Sheriff* Moody and *Deputy* Manson, Sheriff Moody would be required to pay damages to the shoplifter whom Deputy Manson shot, even if he had acted reasonably in hiring, training, and retaining Deputy Manson.

Personal liability of police officers

The police officer is always individually subject to liability for damage or injury he causes by intentional wrongful acts or negligent conduct while performing his job. Careless use of firearms is a common example of negligent conduct that may result in personal liability. The standard of care that officers must satisfy in order to avoid liability—as in all negligence cases—is the care that a reasonable man would take under similar circumstances. But because of the inherently dangerous nature of firearms, courts have traditionally declared that a reasonable man would exercise *extra* care in handling loaded guns. For a police officer who has unintentionally shot someone to avoid damage liability, he must demonstrate that he was acting with extreme care under the circumstances. Deputy sheriffs are subject to the same rules for liability as police officers.

The question in determining Officer Manson's liability is whether the shooting was an unavoidable accident or whether his approaching a misdemeanor suspect with his gun drawn and the safety off constituted improper handling of a firearm. A jury would be justified in finding that such conduct, practiced indiscriminately and without regard to the presence of danger, created an unreasonable risk of harm. Officer Manson could then be required to compensate the wounded shoplifter for negligently causing his injuries.

Liability of law enforcement officers for the negligent use of firearms can arise in a number of other circumstances. Several courts have found police officers negligent and liable in damages for shooting innocent bystanders while in pursuit of fleeing criminals. Also, the individual officer will almost always be liable if someone is injured by an intended warning shot. Because the courts require extreme care in handling firearms, in order to avoid liability a police officer must establish that any unintentional shooting was an unavoidable accident.

Officer Moody's personal liability in a civil action brought under Section 1983 would depend also on whether a federal court would impose liability for negligent violation of the injured person's constitutional rights. A Section 1983 lawsuit alleging the negligent handling of firearms requires virtually the same proof as a negligence case under state law.

Defending police officers and paying judgments

A judgment for money damages against a police officer is financially devastating and harmful to department morale. Even the costs associated with suc-

cessfully defending a lawsuit that alleges police misconduct far exceed the financial means of nearly every police officer. Some cities and counties have contracted with liability insurance companies to defend lawsuits against their police officers and protect them from severe financial loss for actions performed in the course of their jobs. The General Assembly has also authorized cities and counties without liability insurance to provide for the defense of their law enforcement officers and to pay claims or judgments entered against them.

Local governments are authorized, though not required, to defend current and former officers in any civil action brought to recover damages for an alleged act or omission done in the scope and course of employment. A defense may be provided through a city or county attorney or by retaining independent counsel. Local governments are also permitted to appropriate funds to pay all or part of a settled claim or final judgment in a lawsuit against a law enforcement officer. There is no statutory limit on the amount of money that may be appropriated for this purpose. However, a local governing body may not appropriate funds to pay a claim or judgment if it finds that the officer acted corruptly or with malice. The local unit's decision to provide a *defense* for a law enforcement officer, on the other hand, is not similarly restricted.

Certain procedural requirements must be followed before a local government may pay a claim or judgment against a police officer. A unit may not appropriate funds to pay a settlement or judgment unless the officer notified the governing body of all pending claims or litigation against him *before* settlement was reached or judgment entered. The governing body must also have adopted a set of uniform standards to control the payment of claims or judgments against officers before a settlement is reached or a judgment is entered.

Example 2. During the past few weeks there have been numerous reports of loud and disorderly conduct by out-of-town teenagers at the Heavenly Valley public beach. A number of the town's citizens had complained directly to Chief Moody, and the weekly town newspaper ran an editorial criticizing him for being "soft on crime." Officer Bloom had been assigned to patrol the beach. Chief Moody directed Officer Bloom to get rid of "those rowdy kids."

While on patrol one afternoon Officer Bloom noticed a group of unfamiliar teenagers gathered around a picnic table at the beach. One of them, Lenny Berman, pointed his finger at Officer Bloom as he approached the group. Officer Bloom grabbed Berman by his neck and told him that he was under arrest. Berman indignantly proclaimed his innocence and resisted by flailing his arms at Officer Bloom. Officer Bloom, after being struck in the face, hit Berman several times with his nightstick and handcuffed him. Berman suffered a mild concussion and needed twenty stitches to close the wounds inflicted by Officer Bloom.

Officer Bloom took Berman into custody and charged him with resisting arrest and assaulting an officer. Berman sued Officer Bloom in federal court under Section 1983 alleging a violation of his Fourth Amendment right to be free from unreasonable seizures, and he also requested the court to decide his state claims of assault and false arrest.

Liability of police officers for warrantless arrests and assaults

State law. The lawsuits against police officers discussed so far have sought to recover for damages caused by the officer's negligence or failure to exercise reasonable care under the circumstances. However, Officer Bloom *intentionally* struck Berman and took him into custody. State law rules also permit a person to recover damages in civil court for harm caused by the intentional conduct of another. For example, a police officer may be liable in damages for *false arrest* if he intentionally restrains a person without probable cause to make an arrest. A police officer is more likely to face a suit for false arrest if he makes the arrest without a warrant. The arrestee may challenge the correctness of the officer's on-the-spot decision to arrest and may recover damages from the officer if the arrest was clearly made without probable cause. But an officer who acts pursuant to an apparently valid arrest warrant is protected against liability for false arrest because the judicial official, not the officer, made the incorrect decision to issue the warrant and arrest without probable cause. (A citizen also may sue and recover damages against a police officer for false arrest if the officer has probable cause but exceeds his authority and makes an arrest outside his territorial or subject-matter jurisdiction.)

If a private citizen intentionally strikes another without a justifiable excuse, he may be held liable in a civil court for *assault* and required to pay damages. A police officer, on the other hand, is authorized to use reasonable force to effect a lawful arrest and is excused from liability for intentional physical contact that

would otherwise be considered an assault. The courts, in other words, have granted police officers a privilege to protect them against civil liability for damages when they use reasonable force during a lawful arrest. Still, a police officer may be required to pay for any damage caused by the use of *excessive* force during a lawful arrest.

A police officer must be making a lawful arrest, however, before the court will protect him from civil liability for disturbing a private individual's right to be let alone. In North Carolina a police officer is subject to damage liability for using force during an illegal arrest; furthermore, anyone who is being arrested illegally may use whatever force is reasonably necessary to resist. In effect, an illegal arrest transfers the privilege to use reasonable force from the arresting officer to the person being illegally arrested, and anyone who resists an illegal arrest by using reasonable force may not be convicted of resisting arrest or assault on an officer. A law enforcement officer, on the other hand, may be required to pay damages for assault if he harms someone by the use of any force during an illegal arrest.

In the hypothetical case, Berman was arrested simply because he pointed his finger at Officer Bloom. Officer Bloom had no probable cause to arrest Berman—pointing a finger is not a crime. Whether Bloom was motivated by citizen complaints or Chief Moody's stern lecture does not matter, because a warrantless arrest without probable cause is illegal. Officer Bloom acted without authority and thus was not privileged to use reasonable force while taking Berman into custody. Berman would be entitled to recover from Officer Bloom an amount of money necessary to compensate him for any injuries caused by the false arrest and assault. If Berman could demonstrate that Officer Bloom acted maliciously in making the arrest, he would also be entitled to recover punitive damages. The facts of this case do not support an award of punitive damages, however, because Officer Bloom's actions were simply mistaken and not malicious. Berman could not be convicted of resisting arrest or assault on an officer in the criminal proceeding because he was legally entitled to use reasonable force to resist the unlawful arrest.

Federal law. If a false arrest case is brought only in state court, the rules discussed above apply. An illegal arrest, however, is covered by an overlap of state and federal law that also permits a person to sue in federal court under Section 1983 to recover damages for an alleged deprivation of his constitutional right to be free of unreasonable seizures. If a person alleges that both state and federal law violations arise out of the same occurrence, a federal court may decide both claims and make a single award of compensatory damages. Berman's lawsuit falls within this category.

The Fourth Amendment protects an individual's expectation of privacy by prohibiting unreasonable seizures of his person. Although the federal courts recognize that warrantless arrests based on probable cause are reasonable in a limited number of carefully defined situations, the preferred method of making an arrest is with a warrant issued after a finding of probable cause by a neutral judicial official. A warrantless arrest without probable cause, however, is always unreasonable and violates the arrestee's constitutional rights. Berman's rights under the Fourth Amendment were clearly violated by Officer Bloom's seizure without probable cause. As a result, Berman could recover compensatory damages from Officer Bloom in federal court for any actual injury under Section 1983, which authorizes civil suits for damages against public employees whose official actions violate somebody's constitutional rights.

The good-faith defense

Police officers exercise considerable discretion in performing their duties and must react quickly to dangerous and pressure-filled situations. If police officers were subject to personal liability for the consequences of their innocent mistakes, they might well act only in clearly defined and safe situations. The result, of course, would be a tentative response to suspected criminal activity and reduced security for the community. The privilege discussed above protects officers from liability for damages caused by the use of force during the course of *a lawful arrest*. Perhaps more important, though, the courts have also recognized a "good faith" defense to protect officers under certain circumstances from damage liability for harm caused during the course of an *unlawful* arrest.

The longstanding rule in state and federal courts is that police officers may not be held liable for damages caused by honest and reasonable mistakes made in performing their duties. For example, a police officer might rely on the good-faith defense to avoid liability for mistakenly and illegally arresting an innocent person who closely resembled a criminal suspect. If a jury in a civil action that seeks damages against a police officer for making an illegal arrest finds that the officer reasonably believed in good faith that the arrest was made with probable cause and was constitutional, then the verdict must be for the officer even if the arrest was in fact without probable cause and was unconstitutional. To establish a good-faith defense, the officer must prove that he subjectively believed that the arrest was lawful and that his belief was objectively reasonable under the circumstances.

Officer Bloom cannot prove the facts necessary to establish a good-faith defense and avoid liability for illegally arresting Berman. Even if he could show that

he subjectively believed that he had probable cause to make a warrantless arrest, a jury would be compelled to find that Officer Bloom's belief was not objectively reasonable under the circumstances. Berman's conduct was innocuous and not criminal. Officer Bloom's arrest was not caused by an honest mistake, and he may not be excused from liability.

The vitality of a police officer's good-faith defense is supposed to depend on his ability to demonstrate that his decision to make a warrantless arrest was in good faith and objectively reasonable under the circumstances existing *at the time of the arrest.* As a practical matter, however, later actions by judicial officials influence the outcome of lawsuits against police officers who rely on the good-faith defense. An arresting officer is not required to show that probable cause existed in order to avoid liability for an illegal arrest if he acted in good faith; but the failure of a magistrate to find probable cause to hold a person arrested without a warrant undercuts the officer's good-faith defense and encourages a lawsuit for false arrest. The officer is faced with a magistrate's contradictory finding of no probable cause shortly after his own determination of probable cause. The burden is on the officer to come forward with some evidence to explain the different conclusions and establish that his decision to arrest was reasonable under the circumstances. He must show circumstances or factors that he considered but that were not available to the magistrate in order to preserve his good-faith defense and avoid liability.

Example 3. During the past few months a group of students from Heavenly Valley Community College had started to solicit support for the National Solar Party. Convinced that President Carter had not responded to the "energy crisis," the students were determined to persuade the townspeople to convert to a solar lifestyle. They held several peaceful political rallies in the town square and distributed campaign literature door-to-door. The town newspaper recently reported that the students were planning to enter a candidate in the next election for mayor.

Quite a few irritated citizens had told Chief Moody to do something about the National Solar Party, and the mayor had informally suggested to Chief Moody that a plan be developed to undermine their political organizing. The students had planned a big rally for a particular weekend, and Chief Moody decided that something had to be done. The afternoon of the rally Chief Moody met with all of his officers to map a strategy. He told the group that anyone who advocates solar energy in public has automatically and voluntarily waived his constitutional rights. He therefore directed his officers to arrest anybody who attended the rally. All persons arrested were to be held on suspicion for twenty-four hours and then released. Chief Moody told the Mayor about the plan and predicted that it would bring peace to Heavenly Valley.

Later that afternoon about forty students entered the town square and listened to solar energy and antinuclear speeches. Police officers surrounded the square and arrested everybody present. The students were all herded into a city bus and taken to the police department. The arresting officers told them that they were being held "on suspicion" and that they would remain in custody without bail for twenty-four hours. Notwithstanding their protests and demands for release, none of the students were released until the next day. Several students filed a lawsuit in federal court under 42 U.S.C. § 1983 against the Town of Heavenly Valley, alleging that the police officers were carrying out an official city policy that violated their First Amendment right to free speech and association and their Fourth Amendment right to be free from unreasonable seizures.

Liability of local government in federal court

The doctrine of governmental immunity insulates a local government from civil liability in state court for the wrongful or careless acts of its police officers. Formerly they were also exempt from liability for damage in federal court under Section 1983 for the acts of their employees that allegedly violated a person's constitutional rights. Last year, however, the United States Supreme Court ruled that cities and counties may be sued under Section 1983 and required to pay damages out of the public treasury if a person's constitutional rights are violated by a public officer who is *carrying out an official policy or custom of the governmental body.*

This highly significant case established a few guidelines, although the precise rule of liability is not clear and needs to be interpreted and developed through lower court decisions.

No municipal liability will result in federal court just because a police officer independently and arbitrarily violates someone's constitutional rights. Governmental liability may result, on the other hand, if a person's constitutional rights are violated by a police officer who is acting pursuant to an unconstitutional ordinance, regulation, or decision adopted by a local governing body. A local unit may also be liable under Section 1983 if a person's constitutional rights are violated because of an action or policy by someone other than the governing body who has been delegated the authority to make official policy. The actions of low-level employees who follow orders and exercise virtually no discretion do not represent official policy, but the decisions of public officers and department heads who have been delegated final policy-making authority represent official governmental policy and may result in municipal liability under Section 1983. A local unit may also be required to pay damages in a Section 1983 lawsuit if a person's constitutional rights are violated because a public officer is following an unconstitutional governmental custom, but it is not clear at what point historical practices rise to the level of "custom" for which a city or county may be held liable.

The Town of Heavenly Valley may be found liable in a Section 1983 lawsuit and be required to compensate the arrested students. No probable cause existed to believe that the students had committed any crime, and the mass warrantless arrests violated their Fourth Amendment right to remain free from unreasonable seizures. Furthermore, the arrests violated the students' First Amendment right to express their political views peacefully. Heavenly Valley may be liable for damages in federal court even though its governing body did not take a formal vote and did not promulgate the unconstitutional policy. Chief Moody caused these constitutional violations by ordering the arrest of everybody at the rally. He had final authority to make police department policy, and his decisions represented official city policy with regard to law enforcement. As a result, the Chief's unconstitutional policy is equivalent to an official governmental action, and Heavenly Valley may be held responsible under Section 1983 for damages caused by the policy's implementation. On the other hand, if a group of officers had impulsively arrested the students independently of any departmental policy, there would be no official sanction of the action and the municipality could not be held responsible. Still, the students could sue the police officers individually under Section 1983 in federal court or in state court to recover damages caused by their independent wrongful acts.

THIS ARTICLE HAS TRIED to answer a few basic questions and remove some of the mystery surrounding the civil liability of police officers. Discussions of potential liability often have the undesired effect of worrying rather than reassuring public officers and employees. Police officers have greater direct contact with the public and are probably sued more often than any other governmental employees. It should be clear, however, that police officers do not usually lose civil lawsuits and are not held liable for honest and reasonable mistakes.

They will be ordered to pay money damages, however, if a claimant is able to establish that he was injured as a result of police misconduct. Careful selection and thorough training of new officers continue to be the most reliable means of preventing misconduct that gives rise to civil damage liability. □

Liability Insurance for Law Enforcement Officers

Michael R. Smith

THE PAST TEN TO FIFTEEN YEARS have been marked by a significant increase in the number of lawsuits brought to collect money damages for harm or injury caused by law enforcement officers. Some of these lawsuits have been well-intentioned and have stated legitimate claims of police misconduct. The greater number, though, have been frivolous and totally without merit. Of course, law enforcement officers and local governments must treat seriously each lawsuit that alleges police misconduct and seeks money damages. An attorney, whether he is an employee of the local unit or privately retained, must analyze the merits of the case and take appropriate action to resolve it. Even if the suit is groundless, it may be expensive for the attorney to make that determination and to have the case dismissed in the officer's favor before trial. If an injured party states a legitimate claim of police misconduct, the cost of defending the lawsuit increases because an attorney must prepare the case for trial. Frequently, even though the officer and the local agency deny all allegations of misconduct, the defendants decide that a time-consuming public trial would be too expensive—even if successful—and the case is settled out of court. The most expensive situation, though, occurs when a lawsuit alleging police misconduct goes to trial, and the officer is found liable and is required to pay money damages. Clearly the increase in the number of lawsuits brought against law enforcement officers has increased the amount of local funds appropriated to defend those lawsuits.

Unfortunately, a significant number of law enforcement officers and their local governments have not been able to transfer the cost of defending police misconduct lawsuits, including damage awards and settlement costs, by purchasing liability insurance. Liability insurance companies contract with individuals and for a fixed premium agree to assume the risk of financial liability involved in some of their activities. An insurance company determines the amount of premium needed to cover potential liability for injury or harm caused by the covered individual's activity (law enforcement) by studying the past experience of other individuals involved in the same activity and using that information to predict the probability and nature of future claims. Of course, the accuracy of the prediction and the willingness of the insurance company to assume the risk of liability associated with a particular activity depends on the reliability and stability of past experience. Liability insurance companies, however, have claimed that the so-called civil liability revolution is so volatile that they cannot predict the risk of future liability accurately and therefore cannot profitably offer liability insurance to law enforcement officers at reasonable rates. A few insurance companies still offer contracts of law enforcement officers' liability insurance, but the coverage is limited and the cost too high.

[T]he increase in the number of lawsuits brought against law enforcement officers has increased the amount of local funds appropriated to defend these lawsuits.

Legislative history

Governor Hunt, in his crime message to the 1977 General Assembly, asked the legislature to provide insurance coverage of $1,000,000 to protect each law enforcement officer against civil liability for acts performed in the line of duty. The 1977 General Assembly created the Law Enforcement Officers Liability Insurance Study Commission to consider the problem and submit recommendations. After hearing testimony from police legal advisers and insurance company representatives, the Study Commission concluded that the private insurance market was not providing adequate coverage and that the premiums charged were excessive. One of its recommendations to the General Assembly called for the creation of a permanent commission to obtain affordable and comprehensive liability insurance coverage for North Carolina law enforcement officers. The 1979 General Assembly accepted this recommendation and created the Public Officers and Employees Liability Insurance Commission.

The legislature granted this Commission full authority to negotiate with

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insurance companies and to award a master contract that would make a group plan of liability insurance available to local governments. Any master contract awarded by the Commission was to be entered into with the private company that offered the maximum liability coverage for local law enforcement officers at the most reasonable cost, but if the Commission investigated and was not satisfied with the coverage available, it was not required to enter into any contract. To increase the possibility of securing a comprehensive and affordable liability insurance package, the General Assembly provided that any group plan awarded could also cover other city and county employees in addition to law enforcement officers. The legislature's intent was to increase the number of employees covered under a group liability insurance plan so that an insurance carrier might have more premium money to cover potential losses. The legislature hoped that by spreading the risk of liability among a large number of employees a private insurance company could profitably insure law enforcement officers and other local employees at a reasonable cost.

The liability insurance coverage . . . is designed to protect officers against damage liability that may arise from duties and activities peculiar to law enforcement.

The enabling legislation made the local government responsible for buying the insurance to protect law enforcement officers against liability for actions taken in the scope of their duties. The local unit must pay all insurance premiums under any group plan of liability insurance secured by the Commission; police officers cannot individually contract and pay for the insurance. The legislature also encouraged the Commission to make any group plan of liability insurance that it secured both attractive and marketable. The reason: Counties and municipalities are not required to participate in any group plan of liability insurance negotiated by the Commission—local participation is entirely voluntary. Because local participation in any group plan is voluntary, the Commission was faced with the task of balancing the unwillingness of private insurance carriers to provide professional liability insurance to a small number of employees against the unwillingness of local governments to pay high premiums for limited coverage. However, the new law contains a trade-off that was designed to attract the interest of private insurance companies. Although a local government may contract for coverage of only a few or none of its departments, it must provide coverage for *all* employees in any department that it contracts to insure under a group liability insurance plan. Again, this provision retained the local participation option while attracting private carriers by combining a larger number of risks and increasing the premiums an insurer might earn.

If a balance between these competing interests could not be struck and reasonable coverage was not available at a reasonable cost, the Commission was also authorized to study alternatives (self-insurance by local governments and an insurance fund set aside and administered by the state) and make appropriate recommendations to the General Assembly. All companies that issued professional liability insurance in North Carolina were directed to provide information and statistics concerning loss experience to the Commission upon written request. After careful study, the Commission concluded that a group plan of liability insurance providing adequate coverage was available from a private insurance carrier at a reasonable cost. After requesting bids and considering all of those that were received, it awarded the contract to provide a group plan of liability insurance to James F. Jackson and Associates, Inc. of Woodbine, Maryland.

Coverage available under the group plan

The group plan of liability insurance that is now available to local governments offers comprehensive liability coverage for law enforcement personnel. Coverage options are also available to include other elected or appointed public officers and employees in selected departments, such as recreation and sanitation.

A local government that wishes to protect law enforcement officers against liability for damages under the available group plan must purchase liability coverage for *all* employees in the police or sheriff's department. The premium amount for each department employee under the available plan depends on the nature of the particular employee's duties. There are three employee classifications: (A) armed officers actively engaged in making arrests and jailers—$100 per year; (B) officers not primarily involved with making arrests, such as civil process deputies—$50 per year; and (C) department employees whose duties are only indirectly related to law enforcement, such as clerical employees—$25 per year. Under the group plan, the insurer is obligated to pay up to $300,000 in damages and expenses for each incident of misconduct or negligence by an officer that results in a claim for compensation. The $300,000 limit includes amounts paid by the insurer to settle claims or to satisfy judgments of liability (including reimbursement of up to $50 per day for officers attending hearings or trials), legal fees, and other litigation costs. Also, $300,000 is the limit of the insurer's liability for each incident that results in a claim for damages, regardless of the number of defendants being sued. However, there is no cumulative limit to the insurer's liability, and the insurer may be required to pay up to the $300,000 limit for each separate incident during the policy period.

The liability insurance coverage made available by the Commission is designed to protect officers against damage liability that may arise from duties and activities peculiar to law enforcement. The insurer, for example, is obligated to pay all damages caused by a negligent or intentional act of an officer that causes "bodily injury" (physical injury, including death, and accompanying mental suffering). This obligation applies to bodily injury to a person that is caused by an officer's assault or battery and is not limited to injury suffered during an arrest. Property dam-

age that is caused by a law enforcement officer while performing his duties is also covered and must be paid by the insurer (though there is a $100 deductible provision for property damage claims). The policy also protects against damage liability for "personal injury" caused by an officer. This term includes physical or emotional harm caused by false arrest, false imprisonment, wrongful eviction, erroneous service of civil process, malicious prosecution, defamation, invasion of privacy, and discrimination. The insurer is also obligated to pay damages awarded against an officer under federal statute 42 U.S.C. § 1983 for violating a person's civil rights, such as interfering with his First Amendment right to free speech and association. Since the greatest expense associated with police misconduct lawsuits is the cost of successfully defending frivolous lawsuits, it is significant that the insurer must defend all claims brought against a covered law enforcement officer, even if the lawsuit is "groundless, false or fraudulent."

The liability insurance group plan secured by the Commission excludes several significant items from its coverage. It is important to recognize that this liability insurance package is clearly intended to supplement and not to substitute for a general liability policy. For example, it does not cover personal injury or property damage caused by the negligent operation of automobiles or other police vehicles. Nor does it cover injuries sustained by officers or employees of the insured law enforcement agency. If Officer A accidentally shoots Officer B while shooting at a fleeing suspect, a lawsuit to recover damages for bodily injury brought by Officer B would not be covered under the group policy. The liability insurance also does not obligate the insurer to pay punitive damages awarded against an officer. Punitive damages are intended to punish the person whose malicious actions caused the harm, and they are awarded in addition to damages that compensate the injured party. It is considered against public policy for punitive damages to be covered by insurance.

Coverage under this group liability insurance policy is available on a "claims-made" basis. That is, the insurer is responsible only for claims made against the law enforcement officer during the term of the policy. The law enforcement officer's conduct that gave rise to the claim or lawsuit must have occurred on or after the inception date of the policy. Coverage for conduct of a law enforcement officer that took place before the policy took effect is available for an additional premium (25 per cent of the first annual premium) if the insured did not have reason to know before the inception date that a claim would be made.

Law enforcement officers, however, also may be sued and required to pay money damages any time within three years after committing a particular act that causes damage or injury. This period of time within which an injured person may bring a lawsuit to recover damages—the statute of limitations period—begins to expire when the injured person knows or should have known of the injury. Suppose that an officer negligently injures someone during the last year of coverage under the policy, but for some reason a claim (e.g., lawsuit) to recover damages is not made until one year after the term of the policy has expired: *Under the available group policy, the insurer is liable only for claims made during the term of the policy.* An officer covered under the available group policy may also be protected against liability for the entire three-year period after the policy expires during which a person who was injured before coverage expired might bring a lawsuit. The local government may elect to extend the policy's terms to cover claims made up to three years after the policy expires or is canceled for conduct by the officer that took place during the original policy period. The extended period of coverage is available at no cost to the insured if the company cancels and for an additional premium if the insured canceled the policy.

It is important to recognize that this liability insurance package is clearly intended to supplement and not to substitute for a general liability policy.

Conclusion

The liability insurance contract that is available under the group plan carefully outlines the range of law enforcement activities covered. A few of its provisions, however, could benefit from further clarification. For example, last year the United States Supreme Court ruled that local governments could be sued in federal court and held liable for official policies or customs that violate a person's constitutional rights. A local government could therefore be sued for damages by a person whose civil rights have been violated, although the officer who carried out the unconstitutional policy is not sued. The available group insurance policy clearly protects individual officers against damage liability for violating a person's civil rights. But it is not entirely clear whether the policy covers a local unit that is sued for damages after a law enforcement officer has violated someone's constitutional rights by carrying out an unconstitutional policy adopted by the governing body. Another confusing policy provision appears to protect a jailer against liability if he fails to provide or negligently provides medical care to an inmate, but the language is somewhat confusing. Still, despite a few provisions like this that could be clarified, the coverage provided under the policy is fairly clear.

The Commission has done an expedient job of securing a comprehensive and affordable liability insurance package for law enforcement officers. The group liability insurance plan now available to local governments is superior in terms of cost and coverage to any other liability insurance available. When this article was written, nearly 100 local governments, which have a total of nearly $750,000 potential premiums, had filed applications of intent to purchase insurance with the Commission. Local governments that are interested in protecting their law enforcement officers against damage liability for actions taken in the line of duty should carefully consider the Commission's liability insurance plan. □

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