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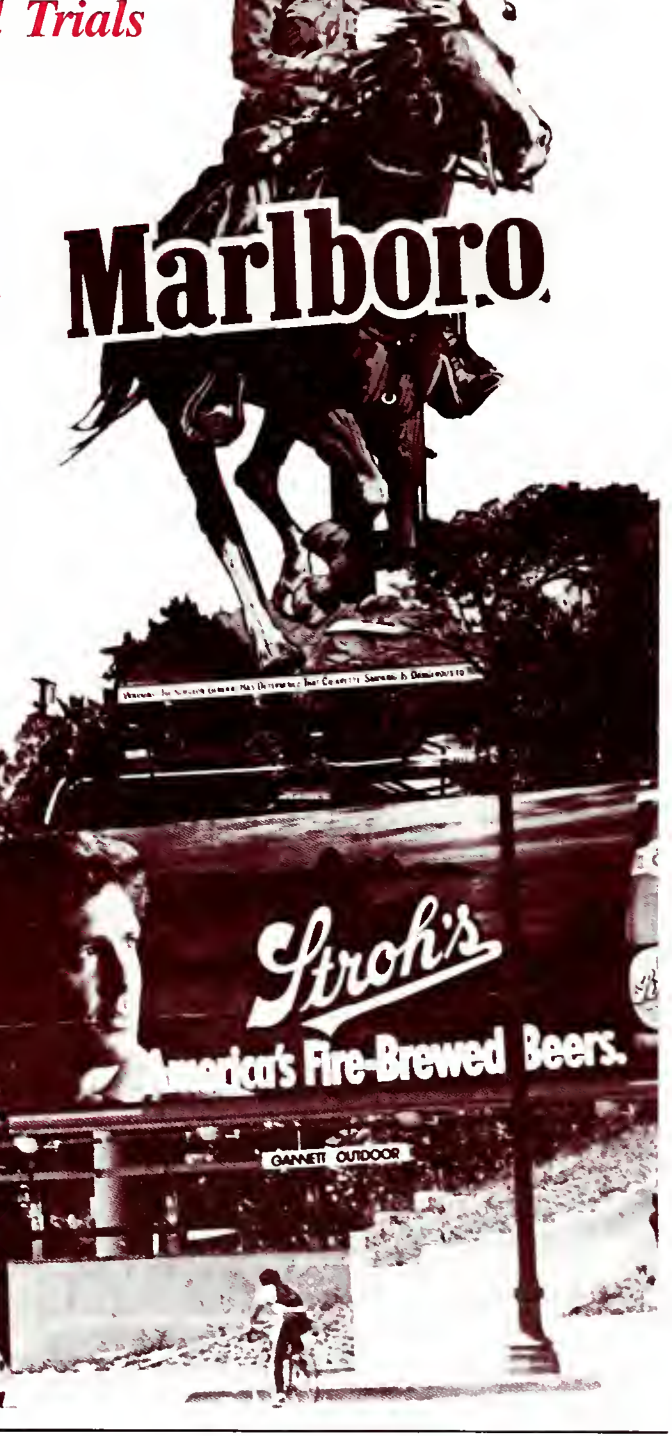


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# Rules of Evidence in Criminal Trials Involving Child Victims

Benjamin B. Sendor

Increased public concern about child abuse[1] has focused legal attention on evidentiary rules used in criminal trials involving child victims.[2] Attorneys, judges, legislators, and commentators have realized that traditional rules of criminal trial evidence sometimes are ill suited to the search for truth in such cases and that the rules can aggravate the emotional trauma suffered by young victims who testify at trial.[3] Recent court decisions and legislation in North Carolina and other states have altered evidentiary rules in ways that accommodate the needs of prosecution and of children. These measures offer the twin hopes of removing legal barriers to valuable evidence and reducing the risk that child victims will suffer emotional harm from testifying. It is important in making and evaluating such changes, however, to consider them from another perspective as well—their effect on the basic rights of defendants in criminal cases to a fair trial.

This article will discuss these changes in evidentiary rules with respect to their effects on the prosecution, on children's needs, and on defendants' rights. First it will discuss the criteria for determining whether a child witness is competent. Then it will address measures that can make testifying easier for children. Finally the article will consider measures that sometimes permit prosecutors to present the child's account of an incident without having the child testify.[4] Such alternatives to the

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1. In fiscal year 1983-84, North Carolina county departments of social services received 17,185 reports of suspected juvenile abuse or neglect. This number increased to 18,456 in 1984-85 and to 19,786 in 1985-86. Division of Social Services, North Carolina Department of Human Resources, *Selected Data, Child Abuse & Neglect Central Registry, SFY: 1983-84 through 1985-86* (unpublished). As noted in the report, these figures are subject to possible imprecision; however, they do suggest increasing public awareness of the problems of child abuse and neglect.

2. North Carolina law provides two separate systems for responding to the abuse of children: a criminal system and a civil system. In the criminal system, a person who physically abuses a child in violation of statutory or common law prohibitions is subject to criminal liability and punishment by imprisonment or fine. The civil system (established in the North Carolina Juvenile Code, G.S. 7A-516 through -744) governs designated types of physical and emotional abuse of children committed by a parent or other caretaker [G.S. 7A-517(1) defines the term "abused juveniles" under the Juvenile Code]. The aim of civil proceedings concerning juvenile abuse under the Juvenile Code is not to assess criminal guilt or impose punishment, but to determine whether a child has been abused and to remedy the circumstances of his care or custody in order to prevent further abuse. *See* G.S. 7A-647 regarding the variety of dispositional alternatives available to a judge in a case of confirmed juvenile abuse.

3. *See* Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 Dick. L. Rev. 645 (1985).

4. Although this article focuses on the testimony of child victims, the principles discussed generally apply to other child witnesses as well. Related topics that will not be discussed include testimony by expert and nonexpert witnesses about the credibility of child witnesses [see State v. Chul Yun Kim, 318 N.C. 614, 350 S.E.2d 347 (1986); State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986); State v. Heath, 316 N.C. 337, 341 S.E.2d 565 (1986)] and expert testimony about medical evidence that can be used to help prove child abuse [*see* State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978)].

child's live trial testimony might include having another witness, such as a physician or a relative to whom the child reported an incident of child abuse, testify about the child's pretrial account of the incident ("hearsay" testimony); showing a videotaped pretrial interview by a police officer, social services worker, or physician with the child; and showing a videotaped session of pretrial testimony (known as a deposition)[5] by the child at trial.

### Competency

Before considering measures designed to help children testify, it is important to discuss the threshold issue of the competency of children to testify, that is, whether a child has sufficient mental and verbal capacity and maturity to testify. Rule 601 of the North Carolina Code of Evidence establishes the following two criteria for determining whether any witness—including a child—has the minimal competency required to testify in court:
"A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth." The questions that frequently arise regarding the testimony of a child are whether the child has sufficient mental and verbal capacity to understand an attorney's questions and a judge's instructions and to speak accurately about a past incident through clear narrative and description, and whether the child has sufficient maturity to understand the importance of telling the truth. As Brandis points out, the legal standard of testimonial competency does not set a fixed age below which a child is too young to testify. Rather, "[t]he test is whether he understands the obligation of an oath or affirmation and has sufficient intelligence to give evidence."[6]

North Carolina courts have shown considerable flexibility in finding very young children competent to testify. For example, in *State v. Higginbottom*,[7] the North Carolina Supreme Court upheld a trial court's finding that a four-year-old child witness understood the duty to tell the truth after she testified "that she knew what a lie was and that a heavenly Father punished persons who told lies."[8] The court reached the same result in *State v. Jones*,[9] a case in which a seven-year-old stated that "she knew God would 'get' people who did not tell the truth, and that she would get a spanking."[10] In *State v. Shaw*,[11] the Supreme Court upheld a trial court's finding that a nine-year-old victim of a sexual assault possessed sufficient intelligence and communicative ability to testify, despite her inability to identify portions of her body and the body of the defendant involved in the assault, because she was able to point to the relevant parts of her own body and to draw on a blackboard a picture of a man showing his sex organ.[12]

## Measures to Help Children Testify

Even children who have the minimal degree of maturity, intelligence, and verbal capacity required for testimonial competency can have difficulty testifying in a formal, potentially intimidating courtroom setting because of the emotional ordeal and mental challenge of testifying before strangers (including the defendant) about complicated events that might seem frightening or embarrassing, events that might have involved conduct unfamiliar to a child (such as sexual activity). Attorneys and judges have developed three approaches for helping children cope with the challenges of testifying clearly in such a situation.

### Leading questions

One way a prosecutor can ease a child's burden in testifying is by using leading questions (that is,

5. A deposition is pretrial testimony by a witness. A deposition can be taken in a criminal case for the purpose of recording for introduction at trial the testimony of a witness who may be unavailable to testify. *See generally* 1 H. Brandis, North Carolina Evidence §§ 18, 19 (1982).

6. *Id.* § 58, at 203.

7. 312 N.C. 760, 324 S.E.2d 834 (1985).

8. *Id.* at 766, 324 S.E.2d at 839.

9. 310 N.C. 716, 314 S.E.2d 529 (1984).

10. *Id.* at 722, 314 S.E.2d at 533.

11. 293 N.C. 616, 239 S.E.2d 439 (1977).

12. Note that in State v. Fearing, 315 N.C. 167, 337 S.E.2d 551 (1985), the court held that the prosecution and the defendant may not stipulate that a witness is incompetent to testify. In order to rule that a witness is incompetent, a trial judge must personally observe the witness and reach his own decision about the question.

questions that suggest or lead to their own answers) during direct examination of a young witness. Rule 611(c) of the North Carolina Code of Evidence generally prohibits an attorney from asking his own witness leading questions during direct examination. The rule limits the use of leading questions to cross-examination of an opponent's witnesses.[13] But the rule also authorizes a trial judge to allow an attorney to ask his own witness leading questions when "necessary to develop his testimony."

Our courts have long permitted prosecutors to ask a child witness leading questions when the child's age makes it difficult for him to understand the question and when the prosecutor's inquiry pertains to delicate subjects, such as sexual matters.[14] For example, in *State v. Pearson*,[15] the Supreme Court upheld the trial judge's decision to permit the prosecutor to ask the 14-year-old complaining witness in a rape case a series of leading questions when her embarrassment made her reluctant to testify. The following is excerpted from the record showing the prosecutor's need to ask the witness leading questions:

> The Solicitor asked her to tell what happened after they got to the chicken house and stopped. No answer was given. The Solicitor again asked her to go ahead and without him leading her to tell what happened. She said: "Well, we were just sitting there talking—and he put his arms around me and kissed me." The witness then stopped and the Court directed her to go ahead. The Solicitor then asked the following question: "Now, you told us about his stopping at the chicken house and you told us that he put his arms around you and kissed you. Did he put his hands on you?" To which the witness answered: "Yes, sir." The Solicitor then asked: "Did he take out his private parts?" Witness answered: "Yes, sir." Solicitor asked: "What did he do with them?" To which there was no answer. The court instructed witness to answer his question. The Solicitor then asked witness if he put his private parts in hers, and the witness answered: "Yes, sir."[16]

## Tangible evidence: illustrations and anatomically correct dolls

A second method for easing a child's burden in testifying is to permit the child to supplement, illustrate, or clarify his oral testimony by making drawings and using anatomically correct dolls. For example, in *State v. Shaw*,[17] discussed above, the court commented favorably on the prosecution's tactic of allowing a child victim in a sexual abuse case to point to the portion of her own body penetrated during the incident and to draw on the blackboard a picture of a man showing his sex organ. In *State v. Williams*,[18] the Supreme Court upheld a trial judge's decision to permit the prosecution to illustrate the testimony of two child victims of sexual abuse by introducing into evidence photographs of the victims, taken by a social worker, showing each pointing to the parts of her body where the defendant had put a tampon. One child had already testified that the defendant had put the tampon "in me in front and in back" and that the defendant did the same to the other victim.

Anatomically correct dolls can be a particularly valuable form of tangible evidence for helping children clarify their testimony about alleged sexual abuse.[19] As an Ohio court explained, such dolls can be useful when "[t]he record indicates that the witness was unable to relate to the jury the events using the appropriate sexual or physiological terminology. The dolls [can be used] to clarify the witness' expla-

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13. The Supreme Court of North Carolina explained the basis of this rule in State v. Greene, 285 N.C. 482, 206 S.E.2d 229 (1974):

> The rule prohibiting leading questions is not based on a technical distinction between direct or cross-examination, but on the alleged friendliness existing between counsel and his witness. It is said that this relationship would allow the examiner to provide a false memory to the witness by suggesting the desired reply to his question.

Compare, for example, the following hypothetical questions asked by a prosecutor in a fictional child abuse trial (assume that the child witness has just testified that at a particular point during an evening, his father took him into the living room) (1) "What did your daddy do when you went into the living room?" (2) "Did your daddy hit you with a belt when you went into the living room?" The first question is open-ended; it does not suggest the proper answer. The second question, though, is leading; it suggests the answer the prosecutor wants to hear.

14. *Id.* at 492-93, 206 S.E.2d at 231.

15. 258 N.C. 188, 128 S.E.2d 251 (1962).

16. *See also* State v. Stanley, 310 N.C. 353, 312 S.E.2d 482 (1984); State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981).

17. 293 N.C. 616, 239 S.E.2d 439 (1977).

18. 303 N.C. 507, 279 S.E.2d 592 (1981).

19. *See* B. Boat & M. Everson, Using Anatomical Dolls: Guidelines for Interviewing Young Children in Sexual Abuse Investigations (Chapel Hill, N.C., 1986).

nation and to insure a common understanding between the witness and jury as to events which took place."[20] Although the appellate courts of North Carolina have not squarely addressed the propriety or conditions of using anatomically correct dolls, the North Carolina Supreme Court has noted in several cases that child sexual-abuse victims used such dolls at trial to illustrate their testimony.[21] Moreover, in three of those cases,[22] the Court mentioned the child victims' use of the dolls at trial as evidence that supported the state's case by helping to establish the element of penetration required to prove first-degree statutory rape and first-degree statutory sexual offense.[23] In addition, the Court observed in one case that children used dolls during a pretrial interview with police officers[24] and in another case that a mental health worker testified at trial about a child's use of dolls during pretrial counseling sessions.[25] Although the Court did not expressly discuss the propriety of using dolls in any of the three cases, the decisions seem to signal the court's implicit approval of their use.

## Closed-circuit television testimony

Sometimes a child witness's problem in testifying does not involve difficulty in communicating, but rather the emotional ordeal of testifying in a formal courtroom before strangers or in the presence of the defendant. In such a situation, a child's fear, nervousness, or embarrassment may prevent him from testifying or may cause emotional trauma that exacerbates the harm he might already have suffered from the alleged crime. To address this type of problem, attorneys, judges, and legislatures have sought in some instances to change the setting of the witness's testimony to reduce the child's stress. The type of solution used depends upon whether the child's stress results from appearing in a courtroom before strangers or from testifying in view of the defendant. In the former situation, the goals of any solution would be to exclude from the courtroom any strangers to the child whose presence is not required for the proceeding and, if necessary, to use a less intimidating room for the child's testimony. For example, G.S. 15-166 authorizes the trial judge in a case involving an alleged rape, other sexual offense, or attempt to commit such a crime to "exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case" during the complaining witness's testimony. Such a measure entails excluding members of the public and the press, although other strangers—including the defendant, the judge, the attorneys, and the jurors—must remain.[26]

***Is a face-to-face encounter fundamental to the right of confrontation? If it is, do public policy concerns warrant exceptions to a requirement of such an encounter?***

To reduce a child's stress from testifying in an intimidating, formal courtroom in front of strangers, closed-circuit television might also be used. The child could testify in another, smaller room (such as the jury room or the judge's chambers) with the attorneys, the judge, the defendant, a support person (such as the child's parent or a social worker), and a cameraman present, while the jury and members of the public watch and listen through a one-way closed circuit television connection.

20. State v. Lee, 9 Ohio App.3d 282, 283, 459 N.E.2d 910, 912 (1983); *accord* State v. Madden, 15 Ohio App. 3d 130, 472 N.E.2d 1126 (1984).

21. State v. Watkins, 318 N.C. 498 , 349 S.E.2d 564 (1986); State v. Hannah, 316 N.C. 362, 341 S.E.2d 514 (1986); State v. DeLeonardo, 315 N.C. 762, 340 S.E.2d 350 (1986); State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

22. *See Watkins, Hannah, DeLeonardo,* cases cited *supra* note 21.

23. *See* N.C. GEN. STAT. § 14-27 (1986).

24. *Watkins*, 318 N.C. 498, 349 S.E.2d 564 (1986).

25. State v. Gordon, 316 N.C. 497, 342 S.E.2d 509 (1986). *But see* Herzog, *Child Sexual Abuse Offense: Proxy Testimony*, 7 THE TRUE BILL No. 1, p. 1, 2-3 (1987) (questioning reliability of assessments of child abuse based on child's play with anatomically correct dolls).

26. Under Globe Newspaper v. Superior Court, 457 U.S. 596 (1982), such a provision does not violate the First Amendment right of the public and members of the press to attend a trial as long as closure orders are made in light of a case-by-case assessment of each complaining witness's needs rather than as a blanket protective measure in every case.

If the child's emotional difficulty also stems from the defendant's presence during his testimony, it would appear at first glance that the natural solution would be physical separation of the witness and the defendant during the testimony. For example, if the only consideration were accommodation of the child's needs, solutions could include excluding the defendant from the courtroom during the child's testimony; using a screen to separate the defendant and the witness visually; and using a closed-circuit television set-up, placing the child, the attorneys, a support person, and the cameraman in one room and the defendant, the judge, the jury, and the public in the courtroom. Such a television connection could involve either two-way viewing, permitting the child to see the defendant[27] or one-way viewing, permitting people in the courtroom (including the defendant) to see and hear the child but not permitting the child or other people with him to view anyone in the courtroom.[28] With either type of connection, the defendant and his attorney could be linked through an audio connection, allowing them to consult privately.

Although measures that physically separate a child from the defendant during the child's trial testimony might ease the child's emotional burden in testifying, they all raise important questions regarding the rights of the defendant to a fair trial under the United States and North Carolina Constitutions. First, court-ordered exclusion of the defendant from the courtroom for any period of time during a trial would violate the defendant's right, under the Sixth Amendment of the United States Constitution and Article I, Section 23 of the North Carolina Constitution, to be present during every stage of a criminal trial.[29] That right is virtually absolute, subject only to waiver by the defendant himself and to forfeiture through conduct that interferes with the trial.

A more complex problem concerns a defendant's right under the same constitutional provisions to confront the witnesses against him. Although neither the United States Supreme Court nor the appellate courts of North Carolina have had occasion to examine the full scope of a defendant's confrontation right, courts elsewhere in the nation recently have done so. Unfortunately, they have not reached a consensus on the question. Historically the United States Supreme Court has identified two purposes of the confrontation clause of the Sixth Amendment: (1) to enable a defendant to use cross-examination to test the credibility of a prosecution witness and (2) to promote truthful testimony by prosecution witnesses by placing them in a face-to-face encounter with the defendant.[30] All courts have agreed that the right to cross-examine one's accusers is a fundamental aspect of the right to confrontation and that exceptions to the right of cross-examination may be granted only in carefully limited circumstances.[31] Difficult questions recently debated by courts are whether a face-to-face encounter also is a fundamental facet of the right to confrontation and, even if it is, whether public policy concerns can warrant exceptions to a requirement of such an encounter.

Cases involving accommodations to the needs of child witnesses have been major forums for this nationwide debate. Although the appellate courts of North Carolina have not yet addressed the propriety of such accommodations, courts elsewhere have done so. For example, in *Herbert v. Superior Court*,[32] a California case of alleged sexual offenses committed by the defendant against his three-year-old stepdaughter, the trial judge ordered the defendant to sit in a part of the courtroom where he and his daughter (then five years old) could not see each other. Noting that the prosecution did not demonstrate the need for such visual separation and that there was no record of intimidation of the girl by the defendant, the California Court of Appeals ruled that the measure violated the defendant's right to confrontation.

In *Hochheiser v. Superior Court*,[33] a case involving alleged lewd conduct with minors, the emotional distress the complaining witnesses experienced as a result of their preliminary hearing testimony

27. *See, e.g.*, CAL. PENAL CODE § 1347 (1986).

28. *See, e.g.*, KY. REV. STAT. § 421.350(3) (1986); LA. REV. STAT. ANN. § 15:283 (West 1987); TEX. CODE CRIM. PROC. ANN. art. 38.071(3) (Vernon 1987); State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984). S 165, which was introduced, but not voted on, during the 1985 Session of the North Carolina General Assembly, would have authorized the use of such a one-way, closed-circuit system in certain types of criminal cases involving child witnesses.

29. State v. Braswell, 312 N.C. 533, 324 S.E.2d 241 (1985).

30. *See, e.g.*, Ohio v. Roberts, 448 U.S. 56 (1980); Mattox v. United States, 156 U.S. 237 (1895).

31. *See generally* Ohio v. Roberts, 448 U.S. 56 (1980).

32. 117 Cal. App.3d 661, 172 Cal. Rptr. 850 (1981).

33. 161 Cal. App.3d 777, 208 Cal. Rptr. 273 (1984).

prompted the prosecution to request permission to use a two-way closed circuit television connection for their trial testimony. The prosecution proposed to place only the witness, the witness's parent, and the bailiff in one room and everyone else in the courtroom. After the trial judge granted permission, the California Court of Appeals reversed that ruling. The appellate court explained that only the legislature could authorize such a significant departure from trial practice. In support of its ruling, the court mentioned the potential confrontation clause problem in using televised testimony.

*Measures that physically separate the child witness from the defendant during the child's testimony raise important questions about the defendant's rights to a fair trial.*

On the other side of the ledger, in *State v. Strable*,[34] a case involving sexual abuse by the defendant against his 14-year-old stepdaughter, the Iowa Supreme Court found no confrontation clause violation when the judge in a bench trial allowed the prosecutor to place a blackboard between the complaining witness and the defendant during the witness's testimony in order to reduce the complaining witness's embarrassment from testifying in the defendant's presence. The court explained that the defendant's right of confrontation was preserved because his right to cross-examine the complainant through his attorney was honored.

In *State v. Sheppard*,[35] a trial judge in a New Jersey case involving alleged sexual abuse of a child granted the prosecution's request to use a one-way closed-circuit television system during the complainant's testimony. The child, the attorneys, and a cameraman would be in a room near the courtroom, and the defendant, judge, and jury would be in the courtroom, able to watch and hear the child on television monitors. An audio connection would permit private communication between the defendant and his attorney. In granting the prosecution's request, the court explained that the right to cross-examination, not the right to a face-to-face encounter, is the primary interest secured by the confrontation clause, that the closed-circuit system proposed by the prosecutor would honor the defendant's right to cross-examination, and that the public policy concern of obtaining the child's testimony without subjecting her to unreasonable emotional trauma warranted an exception to any right of the defendant to a face-to-face encounter. The Arizona Court of Appeals and the Kentucky Supreme Court reached the same result in *Matter of Appeal in Pinal County Juvenile Adjudication*[36] and *Commonwealth v. Willis*,[37] respectively.

Another concern that courts have addressed regarding the use of closed-circuit television testimony is the danger that television might distort testimony through camera angles and lighting and might unfairly enhance the credibility of a televised witness.[38] The court in *Sheppard* sought to solve those problems by specifying requirements with respect to lighting, camera angles, and instructions to the jury about the proper evaluation of televised testimony.[39]

As noted above,[40] a bill that would have authorized the use of a one-way closed-circuit system for trial testimony in certain types of criminal cases involving child witnesses was introduced, but not voted on, during the 1985 Session of the General Assembly. This history prompts an important question: Do North Carolina courts have inherent power to permit this measure in the absence of legislation, or is statutory authorization necessary? Indeed, in 1986 a superior court judge allowed a child to testify

34. 313 N.W.2d 497 (Iowa 1981).

35. 197 N.J. Super. 411, 484 A.2d 1330 (1984).

36. 147 Ariz. 302, 709 P.2d 1361 (Ariz. Ct. App. 1985); *see also* Kansas City v. McCoy, 525 S.W.2d 336 (Mo. 1975) (*en banc*).

37. 716 S.W.2d 224 (Ky. 1986).

38. *See* Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (Cal. Ct. App. 1984). *See also* Long v. State, 694 S.W.2d 185 (Tex. Ct. App. 1985) (discussing these problems in regard to the use of videotaped pretrial interviews as evidence at trial).

39. *See* the appendix to the court's opinion setting forth conditions on the use of the closed-circuit presentation. 197 N.J. Super. 411, 442, 484 A.2d 1330, 1349-50 (1984).

40. *See* material cited *supra* note 28.

by using closed-circuit system in a first-degree sexual offense case in Onslow County.[41] Although the appellate courts of North Carolina have not discussed this specific question, they have stated generally that a trial judge "is given large discretionary power as to the conduct of a trial. Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within his discretion."[42] Thus, apart from the crucial constitutional question of whether closed-circuit testimony that entails physical separation of the witness and the defendant violates the defendant's confrontation clause rights (a question to be answered by the courts and which the General Assembly lacks ultimate authority to answer), it is possible—though by no means clear—that a North Carolina trial judge has inherent power to permit the use of this measure.[43]

## Alternatives to Testimony by a Child Victim

The measures discussed above can alleviate the emotional distress a child can suffer from testifying at trial. Sometimes, however, even these techniques prove inadequate to save a child from significant emotional harm. In such cases, no method used to present the child's live testimony would prevent harm to the child. Attorneys, judges, and legislatures have developed three major ways to present a child's account of an incident without requiring the child to testify at trial. First, in some states (including North Carolina), another witness, such as a relative or a physician, *sometimes* can testify about the account the child gave him of an alleged criminal incident.[44] Such testimony by a witness used to prove the truth of the contents of an out-of-court statement made to him by another person is known as *hearsay* evidence. Second, statutes in some states (but not in North Carolina) admit videotaped pretrial interviews by police officers, social workers, or physicians with children as evidence at trial under certain conditions.[45] Third, statutes in some states (but not in North Carolina) allow the use of pretrial videotaped depositions of children as trial evidence under certain conditions.[46]

This section will examine the difficult legal issues raised by these alternatives to presenting a child's live testimony at trial. These issues stem from two sources: the general rule prohibiting the use of hearsay evidence at trial and the confrontation clause. Building on its common law heritage, North Carolina law generally prohibits any party in a case from introducing hearsay evidence at trial. Rule 801(d) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted." To use a hypothetical example, if an alleged victim of child abuse tells his teacher that his mother beat him so severely that he sustained injuries requiring medical care, the teacher's repetition of the child's statement at trial in a subsequent child abuse prosecution against the mother would be hearsay. The major reason for barring hearsay evidence from trial is that it precludes any opportunity of the opposing party to test its credibility by cross-examining the out-of-court declarant.[47]

Although Rule 802 generally prohibits the introduction of hearsay in trials, it also states that hearsay may be introduced "as provided by statute or

41. *See* 18 Trial Briefs No. 4, p. 29 (1986).

42. State v. Rhodes, 290 N.C. 16, 23, 224 S.E.2d 631, 635 (1976); *accord* State v. Higginbottom, 312 N.C. 760, 324 S.E.2d 834 (1985). *See generally In re* Superior Court Order, 315 N.C. 378, 380, 338 S.E.2d 307, 309 (1986); Mallard, *Inherent Power of the Courts of North Carolina*, 10 Wake Forest L. Rev. 1 (1974).

43. *But see* Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (Cal. Ct. App. 1984), in which the California Court of Appeals ruled that in light of the potential problem that closed-circuit testimony raises under the confrontation clause, a court does not have such inherent authority under California law. In her partial dissent in State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986), Chief Justice Billings raised a similar question regarding the propriety of judicial interpretations of exceptions to the hearsay rule that seek to accommodate the needs of child victims.

44. *See, e.g.*, State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985); State v. Gregory, 78 N.C. App. 565, 338 S.E.2d 110 (1985), *rev. denied and appeal dismissed*, 316 N.C. 382, 342 S.E.2d 901 (1986).

45. *See, e.g.*, Ky. Rev. Stat. § 421.350(1), (2) (1986); La. Rev. Stat. Ann. § 15:440.1 through 440.5 (West 1987); Tex. Code Crim. Proc. Ann. art. 38.071(2)(a) (Vernon 1987).

46. *See, e.g.*, Colo. Rev. Stat. § 18-3-413 and § 18-6-401.3 (1986); Ky. Rev. Stat. § 421.350(4); Tex. Code Crim. Proc. Ann. art. 38.071(4) (Vernon 1987). S 165, discussed in note 28, *supra*, would have authorized the introduction at trial of the videotaped deposition of a child witness in certain types of criminal cases.

47. Brandis, *supra* note 5, § 139, at 555-56.

by these rules." Rules 803 and 804 set forth 27 specific exceptions for types of hearsay that may be admitted as evidence at trial. For example, those exceptions include records kept by organizations in the ordinary course of business [Rule 803(6)], statements made for the purpose of medical diagnosis or treatment [Rule 803(4)], public records [Rule 803(8)],

*The confrontation clauses of the United States and North Carolina Constitutions embody a preference for in-court testimony over use of out-of-court statements; this preference stems from concern for a defendant's interest in cross-examining and encountering an adverse witness.*

and the record of former testimony given by a witness [Rule 804(b)(1)]. The rationale for establishing these exceptions is that the General Assembly considers the categories of evidence exempted from the hearsay rule to be so reliable ordinarily as to warrant use as trial evidence even without giving the opposing party a chance to cross-examine the out-of-court declarant.[48]

The exceptions set forth in Rule 804 apply only if the declarant himself is not available to testify in court. The rule identifies five reasons a declarant might be unavailable: (1) a testimonial privilege[49] shields him from the duty to testify in court; (2) the declarant refuses to testify despite the court's order to testify; (3) the declarant asserts that he has a lack of memory about the subject of his out-of-court statement; (4) the declarant's death or physical or mental illness or infirmity prevents his testifying in court; or (5) the proponent of the declarant's statement is unable to procure the declarant's attendance in court by subpoena or other reasonable means.[50] In contrast, the exceptions listed in Rule 803 apply, even if the declarant is available to testify in court. Rules 803 and 804 also contain residual or "catch-all" exceptions permitting (under certain circumstances) the introduction of hearsay that does not fit into any of the 27 enumerated categories of exceptions.

The confrontation clauses of the United States and North Carolina Constitutions, discussed earlier, are similar, but not identical, to the common law and statutory hearsay rules. They embody the same preference for in-court testimony over use of out-of-court statements, and they stem from the same concern for a defendant's interest in cross-examining and encountering an adverse witness. The confrontation clauses, however, apply only to criminal and delinquency proceedings. Moreover, they sometimes bar hearsay evidence that would otherwise be admitted under exceptions to the hearsay rule. As the United States Supreme Court explained in *Ohio v. Roberts*,[51] a defendant's confrontation right bars admission of hearsay evidence in a criminal trial unless the prosecution can demonstrate the necessity and reliability of that evidence. The Court stated that necessity ordinarily entails the unavailability of the out-of-court declarant for trial testimony; it also stated that "firmly rooted" hearsay exceptions, such as the 27 exceptions enumerated in Rules 803 and 804, generally will be regarded as reliable under the confrontation clause.[52]

48. *Id.* § 144, at 570-71.

49. A testimonial privilege is a rule of evidence that either entitles a witness to refuse to testify in court [such as the privilege against self-incrimination (N.C. CONST. art. I, sec. 23; G.S. 8-54)] or prevents a witness from testifying if another person involved in a designated type of relationship with the witness objects [such as the common law attorney-client privilege and the statutory husband-wife privilege (G.S. 8-56, -57, -57.1)]. *See generally* 1 H. BRANDIS, NORTH CAROLINA EVIDENCE §§ 53-65 (1982). For a discussion of the applicability and limits of certain testimonial privileges in criminal and civil child abuse and neglect cases, *see* Mason & Watts, *Protecting North Carolina's Children: The Duty to Report Suspected Abuse and Neglect*, SOCIAL SERVICES LAW BULL. No. 9 (Institute of Government, June 1986).

50. Rule 804(a) states that unavailability "includes" the circumstances enumerated in 804(a)(1)-(5), but it does not restrict the scope of the term to those circumstances.

51. 448 U.S. 56 (1980).

52. *Id.* at 66.

## Presenting the child's account through hearsay testimony by another witness

Several recent North Carolina decisions interpret hearsay exceptions in ways that have special significance for child abuse cases. In *State v. Smith*,[53] the defendant was charged with sexually abusing a four-year-old girl and a five-year-old girl. Both girls testified about the incident at trial. In addition, the prosecution introduced testimony by the girls' grandmother that two or three days after the assault, one of the girls described the incident to her and identified the defendant as the assailant. The grandmother then contacted the girls' mothers, which led to medical examination of the children. The prosecution also introduced hearsay testimony by two rape task force volunteers concerning the girls' statements to them about the incident.

The Supreme Court upheld the admissibility of the grandmother's hearsay testimony, but not the hearsay testimony of the rape task force volunteers. The grandmother's testimony was admissible under two hearsay exceptions: the exception for statements made for the purpose of medical diagnosis or treatment [Rule 803(4)] and the exception for excited utterances [Rule 803(2)]. The Court ruled that the grandmother's testimony qualified under Rule 803(4), even though she was not a medical worker, because the child's statement to her (including descriptions of bleeding and pain caused by the incident) *led* to medical diagnosis and treatment for the girls. Furthermore, the Court ruled that testimony admitted under Rule 803(4) could include the declarant's identification of an assailant where, as in this case, the motivation for the identification was to obtain medical help rather than to accuse the assailant of wrongdoing.

With respect to the applicability of Rule 803(2), the Court focused on the following factors for determining the admissibility of a statement as an excited utterance: whether the experience that prompted the statement was startling in nature and whether the declarant made the statement spontaneously. Although the Court acknowledged that the timeliness of the statement also is relevant, it stressed that this factor is not as important as the other two. In this case, the sexual assaults plainly were startling, and the report by one of the victims was spontaneous. Consequently, the Court ruled that the grandmother's hearsay testimony about that child's report to her was admissible because it contained an excited utterance despite the delay of two to three days between the incident and the child's report.

Nevertheless, the Court held that the testimony of the rape task force volunteers was not admissible under either of the exceptions at issue: Rule 803(4) and the residual exception of Rule 803(24). Regarding Rule 803(4), the Court explained that the girls first spoke to the volunteers *after* they received medical treatment. Furthermore, the Court stated that the girls made the statements to the volunteers in order to obtain psychological help rather than to obtain medical treatment.[54] In holding that the volunteers' testimony also did not qualify for the residual hearsay exception of Rule 803(24), the Court set forth a six-part test for determining the admissibility of hearsay under that rule. The proponent must show (1) that he gave the adverse party adequate written notice about the testimony and the declarant's name and address; (2) that the testimony does not qualify for one of the 27 specific hearsay exceptions; (3) that the hearsay testimony is trustworthy; (4) that the evidence relates to a material issue of fact in the case; (5) that the testimony is "necessary," which means that it is more probative than any other evidence that the proponent can procure by reasonable efforts and which ordinarily requires that the declarant be unavailable to give live testimony in court; and (6) that introduction of the evidence will best serve the interests of justice. Because the record in *Smith* did not demonstrate that the prosecutor had satisfied these criteria, the Supreme Court ruled that the volunteers' testimony was not admissible under Rule 803(24).

The Supreme Court ruled in the subsequent case of *State v. Triplett*[55] that the same six-part test ap-

53. 315 N.C. 76, 337 S.E.2d 833 (1985).

54. The court's rationale for ruling that Rule 803(4) did not apply to the volunteers' testimony leaves unclear the scope of admissibility under Rule 803(4) of statements made for psychological diagnosis and treatment. *Cf.* State v. Aguallo, 318 N.C. 590, 596-97, 350 N.C. 76, 80-81 (1986) (child's identification to physician of defendant as alleged sexual abuse assailant admissible because relevant to psychological diagnosis and treatment).

55. 316 N.C. 1, 340 S.E.2d 736 (1986).

plies to the companion residual exception of Rule 804(b)(5).[56] In *Smith*, *Triplett*, and *State v. McLaughlin*,[57] the Supreme Court identified the following factors to be used in evaluating the key criterion of the trustworthiness of hearsay evidence under the residual hearsay exceptions: whether the declarant had personal knowledge of the subject matter of his statement, the declarant's motivation to speak truthfully or falsely, whether the declarant ever recanted his out-of-court statement, whether the declarant is available for meaningful cross-examination, the nature and character of the statement (e.g. whether the declarant made the statement against his own interest), the relationship of the parties, and whether any other evidence corroborates the out-of-court statement.[58]

In *State v. Aguallo*[59] and *State v. Stafford*,[60] the Supreme Court of North Carolina again considered the use of Rule 803(4) to introduce at trial statements made by a victim of child abuse to a physician during a pretrial interview. In *Aguallo* the court upheld the admission of testimony by a pediatrician about a nine-year-old child's account of alleged sexual abuse by her mother's boyfriend. The girl told the doctor about the incident during a medical examination initiated by a protective services worker seven or eight months after the alleged incident and three months before trial. The child made the statements during an initial diagnostic examination by the physician. In ruling in favor of admissibility of the statements, the court stressed that the statements were admissible under Rule 803(4) because the physician conducted the interview of the child for the purposes of diagnosis and treatment. The court further ruled that the portion of the statements in which the child identified the defendant as the alleged assailant was admissible because the identity of the perpetrator of child sexual abuse is relevant to psychological diagnosis and treatment of the victim.[61]

In contrast, the court ruled in *Stafford* that a pretrial statement made to a physician by a nine-year-old alleged victim of sexual abuse was inadmissible because the statement was made to prepare the prosecutor's case rather than for the purposes of diagnosis and treatment. The physician had examined the girl twice: one month and seven months after the alleged incident. The child made the statements in question during the second examination. Significantly, that examination occurred only three days before trial. Moreover, the court observed that the prosecution did not introduce evidence establishing that the physician conducted the examination for the purposes of diagnosis or treatment. The physician even testified that he did not conduct the examination for either of those purposes.

In another North Carolina case, *State v. Gregory*,[62] the defendant was charged with sexual abuse of his daughter, aged three and one-half. The child described the incident to her grandmother, leading to a medical examination during which the child also described the incident to a physician. Both times the girl identified her father as the assailant. After a competency hearing, the trial judge found that the girl was not competent to testify, and he permitted the prosecutor to introduce the hearsay testimony of the grandmother and the physician under Rule 803(4). The North Carolina Court of Appeals upheld the trial judge's decision on the basis of *Smith*. The Court of Appeals also considered an issue not squarely addressed by the Supreme Court in *Smith* or *Aguallo*: whether admission of the hearsay testimony complied with the federal and state confrontation clauses. In those cases the Supreme Court had discussed necessity solely as a statutory condition of admissibility under Rule 803(24), without reaching the question of necessity as a constitutional

56. *See also* State v. Fearing, 315 N.C. 167, 337 S.E.2d 551 (1985) [in which the court stated that the criteria for admitting hearsay under Rules 803(24) and 804(b)(5) are identical and that unavailability is a crucial factor under both rules].

57. 316 N.C. 175, 340 S.E.2d 102 (1986).

58. 315 N.C. 167, 337 S.E.2d 551 (1985).

59. 318 N.C. 590, 350 S.E.2d 76 (1986).

60. 317 N.C. 568, 346 S.E.2d 463 (1986).

61. Dissenting in part in *Aguallo*, Chief Justice Billings raised a concern that "this case may encourage prosecutors to rely exclusively upon the testimony of physicians, relating hearsay statements of child victims in sex abuse cases, to identify the abusers." 318 N.C. at 602, 350 S.E.2d at 83; *see also* Widenhouse, *Child Hearsay: The Appellate Courts Speak*, 17 Trial Briefs No. 1, p. 20 (1986). In State v. Durham, 74 N.C. App. 159, 327 S.E.2d 920 (1985), the court raised a similar concern about improper use of surrogate witnesses in place of a child; in that case the court criticized a procedure used at trial that permitted the defense attorney to cross-examine the mother of an alleged child sexual abuse victim—but not the child herself—about a matter relevant to the credibility of the child's testimony on direct examination.

62. 78 N.C. App. 565, 338 N.C. 110 (1985), *rev. denied and appeal dismissed*, 316 N.C. 382, 342 S.E.2d 901 (1986).

condition for admitting hearsay testimony under the confrontation clauses. The Court of Appeals followed the two-step inquiry into trustworthiness and necessity set forth by the United States Supreme Court in *Ohio v. Roberts* (discussed above). Since the trial judge had found that the child was incompetent to testify, her testimony was unavailable, and the hearsay testimony by her grandmother and the physician was therefore necessary. The court further found that three factors supported the trustworthiness of the evidence: the strong natural motivation of most people to make truthful statements for the purposes of medical diagnosis and treatment, the corroborating physiological evidence found by the doctor, and the girl's demonstrated ability to identify her father.

*Necessity ordinarily will require that the declarant's live testimony be unavailable at trial; a child's testimony might be unavailable for several reasons.*

*Smith, Aguallo*, and *Gregory* together carve out broad exceptions for child hearsay evidence, exceptions that should significantly affect child abuse cases. Although the courts did not expressly rule that child hearsay could be admissible under the twin residual exceptions of Rules 803(24) and 804(b)(5), the Supreme Court's analysis of those exceptions in *Smith, Triplett*, and *McLaughlin* should, at a minimum, be interpreted as permitting the admission of such evidence under the residual exceptions if the evidence passes the six-part test for those exceptions. Necessity is an important issue in all three opinions. It is important to remember, however, that the issue of necessity can arise in two different contexts: (1) as a statutory condition of admissibility of any hearsay evidence under Rule 804(b) and under the residual exception of Rule 803(24) and (2) as a constitutional condition of admissibility under the confrontation clauses of the state and federal constitutions. Read together, the three cases provide that necessity is a condition for the admission of child hearsay in the following circumstances: (1) as a statutory condition of any hearsay evidence under Rule 804(b) and under Rule 803(24); and (2) as a constitutional condition of admissibility of any child hearsay in a criminal case in which the child does not testify (if the child does testify, no constitutional issue of confrontation arises).

As explained above, necessity ordinarily will require that the declarant's live testimony be unavailable at trial. A child's testimony might be unavailable for several reasons. As *Fearing* and *Gregory* show, the child's live testimony might be unavailable because the trial judge rules that the child is incompetent to testify.[63] Even if a trial judge finds the child competent, the child's testimony about a particular issue might become unavailable if he encounters problems in testifying, such as nervousness, loss of memory, or poor narrative ability.[64] An important question in child-victim cases is whether the risk that the ordeal of testifying will cause emotional trauma to the child qualifies as a statutory and constitutional basis of unavailability. North Carolina courts have not yet decided this issue, but courts in other states have ruled that adequate proof of such a risk makes a witness unavailable.[65]

In regard to the trustworthiness of child hearsay statements, it is important to consider a factor not mentioned by the courts in *Smith, Aguallo*, or *Gregory*—the child's capacity to relate facts accurately at the time he made the statement in question. This factor is particularly important when the prosecution argues that a child victim is unavailable because he is incompetent to testify. If the child is incompetent because the ordeal of appearing in court so intimidates him that he cannot testify, then his prior statement made in a less formal setting (such as a physician's office) might well be trustworthy. But if the child is incompetent because he cannot communicate or he cannot understand the importance of telling the truth, then his incompetence casts

63. *See also* Haggins v. Fort Pillow State Farm, 715 F.2d 1050, 1055 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984).

64. United States v. Iron Shell, 633 F.2d 77, 87 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

65. *See, e.g.*, People v. Rojas, 15 Cal. 3d 540, 125 Cal. Rptr. 357, 542 P.2d 229 (1975)(*en banc*); People v. Gomez, 26 Cal. App. 3d 225, 103 Cal. Rptr. 80 (1977); Warren v. United States, 436 A.2d 821 (D.C. Ct. App. 1981).

strong doubt on the trustworthiness of his earlier, out-of-court statement.[66] In addition, before a child's out-of-court statement is admitted as hearsay evidence, a trial judge should carefully examine the circumstances in which the statement was made to ensure that the person to whom the child made the statement did not unduly lead the child into making the statement. In anticipation of trial, social workers, physicians, and police officers who interview alleged child victims after an incident is reported to them should avoid excessive use of leading questions during interviews and should make detailed records of the questions asked and answers given.[67]

***In evaluating the trustworthiness of child hearsay statements, it is important to consider the child's capacity to relate facts accurately at the time he made the statement in question.***

In light of this discussion, child hearsay evidence about a particular factual issue is likely to be admissible under the following conditions when the child does not testify about the issue at trial:

—The child's testimony about the issue is unavailable because the trial judge determines that the child is incompetent or for other reasons;
—The trial judge determines that the evidence is trustworthy; and
—The evidence satisfies the criteria for a specific hearsay exception, such as the exceptions of Rules 803(2) or 803(4); or
—The trial judge finds that the evidence satisfies the six-part test for admission of hearsay under the residual exceptions of Rules 803(24) or 804(b)(5).

If, on the other hand, the child does testify about the issue at trial (and is, therefore, subject to cross-examination about both the issue and his out-of-court statement about the issue), then no confrontation clause problem arises.[68] Accordingly, hearsay testimony about the issue under specific Rule 803 exceptions should be admissible without any showing of necessity, as occurred in regard to the grandmother's testimony in *Smith*. Nevertheless, since necessity is a statutory condition of admissibility under Rule 803(24), the prosecution would have to establish the necessity of introducing such evidence in order to invoke that residual hearsay exception.[69]

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66. *See* Ellison v. Sachs, 769 F.2d 955 (4th Cir. 1985); Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979); State v. Ryan, 103 Wash.2d 165, 691 P.2d 197 (1984) (*en banc*); Widenhouse, *Child Hearsay: The Appellate Courts Speak*, 17 TRIAL BRIEFS No. 1, p. 20 (1986); Widenhouse, *The Victim Speaks No More: The Unwarranted Use of Rule 803(4)*, 16 TRIAL BRIEFS No. 1, p. 9 (1985).

67. In State v. Hannah, 316 N.C. 362, 341 S.E.2d 514 (1986), the court disagreed with the defendant's contention that leading questions asked during pretrial interviews with a child improperly influenced the child's subsequent trial testimony. The court found that no evidence showed improper use of leading questions during those interviews. Despite the outcome of the issue in *Hannah*, the controversy in that case highlights the importance for police, social workers, physicians, prosecutors, and others who might investigate reported child abuse of avoiding undue reliance on leading questions in pretrial interviews with child witnesses. It also points out the need for defense attorneys and trial judges to be attentive, during trial testimony by children and their adult interviewers, to the possibility of improper conduct by the interviewers.

68. California v. Green, 399 U.S. 149 (1970); *see also* State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76, 83 (1986) (Billings, J., dissenting in part).

69. Since the child's testimony about the issue is available in these circumstances, it is difficult to imagine how the proponent of the hearsay evidence could demonstrate that it is necessary to introduce the hearsay in addition to the child's live testimony, unless the child has difficulty recounting the incident for reasons such as poor memory or nervousness (though not so much difficulty as to render him incompetent to testify). Thus, as a practical matter, if the child testifies about an issue at trial, the residual exceptions usually cannot be used to introduce the child's hearsay statement about it as *substantive* evidence, though the statement might be admissible to *corroborate* the child's testimony. *See generally* State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986), regarding flexible North Carolina rules about the admissibility of hearsay evidence for the purpose of corroboration.

Legislatures in several other states have enacted special statutory exceptions to the prohibition against hearsay evidence to permit the introduction of pretrial hearsay statements by child victims. *See, e.g.*, COLO. REV. STAT. § 18-411(3) (1983); ILL. STAT. ANN. ch. 37, § 704-6(4)(c) (1986); KAN. STAT. ANN. § 60-460(dd) (1985). A difficult question of public policy in North Carolina is whether such a statutory exception is necessary or appropriate in view of judicial decisions such as *Smith*, *Aguallo*, and *Gregory* and the availability of the residual hearsay exceptions of Rules 803(24) and 804(b)(5).

## Presenting a child's account through videotaped pretrial interviews or depositions

The analysis used to examine the admissibility of a child's out-of-court statements to other people also applies to newly developed forms of hearsay evidence that rely on modern video technology: videotaped interviews of a child by a physician, social worker, or police officer, and videotaped pretrial depositions or other pretrial testimony of a child. In evaluating the admissibility of such videotapes, it is first important to understand that they are forms of hearsay evidence, since they are out-of-court statements made by a declarant that are used at trial to prove the truth of the statements. Accordingly, they must satisfy the criteria for at least one hearsay exception in order to be admitted as evidence. In addition, if the child does not testify, then the videotapes must also pass the two-pronged confrontation clause test of necessity and trustworthiness.

Neither the General Assembly nor the appellate courts of North Carolina have decided whether videotaped pretrial interviews of children are admissible at trial. Statutes in several other states authorize the introduction of videotaped interviews in trials involving child victims.[70] Such statutes have received mixed, though mostly favorable response from the courts in those states: the Louisiana Court of Appeals has upheld such a statute in one case,[71] and panels of the Texas Court of Appeals have upheld such a statute in four cases,[72] while other panels of the same court struck down the Texas statute as a violation of the confrontation clause in three cases.[73] The use of sophisticated video technology should not obscure the fact that statements made by a child during a videotaped interview are simply another form of hearsay statements by a child declarant. Essentially they are no different from hearsay statements to relatives that can be admissible under Rule 803(2) and 803(4) or hearsay statements to medical personnel that can be admissible under Rule 803(4).[74] They can indeed give a judge and jury a more thorough and faithful understanding of the contents and context of the child's statements during an interview, including verbatim contents of questions and answers, the tone of voice used by the child and the interviewer, and the demeanor of the child and the interviewer. A properly prepared videotape of a child's pretrial statements to another person should be admissible whenever the hearsay rules would permit that person to testify about those statements at trial. Use of videotaped interviews, however, also presents dangers of distortion through lighting, camera angles, editing, and rehearsal. Interviewers should take precautions to avoid such problems, and attorneys and judges should carefully examine videotapes to evaluate their accuracy and faithfulness to the truth before they are introduced as evidence at trial.[75]

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70. *See* statutes cited in note 45, *supra*.

71. State v. Feazell, 486 So.2d 327 (La. Ct. App.), *rev. and cert. denied*, 491 So.2d 20 (La. 1986).

72. Newman v. State, 700 S.W.2d 307 (Tex. Ct. App. 1985); Mallory v. State, 699 S.W.2d 946 (Tex. Ct. App. 1985); Tolbert v. State, 697 S.W.2d 795 (Tex. Ct. App. 1985); Alexander v. State, 692 S.W.2d 563 (Tex. Ct. App. 1985); Jolly v. State, 681 S.W.2d 689 (Tex. Ct. App. 1984).

73. Buckner v. State, 719 S.W.2d 644 (Tex. Ct. App. 1986); Romines v. State, 717 S.W.2d 745 (Tex. Ct. App. 1985); Long v. State, 694 S.W.2d 185 (Tex. Ct. App. 1985). The conflict among the panels of the Texas Court of Appeals has not yet been resolved.

74. *See* Stahl v. State, 497 N.E.2d 927 (Ind. Ct. App. 1986) (videotape of pretrial interview with alleged child sexual abuse victim characterized as a type of hearsay evidence).

75. *See, e.g.*, the following precautions required by Tex. Code Crim. Proc. art. 38.071(2) (Vernon 1987):

> Sec. 2 (a) The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:
> (1) no attorney for either party was present when the statement was made;
> (2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
> (3) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;
> (4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;
> (5) every voice on the recording is identified;
> (6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party;
> (7) the defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and
> (8) the child is available to testify.
> (b) If the electronic recording of the oral statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child.

A significant feature of all three statutes discussed *supra* note 45 is their provision that a child must be available for testimony at trial as a condition of admissibility of a videotape of a pretrial interview with the child. That requirement apparently is designed to avoid problems under the confrontation clause; it plainly limits the range of cases in which a videotaped interview can be used as evidence at trial.

The use of videotaped depositions in lieu of a witness's live testimony as trial evidence has sparked considerable judicial controversy. Although North Carolina courts have not yet addressed the use of such depositions of child witnesses in criminal cases, the Court of Appeals upheld the use of an adult witness's videotaped testimony in a criminal case in *State v. Jeffries*.[76] The defendant was charged with setting fire unlawfully to a building and with the murder of five people who died in the fire. When a prosecution arson expert was hospitalized with a serious heart condition before completion of his testimony and was advised by his physician not to return to court for at least two weeks, the trial judge decided to videotape the remainder of the expert's testimony in the hospital. The judge presided over the session, and the defendant, his attorney, an expert advisor to the attorney, and the prosecutor were present. The defense attorney conducted a thorough cross-examination of the witness. The Court of Appeals approved of the trial judge's solution to the problem. Categorizing use of the videotape as the use of former testimony, the court decided that the videotaped testimony complied with the confrontation clause, since the defendant was present, and his attorney was permitted to cross-examine the witness fully.

*The use of videotaped depositions in place of a witness's live testimony as trial evidence has sparked considerable judicial controversy.*

The court held that videotaped testimony is admissible in a criminal trial under the following conditions: (1) exceptional circumstances must necessitate the procedure; that is, the witness must be unavailable to testify in court; (2) the trial judge must supervise and control the taping session; (3) the defendant and his attorney must be allowed to attend; (4) the defense attorney must be given the opportunity to engage in thorough cross-examination; (5) precautions must be taken to prevent bias due to the location or condition of the witness; and (6) the videotape must be sufficiently clear to enable the jurors to observe the witness's demeanor. Although the Court of Appeals rendered its decision in *Jeffries* before the new rules of evidence became effective in 1984, the court's criteria for admission of videotaped testimony at trial remain applicable under Rule 804(b)(1), the newly codified hearsay exception for admission of former testimony as evidence at trial.[77]

The New Mexico Court of Appeals upheld the use of a videotaped deposition of a six-year-old child victim as a substitute for the child's trial testimony in *State v. Vigil*,[78] a criminal sexual abuse case. The prosecution introduced a videotape of the deposition at trial under a New Mexico statute and a rule of court that authorizes that practice upon a showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. The law further provides that the defendant has a right to be present during

76. 55 N.C. App. 269, 285 S.E.2d 307, *rev. denied and appeal dismissed*, 305 N.C. 398, 290 S.E.2d 367 (1982).

77. In Hutchins v. State, 286 So.2d 244 (Fla. Ct. App. 1973), the Florida Court of Appeals reached the same result regarding use at trial of the videotape of an adult witness. Note that N.C. GEN. STAT. § 8-74 authorizes the defendant in a criminal case to take the deposition of a witness who will be unavailable at trial and to introduce a transcript of the deposition testimony at trial. Although the statute is silent about the use of depositions by the prosecution, the North Carolina Court of Appeals in *Jeffries* implicitly decided that in certain circumstances, a trial judge has inherent authority to permit the prosecution to take and introduce at trial the pretrial deposition of a prosecution witness. The decision in *Jeffries* may be inconsistent with an earlier decision of the Court of Appeals in State v. Splawn, 23 N.C. App. 14, 208 S.E.2d 242, *rev. denied and appeal dismissed*, 286 N.C. 214, 209 S.E.2d 318 (1974), in which the court ruled that a defense attorney had the power to waive a defendant's right to confrontation by agreeing to the deposition of a prosecution witness and the use of the transcript of the deposition testimony at trial. The court's decision in *Splawn* suggests that a defendant's constitutional right to confrontation might include the right to veto the introduction of deposition testimony of a prosecution witness at trial if the witness is not available to testify.

78. 103 N.M. 583, 711 P.2d 28 (N.M. Ct. App. 1985). *See also* Turner v. State, 716 S.W.2d 569 (Tex. Ct. App. 1986) (upholding admission, pursuant to Texas statute, of videotaped testimony of seven-year-old alleged sexual assault victim, where defendant's attorney cross-examined child, and defendant viewed testimony on a monitor in an adjoining room); Commonwealth v. Willis, 715 S.W.2d 224 (Ky. 1986) (upholding statute permitting introduction of videotaped testimony of alleged child sexual abuse victims in lieu of live trial testimony by child).

the deposition and to cross-examine the child through an attorney. The statute establishes an express exception to the hearsay rule for use of the videotape at trial. In compliance with this procedure, the prosecution demonstrated the child's unavailability through a psychologist's testimony that the ordeal of appearing before a jury would endanger the child's health, while participating in a videotaped deposition would be less traumatic. Also, the defendant attended the deposition, and his attorney cross-examined the child. The Court of Appeals also concluded that use of the videotape satisfied the requirements of the confrontation clause because the primary interest secured by the clause is the right to test a witness's credibility through cross-examination, a right honored in this case.

Two cases in which courts disapproved of the use of videotaped depositions illustrate the potential legal pitfalls of the practice. In *United States v. Benfield*,[79] the defendant was charged with the federal crimes of concealing knowledge of a kidnapping and of acting as an accessory after the fact to kidnapping. The trial was delayed twice when the victim's psychiatrist advised the court that the ordeal of testifying in court would aggravate the emotional trauma caused by the kidnapping. Before the third scheduled trial date, the court granted the prosecution's request to conduct a videotaped deposition of the victim for use at trial in lieu of live trial testimony. Because of the victim's condition, elaborate precautions were taken to ensure that the victim was unaware of the defendant's presence in the building in which the deposition was taken. The defense attorney was present in the deposition room and cross-examined the victim, but the defendant watched the deposition on a television monitor through a one-way closed-circuit connection. To confer with his attorney during the deposition, the defendant used a buzzer to signal the attorney to interrupt the proceeding and leave the room to consult.

The United States Court of Appeals for the Eighth Circuit reversed the defendant's conviction, ruling that use of the deposition at trial violated the defendant's right under the federal confrontation clause to a face-to-face encounter with the witness. Adopting a position discussed above, the court interpreted the confrontation clause as entitling a criminal defendant to a face-to-face encounter with witnesses against him as well as to the opportunity to cross-examine those witnesses. The court also pointed out that the prosecution did not demonstrate that the witness's emotional condition required an alternative to live testimony at the time of the third scheduled trial date. Note that the court did not rule that introduction of a videotaped deposition in lieu of live trial testimony generally violates the confrontation clause. Rather, the court held that use of a videotaped deposition at trial violates the defendant's right to confrontation if the defendant is not permitted to attend the deposition. The court also suggested that a face-to-face confrontation through two-way closed-circuit television might be constitutionally adequate. In short, although the court in *Benfield* disapproved of the procedure used for the deposition in that case, it did not disapprove of the procedure used and approved in *Jeffries* and *Vigil*.

In *People v. Stritzinger*,[80] the California Supreme Court focused on another important aspect of the use of videotaped depositions at trial—proof of the witness's unavailability for live testimony at trial. The defendant was charged with sexual abuse of a 14-year-old child. On the sole basis of testimony by the child's mother about the child's emotional distress resulting from the alleged incident, the trial judge permitted the prosecution to invoke a statute that authorized use of a videotape of a child's preliminary hearing testimony instead of the child's live testimony when mental illness or infirmity causes the child to be unavailable for trial. The Supreme Court reversed, ruling that the mother's testimony was inadequate, that the prosecution must present expert testimony about the probable effect of a court appearance on the witness's health. The decision in *Stritzinger* highlights the importance of requiring the prosecution to present sufficient proof of a child's unavailability for trial testimony before permitting substitution of videotaped pretrial testimony for the child's live testimony at trial. *Stritzinger* is consistent with the criteria for establishing unavailability set forth and applied in *Jeffries* and *Vigil*.

79. 593 F.2d 815 (8th Cir. 1979).

80. 34 Cal. 3d 505, 194 Cal. Rptr. 431, 668 P.2d 738 (1983) (*en banc*).

## Conclusion

Courts and legislators in North Carolina and other jurisdictions have taken significant strides to accommodate the needs of the prosecution and of child victims in criminal trials through flexible interpretations of existing rules of evidence and creation of new rules of evidence. Some changes have made it easier for children to testify at trial. Others have permitted the prosecution to use alternatives to a child's live testimony at trial. It is important to remember, however, that reforms made with the best interests of child victims in mind must not violate the right of defendants to a fair trial. The most difficult legal question concerning such recent evidentiary changes is whether the scope of a defendant's constitutional right to confront the witnesses against him includes the right to a face-to-face encounter with prosecution witnesses as well as the right to cross-examine them. The answer to this question, which has not yet been determined by courts with jurisdiction over North Carolina, will help determine the extent of legally permissible accommodation of the needs of child victims.

Although significant legal questions about accommodations to the needs of child witnesses remain unanswered, investigators, attorneys, and judges who are involved in cases involving child victims can draw the following practical lessons from the discussion in this article. First, when interviewing a child who may be the victim of a crime, an investigator (such as a physician, social worker, or law enforcement officer) should phrase questions carefully to avoid excessive reliance on leading questions and, to the extent consistent with the child's emotional needs during the interview, should make a detailed, contemporaneous record (in writing or on videotape or audiotape) of the questions asked and answers given; the record should identify participants and witnesses of the interview. If the child's emotional needs make preparing a record during the interview inadvisable, an account should be written immediately after the interview to promote maximum accuracy. Investigators and prosecutors should work together to prepare a child for trial testimony by having the child visit the courtroom, by explaining trial procedures to the child as clearly as possible, and by stressing to the child the need to testify about the alleged incident exactly as he remembers it. Although investigators and prosecutors can review a child's anticipated testimony with him and try to clarify any inconsistencies among the child's pretrial statements, they should never coach a child to testify to a particular version of the incident.

At trial, the live testimony of a competent alleged child victim generally is the most effective way to relate the incident to the jury and trial judge. If the child is unavailable for any of the reasons discussed in this article, such alternatives as the use of hearsay testimony by other witnesses or videotaped pretrial interviews or depositions might be considered, using the precautions suggested above. If the child testifies at trial, prosecutors should avoid undue use of leading questions. In light of the potential conflicts between such accommodations and the rights of defendants to a fair trial, defense attorneys and trial judges should be attentive to the importance of scrutinizing such accommodations to determine whether they are necessary and whether they promote the introduction of evidence that can be tested adequately for reliability through cross-examination. GP

# Outpatient Commitment for the Mentally Ill

**Lynn E. Gunn**

## Introduction

In 1983 the North Carolina General Assembly enacted legislation to provide for outpatient commitment for mentally ill persons who are in need of treatment but are not dangerous to themselves or others. Sponsored by the North Carolina Mental Health Study Commission, this legislation was intended for those persons referred to as "revolving door" patients. The legislation incorporated alternative decisions and dispositions at various stages in the regular involuntary commitment procedures[1] for mentally ill patients who have histories of noncompliance with continuing outpatient treatment and medication.

Individuals with serious mental illness, particularly schizophrenia and bi-polar (manic depressive) disorders, often show symptoms of decompensation (deterioration) before they exhibit specific actions that meet the definitions of *dangerous*. For example, some patients change their eating, sleeping, and daytime patterns drastically as their bodies adjust to diminishing amounts of medication. The schizophrenic patient may start smoking constantly, may begin to talk with imagined voices and may pace incessantly during the night. When the deterioration reaches a specific level, this patient may strike out with knives at those closest to him, imagining them to be his worst enemies. The individual with a bi-polar disorder may begin to talk with grandiosity about his responsibilities and power, or he may begin to spend money he does not have. Again, these symptoms are often controlled by regular medication, but when the medication is suspended, the symptoms may recur and finally become exaggerated to the point of dangerousness. Under the previous law, family and friends had to wait until the patient either seriously threatened to commit or committed a dangerous act before they could seek treatment for him.

When a hospitalized patient's symptoms are controlled, he is released because he no longer exhibits dangerous behavior. These patients are usually released on the recommendation that they follow up with outpatient treatment and supervision of their medication. If the patient complies with such a recommendation, he can usually survive safely in the community. The noncomplying patient often deteriorates, and then the mental illness interferes with his willingness to volunteer for treatment. The patient who does not comply is likely to decompensate and ultimately will need to be rehospitalized.

The rehospitalizations under the previous law followed routine procedures for involuntary commitment:

—petition;
—probable cause by clerk or magistrate;
—examination and a local physician's determination that the person fit the criteria of mental illness and dangerousness to self or others;

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1. N.C. Gen. Stat. ch. 122C, art. 5, pt. 7.

—transport to a 24-hour facility;
—another physician's examination; and
—a hearing before a district court judge within 10 days with the respondent (patient) represented by an attorney.

Before 1983, the district court judge had authority to commit the patient to inpatient care, outpatient care, or a combination of both. Nevertheless, the same criteria had to be met. If the patient was committed to outpatient care, the commitment was for a period not to exceed 90 days. Provisions for continuation of outpatient commitment were not included. If the patient failed to comply, the only recourse was to rehospitalize him, and within 10 days another hearing had to be conducted. If at this hearing no evidence of dangerousness within the recent past was presented, the judge would have to release the patient again.

The 1983 legislation provides new criteria for outpatient commitment, different procedural protections, and specific directions for action by the supervising center, when the person committed as an outpatient fails to comply with court-ordered treatment. It also includes rehearing procedures so that the patient can be continued under the outpatient order as long as necessary.

Those advocating less stringent criteria for outpatient commitment contend that since outpatient commitment involves less infringement of individual rights than inpatient commitment, due process can be afforded with fewer requirements. The new outpatient commitment law is the first of its kind in the nation specifically to address chronic mental patients who at the time of commitment are not determined to be dangerous. Since its enactment, two other states have adopted similar statutes (Hawaii and Georgia).

## Procedures for outpatient commitment

Patients who are committed for *inpatient* care must still be determined to be mentally ill and dangerous to themselves or others. As a result of the 1983 legislation, a person can be committed for *outpatient* care if he is:

(1) mentally ill;
(2) capable of surviving safely in the community with available supervision from family, friends, or others;
(3) on the basis of his treatment history, in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness; and
(4) his current mental status or the nature of his illness limits or negates his ability to seek voluntarily or comply with recommended treatment.[2]

The law provides for the determination of outpatient commitment to be made at a variety of stages in the regular commitment proceeding. As in the past, anyone having knowledge of the mental condition and behavior of a person can petition a magistrate or clerk and thus seek a petition for commitment. If the magistrate or clerk finds reasonable grounds to believe the testimony (taken as an affidavit), he issues a custody order for a law enforcement officer to take the patient (respondent) into custody for an examination by a local physician or eligible psychologist.

On the basis of the examination, the respondent can either be referred to an inpatient facility because he is mentally ill *and* dangerous to himself or others or he can be released pending a hearing if he meets the new criteria for outpatient commitment. If the examiner determines that neither condition is met, the respondent must be released.

In cases when the respondent is transferred to an inpatient facility on the basis of the local examination, a physician at the inpatient facility will examine him a second time. This second examination can result in a finding under the new criteria for outpatient commitment, a finding for inpatient care, or a finding for release.

When either the first examination or the second examination establishes that the respondent meets the criteria for outpatient commitment, he is released to his home or to the home of another person who consents to take him. The respondent is given an appointment with the proposed outpatient treatment physician or center (usually the local area mental health center). He is also notified of the date of his district court hearing.

For respondents held at inpatient facilities pending their court hearing, the hearing proceedings

2. Paraphrased from N.C. Gen. Stat. § 122C-262(d).

confer all of the routine due process protections (e.g., provision of counsel, rights to cross-examination) because one of the alternatives for the court at this hearing is an inpatient commitment. The judge may, however, in what is referred to as an inpatient hearing, find by clear, cogent, and convincing evidence that the respondent meets the statutory outpatient criteria and order outpatient commitment. The judge also has the option of ordering a combination commitment of some days of inpatient care to be followed by a period of outpatient commitment. The total commitment period, however, may not exceed 90 days.

The initial hearing for a respondent whose examination results in a recommendation of outpatient commitment does not provide for automatic appointment of counsel. The judge may appoint counsel if he determines that legal or factual issues are so complex that the assistance of counsel is necessary for an adequate presentation of the merits, or if the respondent is unable to speak for himself. Neither the person signing the petition nor the physician nor the psychologist who conducts the examination is automatically required to be present at an outpatient commitment hearing, although they may be subpoenaed to appear if their testimony is needed. The respondent must be present at the hearing. Because fewer due process protections are afforded in these hearings, the judge may not order an inpatient commitment. (If the respondent appears to need inpatient care, the judge may order another examination, and a new petition for inpatient care must be issued.) The judge must either find by clear, cogent, and convincing evidence that the respondent meets the criteria for outpatient commitment and so order, or release the respondent.

The outpatient commitment order (whether issued at an initial hearing or rehearing, in the community or after an inpatient stay) does not direct specific treatment to be provided. Rather, the order is for the respondent to be under care, supervision, and treatment in a specified center (or by a private physician). Initial outpatient commitments are for a period not to exceed 90 days; after rehearings, for periods not to exceed 180 days.

Treatment, as defined in the statute, includes medication, individual or group therapy, day programs, and supervision of living arrangements. The statute specifically prohibits physically forcing medication or the forcible detention of the respondent in an outpatient commitment. The center must make reasonable (and documented) efforts to solicit compliance of non-cooperative patients. If necessary, the center can request that a law enforcement officer take the respondent into custody and bring him to the center for examination. During this visit, the center staff can again try to gain compliance. If, however, the patient has deteriorated to the point of becoming dangerous, the center can initiate a petition for inpatient commitment. Alternatively, if the patient refuses to cooperate, but has not become dangerous, the center may notify the court and request the respondent's release from the court order.

## Intent of the legislation

Limitations on forced detention and treatment and prohibition against punishment for respondents who refuse to cooperate with the treatment plan have prompted critics to argue that the law does not provide the "teeth" necessary to make it work. Nevertheless, experience indicates that the law is effective for the majority of respondents for whom it was designed. As mentioned above, the Mental Health Study Commission had proposed an expanded use of outpatient commitment to respond to the problems of "revolving door" mental patients.

The Commission's study indicated that a large number (estimated to be 1,200 per year) of chronically mentally ill persons (particularly schizophrenics and affective disordered patients) had one or more readmissions to one of the four regional psychiatric hospitals in a given year. Patients hospitalized after commitment on the grounds of being mentally ill and dangerous to themselves or others, would become easily stabilized with medication and by the structured hospital setting. Often the treatment and supervision alone would control the symptoms of the disease or the dangerous behavior, and thus the patient would be released from the commitment.

In spite of recommendations for follow-up with the local mental health center, the released patients would often fail to comply. The Commission heard testimony suggesting a variety of reasons for this lack of compliance. Some patients lacked transportation, others lacked financial resources to pay for prescribed medication. Some patients did not understand that their medication was controlling

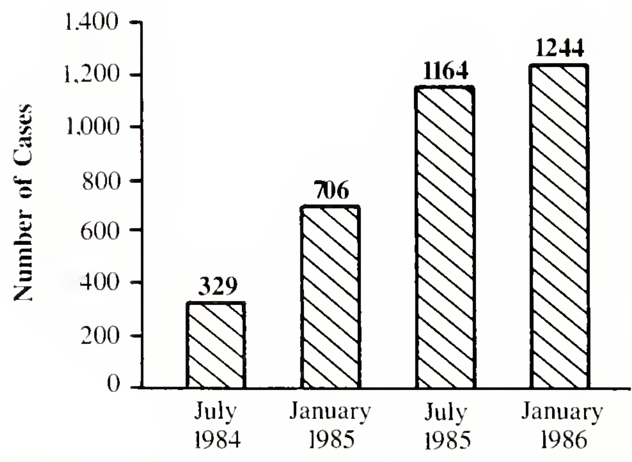
their symptoms, and they would discontinue the medication. Others, usually those without family or other supports, would appear to lose motivation to feel well or to do well once released. Some patients would comply with recommendations for outpatient care for a time and then gradually stop visiting the center. Few were described as *refusing* to cooperate or to comply with recommended treatment.

The Commission's study also noted that confidentiality requirements would only allow a center to be informed of a patient's hospital discharge if the patient agreed to such information being shared. Also, centers often do little to reach out or seek compliance if a patient fails to appear for a scheduled appointment. The centers' reluctance to seek compliance aggressively may result from insufficient resources or from the philosophical belief that patients need "to want to cooperate." Thus the rationale developed that an outpatient commitment order, with specific obligations for the supervising outpatient center, would capture the majority of those "revolving-door" patients who "fail" to comply as compared with those who "refuse" to comply. The General Assembly, in separate legislation, appropriated funds to be allocated on a subsidy basis (now $2,173 per year per respondent) to the mental health centers to defray some of the costs of outpatient commitment supervision.

## How the law is working

So far, it appears that the law's implementation has been uneven across the state. The data available for analysis are based on centers' reimbursement claims for their supervision of respondents. Thus it is possible that outpatient commitments are in fact occuring more evenly than they appear. Court data have proved to be unreliable in assessing outpatient commitments, however, because the courts' system of record keeping is keyed to individual proceedings, rather than to the individual himself, causing problems matching data between the courts and the centers. Reimbursement requests have also been reported erratically because some centers may wait several months to "batch" requests. These limitations aside, it is noteworthy that as of December 1985, nine of the 41 area programs were claiming reimbursements at a rate of less than 10 per 100,000 population. On the other end of the scale, eight area programs claimed reimbursements at a rate of more than 50 per 100,000, with the highest request rate at 89.87 per 100,000.[3]

**Chart 1**
**Number of Active Cases Reported for Reimbursement**




Statewide, the use of the statute seems to have increased gradually during the first four six-month periods (January 1984 through January 1986). Chart 1 shows the number of active cases reported for reimbursement during the first two years of implementation. An "active" case is one for which reimbursement has been claimed but has not been terminated.

Although data are not available on specific activities involved in provision of services for "active cases," one can assume that a person is maintained on an outpatient commitment order as long as he benefits from treatment and continues to meet the criteria for outpatient commitment. Terminations, on the other hand, can occur under one of four conditions:

(1) the respondent does not meet criteria because he lacks the history, is well, or will voluntarily comply;
(2) the respondent absolutely refuses to comply;
(3) the respondent moves out of the area; or
(4) the respondent becomes so ill that he needs to be hospitalized.

3. The author expresses appreciation to Dr. Gus Fernandez, Program Evaluator, Division of Mental Health, Mental Retardation and Substance Abuse Services, for this data.

While specific reasons for the terminations are not known on a statewide scale, of the 1,673 individuals committed to outpatient care during the first two years of the statute, only 493 (26 per cent) have been terminated. Of these terminations, 335 occurred at 90 days or fewer. Local case managers who supervise outpatient commitment care indicate that the cause of the majority of these "early" terminations was that commitment criteria were not met initially; either the patient did not have the history to indicate a required court order, or the patient was released too early from the hospital and had to be rehospitalized within a few weeks of the initial order. (Because hospital staff often make the original recommendation to the judge, these problems can be addressed by the local area case managers and the hospital staff communicating more regularly about appropriateness of specific clients for outpatient commitment.) Very few (estimated to be less than 5 per cent) initially committed patients need to be terminated because they refuse to cooperate.[4]

Additional anecdotal accounts from area directors show wide differences in centers' responses to the statute. In some places, the Area Authority Board and the Director have made a strong philosophical commitment to make the law work and to provide management leadership and support to line staff. Staff have worked closely with the law enforcement community and the judicial authorities to ensure uniform understanding and workability. Staff have been designated as "outpatient commitment case managers" in roles separate from the "therapist" role, so that the pressure for the respondent's compliance is not confused with treatment. Many times the case manager provides supervision and assistance for the clients that go beyond the compliance issue. For example, some case managers assist clients in obtaining disability determination, food stamps, housing, and employment.

Some centers use nurses as case managers, and the nurses make home visits when patients fail to comply. In these cases, the client can often be more easily convinced in his home to take medication or to agree to a prolixin (a psychotropic medication that affects symptoms of schizophrenia) injection. Part of the outpatient commitment legislation includes changes in the confidentiality laws to allow a freer exchange of information, regardless of patient permission, so that the centers that use strong case managers also form stronger relationships with family members.

When a patient appears to be deteriorating, the family can contact the case manager who will often visit the client and his family for an immediate intervention before the situation gets out of hand. Even though some have argued that the law does not have enough "teeth," experience indicates that most clients respect the law, and they take the court order seriously. One patient, an elderly woman who had been diagnosed as schizophrenic, had been under an outpatient commitment order under the previous law, when an outpatient order was limited to one 90-day period. The patient followed a predictable cycle. Once her time period under an order was completed, she would tell her therapist that she no longer needed to come to the center. Her family was also unable to convince her to go. She would stop taking her medication, and within two to three months she would be carrying a rifle in her neighborhood, threatening to kill the next person who told her what to do. A petition would be taken out; she would be committed to inpatient care; she would remain at the hospital until stabilized (two to three weeks); and she would be released again on an outpatient commitment order. Under the provisions of the new outpatient commitment law, however, this woman has had several rehearings, and because the judge tells her she "has to comply," she has done so; she has not been rehospitalized since January 1984.

In one rural county, a patient was well known to the community because no matter who told him he needed help, he would not get help on his own. A diagnosed schizophrenic in his early twenties, this man had been hospitalized on involuntary commitments seven times in two years. After having been put on an outpatient commitment order under the new law, he failed to arrive at the center for his scheduled appointment. He also failed to attend group sessions or to attend the community support day program to which he was referred. Each time

4. The author formed these conclusions after reviewing the raw data collected (and as yet unpublished) by a graduate student. The original data consisted of a questionnaire completed by case managers on approximately 150 individuals who were terminated from their original outpatient court order prior to or at the end of the first 90-day commitment period.

he missed his individual appointment (where his medication was provided through injection), the center would request a custody order from the clerk, and the sheriff would pick up the client and bring him to the center. Once at the center, there was little difficulty in getting him to agree to receive his injection; he would explain that he had either forgotten the appointment, or that he had no transportation. After this happened five or six times, the sheriff suggested that the center let his office know when the patient's next appointment was scheduled. The sheriff volunteered to pick up the client and bring him in for his appointment. The client still does not participate in other treatments, but as long as he is checked regularly and receives his medication, he is not dangerous and not offensive to the community. The sheriff has saved several 200-mile roundtrips to the regional psychiatric hospital over the last 18 months by making biweekly four-mile roundtrips between the client's home and the center.

Numerous other examples could be discussed, but their significance is that the law does seem to be working for a number of patients who otherwise would be revolving in and out of the regional psychiatric hospitals. No one expects all patients who have chronic mental illness to remain under an outpatient commitment order for the rest of their lives. Ideally, centers will release a patient from the order after the patient learns that his well-being is dependent on continuing care and when the patient is willing to continue treatment voluntarily. Nevertheless, the premise that failure to comply with recommended outpatient follow-up care is caused by factors other than patients' refusal seems justified. Not only do the patients take the court order seriously, but in many areas, the centers also take the new law seriously.

Although some data reporting is required under the law, the reliability of the routine reporting from the courts is still questionable. The data collected from the centers on their reimbursement reports assists in the management of the fiscal payments, but is limited in its scope. There are not sufficient data collected, nor enough evaluative resources available to assess the details of what works and what does not work statewide.[5] In the meantime, judgment on the overall effectiveness of the law must rest largely on the numerous anecdotal accounts of individual patient success. PG

5. The National Institute of Mental Health has provided a grant to Dr. Virginia Hiday (N.C. State University) to study the outcome of committed respondents, and her research should be published soon.

# Meeting the Needs of Latchkey Children: *A Community Effort*

Janice Stroud

"Latchkey" children, children who regularly care for themselves after school until a parent returns home from work, have been the focus of much news-media attention. Many people see the latchkey-child phenomenon as indicative of changes in traditional family patterns. From the perspective of the increasing numbers of two-income families and single parents who work outside the home, arranging adequate care for school-age children poses a frustrating dilemma. In many communities few attractive and affordable care options exist for out-of-school hours. Although the possible consequences of self-care are frequently debated, most people seem to agree that more options for supervised care are desirable. Programs providing school-age child care are expanding rapidly to meet this need.

The Council for Children of Mecklenburg County, a United Way local child advocacy agency, led the response to the latchkey problem in the Charlotte area with their School-Age Child Care Project. The Council works to meet the needs of children and youth in the community through four main strategies:

(1) studying children's needs and services;
(2) informing the community about these needs and about policy issues affecting children;
(3) advocating the expansion of resources available to children and the implementation of new or improved services fostering children's growth and development; and
(4) representing individual children.

The first three strategies were brought to bear in the School-Age Child Care Project. The project goal is to increase high quality, affordable school-age child care in Mecklenburg County by stimulating development of diverse model programs, using existing community resources. This two-year project began in July 1985 and is scheduled to conclude in June 1987; however, formal implementation was preceded by two years of preparation. This article details the project's development from inception to the present (almost mid-way through the final year). Other communities may find this model useful, in whole or in part, in developing their own responses to the needs of latchkey children.

## *Phase One:* Study and Planning

The Council's involvement in the latchkey issue began in early summer of 1983 in response to a request from the local child care coordinating agency, Child Care Resources, Inc. (CCRI). CCRI was receiving increasing requests from parents for help in identifying various types of available care for school age children. CCRI asked the Council to address the problem by increasing the visibility of the latchkey phenomenon and by laying the groundwork for a community solution. The Council's initial response was to convene a seven-member task force. This group decided that a local study of the

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latchkey problem would provide the best foundation for community action.

The United Way agreed to fund the study, which consultants with expertise in early childhood education from the University of North Carolina at Charlotte designed and conducted. Study aims included:

- to assess the needs of children aged 5-14 for care during the out-of-school hours;
- to describe the resources currently available;
- to describe barriers to use of current resources and identify gaps in services; and
- to compare service providers' and parents' views of issues in care for school-age children.

The major part of the study was the needs assessment, conducted with the cooperation of the Charlotte-Mecklenburg schools. Parents of a representative sample of students in grades K-9 were surveyed. Eighty-five classrooms with over 2,000 students participated in the study. The consultants trained teachers in procedures for dissemination and return of the three-page parent questionnaires. Children who returned their surveys within one week received small rewards. These efforts resulted in a gratifying parent response rate of 78 per cent.

The survey confirmed that many Mecklenburg children were without adult supervision after school. Twenty per cent of the parents reported that their children cared for themselves for at least part of the after-school hours. An additional 13 per cent of the children were in the care of a brother or sister. Parents cited child care expense as the primary reason for self-care arrangements. Summer programs and after-school care programs were the options most frequently preferred to current arrangements. Barriers to available services included cost, transportation, and children's lack of interest.

After analyzing parents' responses to the questionnaire, the Council convened an action-planning conference, where results of the needs assessment study and reports on model programs in other communities were presented. Representatives from agencies, schools, churches, employers, child care providers, community organizations, concerned parents, and other citizens met at the conference to consider the needs of school-agers, problems, and gaps in services, and to develop plans for addressing these needs. This conference was held April 30, 1984, approximately 11 months after CCRI's request that the Council address the latchkey problem.

The conference focused on developing recommendations and identifying the agency or group to spearhead each proposed change. An important goal was to build coalitions to promote policies and programs for the benefit of latchkey children and their families. Many of the recommendations focused on the public schools as a key element in providing transportation, space, and programs, either school-run or in partnership with other agencies. The Council and CCRI were most often named as lead agencies for implementation of the recommendations.

The Council's Board of Directors appointed a Latchkey Task Force to implement the conference's proposals. The Task Force met during the summer and fall to define its focus and garner support from such key community leaders as the Mayor, the Chairman of the Board of Education, and the Superintendent of Schools. Fortuitously, a team of school and county officials had also drafted a proposal for a community response to the latchkey problem, suggesting the Council as the lead agency.

After six months of study and planning, the Task Force proposed that the Council develop a formal project designed to stimulate more care options for school-age children. The Council again consulted school and county officials and incorporated their suggestions into a proposal to plan a School-Age Child Care (SACC) Project. The proposal was endorsed by the Board of Education, the Superintendent of Schools, and the United Way. One month later, in November 1984, the Board of County Commissioners agreed to fund the SACC Planning Project.

The consultants who had conducted the latchkey study were retained to design the SACC Project and to help seek funding. Over the following eight months, the consultants designed a demonstration project; developed a staff training package, consisting of a training manual and coordinated videotape;[1] wrote grant applications; and asked

1. The SACC Training Package is available from the Council for Children, 229 South Brevard Street, Suite 202, Charlotte, North Carolina 28202.

community agencies to participate in the Project by offering new or expanded after-school child care programs.

The project design responded to several needs identified in the planning conference: to increase the supply of high quality after school child care programs, to develop a diverse range of programs to meet diverse family needs, to keep programs affordable and accessible, and to make maximum use of existing community resources. As coordinating agency of the demonstration project, the Council would provide seed money for start-up costs to the model programs, establish and staff a SACC coordinating committee of program directors, provide a training package to each program, develop a list of training opportunities for SACC staff, inform and educate the public about the project, and monitor and evaluate the project. Programs participating in the project would be directly administered by their sponsoring agencies.

Funding for the project was obtained in summer 1984 from the North Carolina Children's Trust Fund, established by the General Assembly in 1983 to fund local prevention programs for abuse and neglect of children; WBT Penny Pitch, a local children's charity; and the State of North Carolina through a bill introduced in the legislature by Representative Ruth Easterling. Lieutenant Governor Bob Jordan was also interested in the issue and supported the bill to fund a two-year demonstration project. Also during the summer, the consultants negotiated with public agencies and private providers to recruit four participants who would offer different program models. The final list of care options included: school-run (extended day) programs, public-private partnership (YMCA) offering programs in public schools, leisure center programs (city Park and Recreation), and private provider programs (in this case, a family day-care home network). Programs were to open on the first day of school, September 3, 1985.

A last-minute development changed the mix of model programs. In the August school board meeting, the Superintendent proposed, and the Board endorsed, a plan to open extended day programs in 12 schools. Schools would administer their own programs instead of working in partnership with a private agency. As a result, the YMCA withdrew from the project.

## *Phase Two:* Start-Up

### Staffing

The Council hired a half-time project coordinator at the end of August. (Hiring had been delayed by a delay in receipt of funds.) In addition, in the three weeks between the School Board's action and the opening of school, the Board appointed a full-time coordinator for the After School Enrichment Program (ASEP). Working with CCRI to gauge demand, the ASEP coordinator chose 12 elementary schools for program sites and began hiring staff—certified teachers and aides who were not already employed by the school system. The Park and Recreation programs, planned for six recreation centers, would operate with existing staff. The director of the family day care home network (FDC) began outreach to recruit home-based providers of after-school care.

### Model programs

**School-run.** Apart from start-up funds provided by the Council, the ASEP was required to be self supporting. Each site required a minimum of 25 children to open. Fees were set at $20 weekly.

By mid-September, programs were operating in 9 of the 12 planned school sites. Children from 16 additional schools could use school transportation to program sites located on their school bus routes. Total program enrollment reached 435 by mid-September; average site enrollment was 35. Total enrollment grew to 500, and one more school site was added. Clearly, working parents were eager to use the school-run ASEP.

**Leisure center.** Enrollment in recreation centers began in late September and grew slowly. Free programs were offered at five of the six planned centers. Enrollment reached capacity in only two centers; one of these centers was at the site of a school bus stop, and the other was adjacent to a large apartment complex. Two of the programs served fewer than 10 children each. Total enrollment eventually reached 70. Three factors may have inhibited enrollment in these no-fee programs: lack of transportation, lack of publicity, and a traditional pattern of drop-in usage. Parents who wanted well-supervised programs may not have trusted city recreation centers to provide continuous supervi-

sion. Other parents may have been content to have their children continue drop-in use of the centers.

**Family day care (FDC) home network.** FDC recruitment efforts soon uncovered an overlooked barrier. Both state and county regulations for day care homes allow a maximum of five preschool children to be cared for in one home. State regulations had recently been amended to allow three additional school-age children to be cared for after school, but county regulations had not been changed. Home-care providers could not afford to fill any of their five full-day slots with school-agers needing only part-time care. The Council requested that county regulations be made consistent with the state's. Until county regulations changed in December, school-age children could not be placed in homes by FDC. FDC was eventually able to place only three school-age children with family day-care providers. Parents who called CCRI's Information and Referral service were not referred to FDC homes (see below). Other parents may have preferred to make informal arrangements for neighbors to care for their school-age children rather than contacting a network of registered homes.

### Unmet goals for start-up

**Publicity.** Ideally, the project would have begun with a blitz of publicity before or during the first week of school to bring the new options for latchkey children to the public's attention. Delays in completing arrangements and hiring the project coordinator resulted in a delay in developing publicity. Publicity was much less critical for the schools, which routinely send announcements home with children, than it was for the other two model programs.

**Training.** The project's training package, designed to provide diverse agency staff with a common factual and philosophical basis for program development, was not complete and could not be offered to programs at the outset. Editing and overseeing production of the training package was a major task for the coordinator during the project's first year.

## *Phase Three:* Continuation

### Recruiting a fourth model program

After the coordinating committee of program directors was established, the project coordinator invited directors of other non-profit SACC programs to attend committee meetings to share information and help solve common problems. The director of a YMCA program located in a low-income neighborhood regularly attended these meetings. Fees of $23 per week had kept neighborhood children from participating in the Y program. When the project coordinator learned of the availability of expansion grants from the state-funded Community Based Alternatives (CBA) program, she encouraged the Y to apply for funds for a preventive program for children from the high-risk neighborhood. The Council agreed to share costs with CBA. The Y's proposal was rejected by CBA; the Council then decided to fund the program. For the four months remaining in the school year, 40 low-income children attended the Y's after-school program. No fees were charged, and transportation to and from the program was provided.

### Using community resources

The project coordinator encountered both successes and barriers in attempting to make full use of existing community resources. A major success was the location of programs in existing school and park facilities. Community agencies cooperated to provide training for program staff: CCRI, Central Piedmont Community College, The University of North Carolina at Charlotte, *The Charlotte Observer*, the Girl Scouts, and others contributed to training. Each project participant opened in-service training sessions to other participants. CCRI worked with the ASEP to obtain day-care licensing so that children from low-income families whose care is purchased with public funds could be placed in school programs. Eventually 35 low-income children were able to attend ASEP through CCRI's purchase-of-care.

CCRI provided valuable training assistance to the schools and to the project. But serious concerns limited the agency's participation. Although SACC was a time-limited demonstration project, CCRI believed that the Council would establish another child care coordinating agency. CCRI refused to participate on the committee appointed to oversee the project. The agency also believed that the family day care home network duplicated its services. CCRI's Information and Referral Service refused to make referrals to homes in the network, perhaps

contributing to parents' neglect of the family day care home model.

The biggest disappointment came late in the school year. Park and Recreation's model programs had not yet received any project funds because the City of Charlotte had not entered into a contract with the Council. In April, city management ruled that Park and Recreation could not join the project and accept funds. Management determined that a daily, structured after-school program would constitute child care, a county rather than a city responsibility. (A long-standing agreement in Charlotte-Mecklenburg assigns social or human services to the county exclusively.) Park and Recreation could continue to offer their traditional drop-in recreation programs to school-age children, but could not offer a daily, nine-month-long recreation program requiring parents to enroll their children and staff to be accountable for them. Although Council board members, the project coordinator, and the director of Park and Recreation met with city management, the decision that Park and Recreation should remain limited to traditional services was not modified.

Even though their efforts had been blocked, Park and Recreation's management were committed to after-school care for latchkey children. They were receptive to entering into a partnership with the YMCA for 1986-87, whereby the Y would provide after-school programs in city recreation centers. City management had no objection to this arrangement.

## Evaluation

The project coordinator evaluated the model programs between April and June 1986, reviewing enrollment records, visiting program sites, and surveying parents through questionnaires and telephone interviews. The parents' response rate to the questionnaires was very low (20 per cent), but no parent refused a telephone interview. Detailed evaluation results for the largest model program, the schools' ASEP, are presented below.

Parents used the ASEP mainly for younger children: 43 per cent of the children were in grades K-1, one-third in grades 2-3, and only one-fourth in grades 4-6. Boys and girls attended the program in approximately equal numbers. Parents of ASEP children were an affluent group. Four out of five families had annual incomes of more than $20,000. The incomes of two families in five were over $35,000. Single mothers accounted for 40 per cent of the parents, and lower income was much more common in this group: two-thirds of the single mothers earned less than $20,000. In contrast, two-thirds of two-parent families earned more than $35,000.

Parents were highly satisfied with the ASEP. Their children enjoyed the program's age-appropriate activities, and parents appreciated the program's convenience, help with homework, high quality staff, and special enrichment activities such as gymnastics and Scouts.

The evaluation confirmed that different programs served different types of children and families. Children attending recreation center programs were older, predominantly male, and from less affluent families. The YMCA served the poorest children, many of whom had been recommended by the principal of the neighborhood school as being most in need of after-school care.

Staff turnover was high in all programs; this is consistent with other kinds of day care. Periodic in-service training emerged as a critical need, both to orient the stream of new employees and to build skills and understanding of school-age child development. Programs differed greatly in the priority they gave to training, with schools the most committed and recreation programs the least.

Perhaps the greatest need the evaluation revealed is for financial aid to allow more lower-income families to benefit from high quality after-school programs like the ASEP. Another need is for programs to appeal to older school-age or middle school children. Care is still needed before school, for school holidays, for teacher work-days, and during summers.

The SACC project's experience in its first year suggests that public schools are the most viable sites for after-school programs. School sponsorship may be equally important. Parents trust the schools and respect the abilities of the accredited lead teachers employed by the Charlotte-Mecklenburg ASEP. The project remains committed to diversity in programs, but the numbers of children served in both the first and second years of the project suggest that most parents prefer school-based programs.

*(continued on page 60)*

# Federal and State Programs to Control Signs and Outdoor Advertising

Richard D. Ducker

*I think that I shall never see*
*A billboard lovely as a tree*
*Indeed, unless the billboards fall*
*I'll never see a tree at all.*

**Ogden Nash**
as quoted in
*Metromedia, Inc. v. City of San Diego*
23 Cal.3d 762, 154 Cal. Rptr. 212, 232 (1979)

*Ogden Nash was a poet*
*Who desired a sage to be*
*He chose trees over billboards*
*As to what he would like to see*
*Ogden Nash may have never seen*
*A billboard he held dear*
*But neither did he ever see*
*A tree grossing 20 grand a year.*

**David Flint, Counsel, Turner Advertising Company**
as quoted in
Naegele Advertising Company Public Information Packet

The lines above highlight the differences in values between two groups, those interested in environmental aesthetics and those interested in the promotion of outdoor advertising. For years these two groups have clashed over the public regulation of signs and outdoor advertising. Each group has established a hierarchy of political support in government. The sign and billboard industry has successfully influenced outdoor advertising legislation in Congress and in most state legislatures. Nevertheless, urban units of local government have increasingly become emboldened to adopt far-reaching sign controls. One result has been a classic confrontation between federal control and local autonomy, an example of the peculiarities of federalism and the law of pre-emption.

At the heart of the controversy is the federal outdoor advertising legislation adopted in 1965 as the Highway Beautification Act,[1] which required all states to adopt and enforce a federally approved program providing for "effective control" of outdoor advertising along interstate and Federal-Aid Primary Highways in order to receive a full allocation of federal highway aid. Critics of the federal legislation and the state outdoor advertising control programs that implement it claim that at best these efforts are relatively ineffective and at worst amount to outrageous examples of how a regulated industry has turned a program to enhance roadside appearance to its own advantage. Last fall, reformers in Congress narrowly failed in an attempt to make fundamental changes in the federal program that would have allowed the states to exercise greater autonomy. Changes in North Carolina's Outdoor Advertising Control Act (OACA) were also considered last fall. The Legislative Research Commission proposed various amendments to the Act; these are outlined in the Commission's report to the 1987 session of the General Assembly.

This article will outline the features of the federal and state outdoor advertising control programs, review their results, consider some of the proposals for change, and evaluate the effect of the programs on local government.

## History of regulation of outdoor advertising

The rise of outdoor advertising dates from the post-World War I period, when substantial numbers of Americans first began to travel by automobile. Advertisers quickly realized the potential for reaching travelers with roadside messages. Signs of all descriptions began to appear along country roads and town streets, particularly "off-premises" signs (those designed to advertise products or services provided elsewhere). Many of these early signs were owned by the advertiser, who would negotiate an agreement with the landowner to erect the sign on his property. In time, however, another arrangement became more popular. An outdoor advertising company would lease land from a property owner, erect a sign structure, and then lease the structure for the display of a poster panel or painted bulletin advertising a client's product or message. The term "billboard" derives from the poster panel, since it was designed for posting paper "bills." (The term, however, is often applied to painted metal "bulletins" also, and when I use the term in this article, I will be referring to both.)

The growing clutter and proliferation of these signs caused a reaction from those concerned about the appearance of urban and rural areas as well as about the effect of the distracting influence of the signs upon road safety. A number of cities (including some North Carolina cities) adopted regulations governing the location, construction, and size of signs and billboards. These sign regulations typically were adopted as a part of a comprehensive zoning ordinance that applied to residential, commercial, industrial, and rural districts and generally governed on-premises as well as off-premises signs. Today, sign regulations in city and county zoning ordinances and special-purpose sign ordinances (adopted under a city or county's general ordinance-making power) still constitute the most restrictive and geographically comprehensive sign control system.

## Federal legislation and state response

The first major federal outdoor advertising control program came just after the 1956 advent of the national system of interstate and defense highways ("interstate" system). In 1958 the so-called "bonus program" was established.[2] A state that was willing to sign an agreement with the United States Secretary of Commerce to control signs located along the portions of the interstate system within its boundaries would receive a "bonus" or additional financial aid in an amount equal to one-half of 1 per cent of its interstate construction fund allocation. Twenty-five states passed appropriate im-

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1. Pub. L. 89-285, 79 Stat. 1028, Oct. 22, 1965 [codified as 23 U.S.C. § 131 (1966) (also known as the "Lady Bird" Bill because of the First Lady's sponsorship)].

2. Federal Aid Highway Act of 1958, Pub. L. 85-767, § 131, 72 Stat. 906 (1958).

plementing legislation and entered into bonus agreements in timely fashion. (North Carolina was one of the states that did not.) The program is still in effect today.

One day after President Lyndon Johnson sponsored a White House Conference on Natural Beauty in May, 1965, administration-sponsored highway beautification legislation was introduced in both the United States Senate and House of Representatives. The legislation that was adopted that fall, known as the Highway Beautification Act of 1965,[3] remains the basis for the current federal program. The Act required all states to establish a program for "effective control" of outdoor advertising located within 660 feet of the right-of-way lines of interstate and Federal-Aid Primary Highways. (The Federal-Aid Primary system includes most U.S.-numbered highways, the major state-numbered highways, and a few secondary roads.) A 1975 amendment made the law also applicable to signs located beyond 660 feet, if they were visible and were intended to be seen from the main traveled way. The 1965 legislation excepted on-premises advertising signs (including for-sale and for-lease signs) and directional and official signs and notices (including signs pertaining to scenic and historical attractions). The major thrust of the legislation, however, provided that a state was to prohibit all off-premises advertising signs except those (a) within areas zoned industrial or commercial (by local government) or (b) within areas not zoned, but used predominantly for industrial or commercial activities, as determined by each state to be consistent with customary use. If a state failed to comply with federal requirements, the United States Secretary of Transportation was directed to withhold from the state an amount equal to 10 per cent of the state's federal highway aid apportionment.

"Effective control" was also to include provision for the removal of signs made nonconforming by state outdoor advertising control legislation. In contrast to the 1958 legislation, the Highway Beautification Act required that "just compensation" be provided when nonconforming signs were removed. To make the compulsory compensation requirement more palatable to states, the Act also provided that the federal government would pay for 75 per cent of the compensation costs; each state was responsible for the remaining 25 per cent.

The Highway Beautification Act has always provided that state and local governments were free to set higher (stricter) standards for new signs within the federally regulated corridor than those required under the Federal Highway Beautification Program. A 1978 amendment to the Act, however, made it clear that states may not allow local governments to remove an existing nonconforming outdoor advertising sign within the federally regulated corridor by using their zoning or other police-power authority.

According to the terms of the Federal Highway Beautification Program, the various states were to incorporate the various features outlined above into appropriate state implementing legislation. In the summer of 1967 the North Carolina General Assembly adopted the Outdoor Advertising Control Act.[4] But the General Assembly provided that the Act would not become effective until the United States Department of Transportation approved North Carolina's regulatory standards, and federal funds were made available to North Carolina to purchase nonconforming signs and otherwise carry out the program. North Carolina's Outdoor Advertising Control Act did not become effective until October 15, 1972. The Act delegated rule-making and permit-granting authority to the State Highway Commission. Later amendments transferred these powers to the Department of Transportation.

A dual system of sign regulation, one based on local zoning, the other based on North Carolina Department of Transportation (NCDOT) regulations, now applies within some corridors along Federal-Aid Primary and Interstate Highways, as described below. In smaller towns, those corridors accommodate most of the larger and more expensive commercial advertising signs as well as a substantial portion of all advertising signs. In Raleigh, a larger city, 40 per cent of the city's 291 billboards lie within these corridors.[5]

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3. 23 U.S.C. § 131 (1966).

4. N.C. GEN. STAT. § 136-126 *et seq.* (1967).

5. *Billboard size limits endorsed*, News & Observer (Raleigh, N.C.) Oct. 18, 1983, pp. 1A, 6A.

## Standards for new signs

Although federal law allows state and local governments to establish more restrictive standards for new signs than are required under federal law, North Carolina's outdoor advertising sign legislation and regulations reflect only minimum federal requirements. Commercial off-premises signs are allowed only in areas locally zoned for commercial or industrial use or, where land is unzoned, in areas actually used for those purposes. When the Highway Beautification program began, states were allowed to establish standards for signs in these areas on the basis of "customary use," even though the legislation was designed to improve appearance. The "model" sign standards promulgated by Washington and adopted by North Carolina and a majority of other states are quite liberal. For example, the maximum size of a sign under NCDOT regulations has always been 1,200 square feet.[6] Yet an official of the outdoor Advertising Association of America testified in 1978 that not more than one in 2,000 signs then erected even approached that size.[7] Another controversial standard is the definition for an unzoned commercial or industrial area. North Carolina regulations allow billboards within 800 feet of an area actually used for these purposes, even though such areas may support only one commercial or industrial activity, and even though the 800-foot radius may extend onto neighboring properties that are not used for commercial or industrial purposes.[8]

In areas where local governments have adopted zoning, the relationship between state law and local regulations becomes more intricate. The boundaries of commercial and industrial zoning districts in local ordinances determine the areas within which billboards may be located under federal and state law and where state NCDOT sign regulations apply. Critics claim that local governments in some states have actually zoned land for commercial or industrial uses along Federal-Aid Highways in rural undeveloped areas solely to allow rural landowners along such highways to lease their land for billboards and avoid the billboard prohibition that would otherwise apply.[9]

The much more common pattern is for local governments with zoning to impose standards on new signs along Federal-Aid Highways that are more restrictive than those of the state. North Carolina's Outdoor Advertising Control Act has never addressed the question of whether local standards for new signs may be more restrictive than NCDOT standards. In practice, NCDOT apparently recognizes local zoning and assumes that stricter local requirements for new signs must prevail. This conclusion appears consistent with the rather confused North Carolina Court of Appeals decision in *Givens v. Town of Nags Head*.[10] In that case the court upheld Nags Head's prohibition of new off-premises advertising signs within its commercial and industrial zoning districts and dismissed a claim that the less restrictive standards of the North Carolina Control Act pre-empted or superseded the town's authority. The *Givens* decision also suggests that if a local government adopted restrictive standards for new Federal-Aid Highway signs under its general ordinance-making power rather than under its zoning power, those too would prevail over state regulations.

## Amortization or compensation

A central feature of the federal/state outdoor advertising control program today is that "just compensation" must be paid for nonconforming federal highway signs that the law requires to be removed, and this principle holds, regardless of whether the signs were made nonconforming by the force of the state Outdoor Advertising Control Act and implementing regulations or by the force of local sign regulations. A brief review of the origins of the current law will help explain the law's implications.

Each state participating in the first Federal Highway Beautification Program, the so-called "bonus" program, was allowed to choose whether to

6. 19A N.C. Admin. Code § 2E.0201(c)(1) (1984).

7. As quoted in C. F. Floyd & P. J. Shedd, Highway Beautification: The Environmental Movement's Greatest Failure (Boulder, Colorado: Westview Press, 1979), p. 95.

8. 19A N.C. Admin. Code § 2E.0201(c)(1) (1984).

9. As quoted in C. Floyd, *Double Standard*, 51 Planning, No. 7, 23 (July 1985).

10. 58 N.C. App. 697, 294 S.E.2d 388, *cert. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982).

purchase nonconforming signs in order to remove them or to remove the signs through regulation by "amortizing" them (requiring signs to comply or be removed within a reasonable period of time). Nevertheless, the Highway Beautification Act of 1965 clearly indicated that "effective control" meant that the various states had to pay for the nonconforming signs to be removed under the Act. Although the federal provision [23 U.S.C. 131(g)(1966)] is not explicit, it is clear from the legislative history of the Act that cash compensation is demanded and that any argument that an amortization grace period amounts to just compensation is unavailable.

The federal cash compensation requirement did little to stop an increasing number of local governments around the country adopting regulations imposing standards on signs (located both along federally-regulated highways and elsewhere) that were more restrictive than those adopted by state highway departments because of the federal program. Some local ordinances prohibited all off-premises advertising signs in local commercial and industrial zoning districts. Additionally, local governments were terminating existing nonconforming uses through their regulatory (police) power. Signs on federal highways that could not be removed under federal and state outdoor advertising control law unless the owners were compensated were made nonconforming by more stringent local regulations and were being removed by local governments under zoning provisions that recognized the principle of amortization, not compensation.

State courts, applying state law, tended to uphold the concept of amortization against claims that it violated either the constitutional guarantee of substantive due process or the principle that private property may not be taken for public use except upon the payment of just compensation. North Carolina courts recognized the amortization principle as early as 1974. In the case of *State v. Joyner*,[11] the defendant was convicted of violating a Winston-Salem zoning ordinance provision requiring the owner of a nonconforming salvage yard to terminate operations within three years. In that decision, the North Carolina Supreme Court affirmed the amortization of the nonconforming use, quoting language from another case for the proposition that "When the termination provisions are reasonable in the light of the nature of the business of the property owner, the improvements erected on the land, the character of the neighborhood, and the detriment caused the property owner, we may not hold them constitutionally invalid."[12] Several years later, an amortization period of three years was upheld as applied to a large commercial on-premises sign in *Cumberland County v. Eastern Federal Corp.*[13] Later, in the *Givens* case,[14] the North Carolina Court of Appeals reversed a trial court decision and held that a town ordinance that provided for a five and one-half year amortization period for all commercial off-premises signs was reasonable as a matter of law. A period of 30 days was upheld as sufficient for on-premises windblown and portable signs in *Goodman Toyota v. City of Raleigh*.[15] More recently, a five and one-half year amortization period for off-premises signs was sustained by a United States District Court and the Fourth Circuit Court of Appeals in *Major Media of the Southeast v. City of Raleigh*.[16]

In reaction to the specter of local governments eliminating Federal-Aid Highway corridor signs that complied with federal and state outdoor advertising control laws, the outdoor advertising industry convinced Congress in 1975 to amend the compensation statute in the federal law [23 U.S.C. 131(g)] to provide that "Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under state law." This amendment did not end the confusion. It allowed the interpretation that the state law referred to (under which outdoor advertising was lawfully erected and then became nonconforming and subject to removal) was a state outdoor advertising control law (like North Carolina's) adopted pursuant to federal law. Thus, the federal law still did not necessarily

11. 286 N.C. 366, 211 S.E.2d 320 (1975).

12. 286 N.C. at 374.

13. 48 N.C. App. 518, 269 S.E.2d 672, *cert. denied*, 301 N.C. 527, 273 S.E.2d 453 (1980).

14. 58 N.C. App. 697, 294 S.E.2d 388, *cert. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982).

15. 63 N.C. App. 660, 306 S.E.2d 192 (1983).

16. 792 F.2d 1269 (4th Cir. 1986), *aff'g*, 621 F. Supp. 1446 (E.D.N.C. 1985).

prohibit local governments' amortization of nonconforming signs under their zoning power.

As a result, the industry mounted an intense lobbying campaign to extend the just compensation requirement to signs made nonconforming by local ordinances. In 1978 Congress amended subsection 131(g), extending the compensation requirement to signs that are "lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section." Thus a sign that is nonconforming under either a state's outdoor advertising control law or a local sign regulation, or both, may not be amortized under the terms of a local zoning ordinance without cash compensation. This law, however, applies only to signs located along Interstate and Federal-Aid Primary Highways; it does not affect local governments' power to amortize signs located outside of these corridors.

The change in subsection 131(g) in 1978 was not popular with many local and state governments. A number of the states whose programs for maintaining "effective control" of outdoor advertising had already been certified by the federal government (like North Carolina's) were reluctant to change their state implementing legislation to block local governments from using their zoning power to amortize signs within the federally-regulated corridors. These changes in state law came slowly. In North Carolina, the Court of Appeals held in the *Givens* case[17] that the Town of Nags Head successfully amortized (over five and a half years) a number of Federal-Aid Highway commercial off-premises signs located in the town's commercial and industrial zoning districts that apparently met North Carolina Department of Transportation (NCDOT) standards, but not those of Nags Head. The court apparently recognized that the 1978 federal amendment required compensation for signs "lawfully erected under state law." But, it also apparently found that in this case the signs had been completely amortized by the time the matter was brought to trial in 1981, and at that time, the North Carolina General Assembly had not yet incorporated the compensation requirement mandated by the 1978 federal amendments into North Carolina's Outdoor Advertising Control Act.

In 1982, the North Carolina General Assembly adopted G.S. 136-131.1 so that North Carolina's program of "effective control" and its share of federal highway funds would not be jeopardized. This statute, entitled "Just compensation required for the removal of billboards on federal-aid primary highways by local authorities," provides as follows:

> No municipality, county, local or regional authority, or other political subdivision, shall, without the payment of just compensation in accordance with the provisions in paragraphs 2, 3, and 4 of G.S. 136-131, remove or cause to be removed any outdoor advertising adjacent to a highway on the National System of Interstate and Defense Highways or a highway on the Federal-aid Primary Highway System for which there is a valid permit issued by the Department of Transportation pursuant to the provisions of Article 11 of Chapter 136 of the General Statutes and regulations promulgated pursuant thereto.

This statute effectively prohibits local government amortization of signs for which a NCDOT permit has been obtained. Under the state's outdoor advertising control laws, permits issued by NCDOT are required for both conforming and nonconforming signs. If a sign is illegal under state law because no permit was issued or an outstanding permit was revoked, then no compensation is required. Unfortunately, the statute does not make clear that compensation is not required when a sign is illegally erected under a local ordinance, even though the sign may comply with state requirements, and a valid permit may have been issued by NCDOT.

The statute[18] also does not resolve one other question about compensation; it is unclear what unit of government is authorized to fund compensation for signs made nonconforming by local ordinance. The statute indicates that local governments may not remove NCDOT-permitted signs "without the payment of just compensation in accordance with the provisions that are applicable to the Department of Transportation as provided in paragraph[s] 2, 3, and

17. 58 N.C. App. 697, 294 S.E.2d 388, *cert. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982).

18. N.C. Gen. Stat. § 136-131.1 (1982).

4 of G.S. 136-131." (Paragraphs 2, 3, and 4 of G.S. 136-131 provide formulae for determining "just compensation.") But the statute does not reveal *who* may or must pay. The language of G.S. 136-131.1 seems to suggest that *some* unit of government (local or State) has this authority, but the language of the statute does not explicitly provide such power to either.

The power of local governments to acquire signs made nonconforming by a zoning or sign ordinance, even along federal highways, is also questionable because there is no suggestion in the eminent domain, municipal property acquisition, or zoning statutes that either cities or counties enjoy such a power. Similarly, the state's power to acquire signs that conform to federal and state, but not local, ordinance standards is also suspect. The legislative void is not filled by G.S. 136-131, which allows the state to purchase only those signs made nonconforming by the Outdoor Advertising Control Act (OACA). A clear answer to the question of which unit(s) of government may compensate owners of signs along federal highways made nonconforming by local ordinance appears to require a legislative response.

These dilemmas of compensation were recently highlighted by Dare County's removal of 17 billboards along U.S. 64-264 on Roanoke Island, a Federal-Aid Primary Highway. The signs apparently conformed to OACA and NCDOT regulations. Nevertheless, a county ordinance was adopted banning new off-premises advertising signs and requiring the eventual removal of signs made nonconforming by the ordinance along a six-mile stretch of highway designated as a "scenic corridor" in 1984 by "America's 400th Anniversary Committee." The amortization period under the ordinance expired, and a Dare County Superior Court ordered the signs removed, without ruling on questions of compensation.[19] When the county indicated that it did not intend to pay, the Secretary of Transportion warned the county that such a decision might jeopardize the state's full allocation of federal highway funds. Under the terms of an agreement among the Federal Highway Administration, the North Carolina Department of Transportation, and Dare County, the Federal Highway Administration apparently took the unusual step of providing funds to compensate Dare County sign owners for the removal of signs that were entirely in conformance with federal and state, but not local, law.

## Sign removal

**Removal of nonconforming signs.** The central feature of the Federal Highway Beautification Program has always been the purchase and removal of signs made nonconforming by the federal act and state implementing law But the states were not left to shoulder this cost burden alone. The Highway Beautification Act of 1965 also provided for the federal government to pay for 75 per cent of the cost of compensating sign owners and administering the program; the states were expected to provide the remainder. Although there could never be any guarantee that Congress would appropriate the necessary funds for the program in future years, an important amendment was added to the Act in 1968, providing that the states were not required to remove nonconforming signs if the federal share of funds for compensating owners was unavailable.[20] The progress of sign removal, like federal funding, has been disappointing and erratic, beginning slowly in the late 1960s, peaking in the late 1970s, and decreasing dramatically since 1982. The telling fact is that 1982 was the last year Congress appropriated funds for this purpose. In 1983 three times as many new outdoor advertising signs were erected under the program as were removed.[21] It appears that the program has had no perceptible impact upon the landscape. Worse, the ongoing removal of nonconforming signs, purportedly a prime aim of the federal program, today has largely ground to a halt. Ironically the death blow to the sign removal program may have been dealt by the adoption of the 1978 compensation amendments that extended compensation requirements to Federal-Aid Highway signs made nonconforming solely by local zoning or sign ordinances. Although federal monies may be spent to remove signs in this category as well, virtually none has. As a result, these nonconforming signs are even more likely to remain standing.

19. See *Dare warned that billboard removal may threaten road funds*, News & Observer (Raleigh, N.C.) Jan. 5, 1985, p. 34A.

20. 23 U.S.C. § 131(n) (1968).

21. As quoted in C. Floyd, *supra* note 9.

The relative ineffectiveness of the effort to remove nonconforming signs can be traced to several problems. Various citizen and environmental groups have advocated attempts to identify corridors where nonconforming outdoor advertising signs are most inappropriately located or most out of scale with the environment; they have also recommended that the acquisition of such signs be given top priority. The federal regulations, however, reflect other priorities. Federal regulations, 23 C.F.R. 750.304 (1986), recommend that (1) illegal and abandoned signs; (2) hardship situations; and (3) nominal-value signs be given top priority. The full priority list is noteworthy because of the prominence of "hardship situations." The practice suggested by federal law is for the state to solicit sign owners for an inventory of nonconforming signs that the owners wish to sell. This industry-backed "voluntary" sign acquisition approach, used in North Carolina and many other states, means that the signs that are acquired first are those signs that sign owners believe to be most economically or physically obsolete rather than those that are most inappropriately located. As a result, the purchased signs tend to be smaller, and less valuable than those that are left. More important, the voluntary approach also encourages nonconforming sign owners to keep signs that would otherwise be abandoned or lost through attrition, signs for which compensation might not have to be paid at all. One other result is that signs are acquired through negotiated purchase, not through the exercise of eminent domain. Although North Carolina's Outdoor Advertising Control Act provides the state Department of Transportation with the power to condemn nonconforming signs,[22] that power has never been used.

The lenient policy of both federal and state governments with respect to alterations, repairs, and improvement has been another problem in removing nonconforming signs. Owners of nonconforming signs typically have a strong incentive to maintain and even enhance the condition of their investment. Federal regulations, 23 C.F.R. 750.707(d)(1986), provide that if a nonconforming sign is to remain eligible for compensation, it must be essentially as it was when it became nonconforming. A sign that has been substantially altered becomes an illegal sign and can be removed without compensation. But federal regulations explicitly allow reasonable repair and maintenance and allow states to determine when customary maintenance ceases and substantial change has occurred. North Carolina's regulations may be contradictory. Sign alteration involving "extension, enlargement, replacement, rebuilding, re-erecting, or addition of illumination" is not allowed, except to respond to vandalism.[23] Nevertheless, failure to maintain a sign, which results in its dilapidation or disrepair, is cause for permit revocation,[24] and within any 12-month period, repairs costing up to 50 per cent of the initial value of the sign may be performed.[25] Critics claim that such provisions allow the reconstruction of a sign over a period of several years.

Evaluation of state programs to remove nonconforming signs has been difficult, partly because of unreliable sign statistics and partly because adequately estimating the costs to complete the removal program has been almost impossible. Even though many of the signs made nonconforming by state billboard legislation are at least 14 years old, a large number of them have appreciated in value. In rural areas, prohibitions against most new commercial advertising enhance the value of nonconforming signs. The existing signs enjoy locational premiums; thus, their values can reflect their near monopoly status. These factors, along with policies governing sign-purchase priorities and repair, have meant that the average cost of acquiring remaining signs has risen steadily. Federal Highway Administration figures for 1981 show that the average compensation cost per sign as of that date was still less than $1,500 per sign.[26] However, cumulative statistics for North Carolina indicate that by the spring of 1986, the average cost of acquiring all nonconforming signs had risen to over $3,500 per sign.[27] Further-

22. N.C. GEN. STAT. § 136-131 (1986).

23. 19A N.C. ADMIN. CODE § 2E .0210(6) (1984).

24. *Id.* § 2E .0210(11).

25. *Id.* § 2E .0210(13).

26. Federal Highway Administration, Annual Statistical Report: Highway Beautification Program (Sept. 30, 1981), unpublished report quoted in C. F. Floyd, *Issues in the Appraisal of Outdoor Advertising Signs*, THE APPRAISAL JOURNAL (July, 1983), at 422.

27. "Control of Outdoor Advertising," North Carolina Department of Transportation paper presented to the North Carolina Legislative Research Commission Outdoor Advertising Study Committee, April 15, 1976, at 3.

more, NCDOT estimates the cost of removing the remaining signs at between $6,200 and $7,600 per sign.[28]

Other statistics provide a more complete picture of how the removal of nonconforming signs has proceeded. When initial sign inventories had been completed on a state-by-state basis in the late 1960s, estimates were that 889,000 signs would have to be purchased at a cost of $558.7 million. But, a General Accounting Office study in 1985 found that the total number of nonconforming signs had decreased to 238,079, that 48 per cent of this total had been removed (114,252), and that 52 per cent (123,827) remained.[29] By September 30, 1985, the federal government had spent just over $161 million for the removal of signs and associated expenses. However, the Federal Highway Administration estimated that about $427 million in federal funds, more than had been spent on the program to date, would be required to remove these remaining signs.[30]

Since 1979, federal support for sign removal has been curtailed. Federal expenditures under the program have declined from $16.7 million in fiscal year 1979 to less than $2 million currently. In 1979, 10,150 nonconforming signs were removed; in 1983 only 2,235 were removed.[31] Furthermore, the Reagan Administration has sought no new appropriations, and Congress has provided none since fiscal year 1982.

This pattern of decreasing allocations has had a corresponding effect on the North Carolina program. By the end of 1978, North Carolina had purchased roughly 852 of an estimated 5,398 nonconforming signs. This 16 per cent removal rate ranked North Carolina 39th in the country.[32] In November, 1986, North Carolina reported that 1,051 nonconforming signs had been acquired and that 3,911 remained.[33] Estimates made in April, 1986, suggested that acquisition of the remaining signs would cost in the range of $20-25 million.[34] No state matching funds have been appropriated for nonconforming sign acquisition since the federal funding was halted in 1982. Although federal-aid highway construction funds may be used for sign acquisition, North Carolina has not allocated any of these funds for this purpose. The North Carolina sign acquisition and removal program is largely dormant, except for the acquisition of nonconforming signs that are coincidentally acquired as a part of federal highway improvement projects.

**Removal of illegal signs.** The substantial problem of illegal signs has received little notice. The 1966 nation-wide sign inventory and early estimates of sign removal costs did not adequately take into account the costs of securing compliance with state outdoor advertising control laws. Federal Highway Administration figures for the end of 1978 indicated that states claimed to have eliminated 388,519 signs that were illegal under state billboard laws and acknowledged that 92,603 illegal signs remained.[35] The 1985 General Accounting Office study indicated that states claimed that only 47,752 illegal signs remained in late 1983, but found that the statistics from some states were unreliable.[36]

In a 1978 Federal Highway Administration (FHwA) survey, North Carolina claimed no illegal signs (one of only seven states making that claim), and that 5,660 illegal signs had been removed since the inception of the state's regulatory program.[37] A more recent report to FHwA in November, 1986, indicated that 11,036 illegal signs had been removed, but included no entry for the number of illegal signs remaining.[38]

Nevertheless, it is clear that removal of illegal signs can be a time-consuming and costly exercise, even though G.S. 136-134 authorizes NCDOT to remove such signs at the owner's expense if the owner fails to remove them after a warning. The state may seek legal recourse through criminal prosecution or injunctive relief, but the remedy of imposing

28. *Id.*

29. Comptroller General of the United States, General Accounting Office, *The Outdoor Advertising Control Program Needs to be Reassessed* (CED-85-34), January 3, 1985, at 6.

30. *Id.* at 7.

31. *Id.* at 8.

32. U.S. Department of Transportation, Federal Highway Administration, *Highway Beautification Digest* (April 30, 1979), 33, 34.

33. *Outdoor Advertising and Junkyard Report--FY86 (North Carolina)*, Federal Highway Administration, U.S. Dept. of Transportation (Nov. 12, 1986), at 1.

34. "Control of Outdoor Advertising," *supra* note 27, at 4.

35. *Highway Beautification Digest, supra* note 32, at 33.

36. *The Outdoor Advertising Control Program Needs to be Reassessed, supra* note 29, at 6.

37. *Highway Beautification Digest, supra* note 32, at 33.

38. *Outdoor Advertising and Junkyard Report, supra* note 33.

civil penalties is not available. The cutback in federal funds apparently has undercut efforts to remove nonconforming signs; it has undercut efforts to bring enforcement actions against violators; and there is evidence in some states that this lack of money and personnel has emboldened some sign owners to violate the law flagrantly.[39]

## Vegetation control

The aspect of outdoor advertising regulation that is most unpopular with environmentalists is the industry's claim that trees and other vegetation located within the public right-of-way should be removed or pruned to enhance roadway visibility of signs on adjacent private property. The Federal Highway Beautification Act does not address the issue. Since 1977, the Federal Highway Administration's position has been that vegetation control is not a federal matter and may be allowed by states because it is within the scope of the states' highway maintenance responsibilities, at least so long as vegetation control is consistent with good maintenance policy and landscaping practice.

Since the highway maintenance units in most states have higher priorities than clearing right-of-way vegetation for sign owners, vegetation control in those states that allow it is often carried out by sign owners, who are permitted to come onto the right-of-way to do this work. The advertising industry stresses that vegetation control is necessary to protect investments in outdoor advertising. Sign owners emphasize that if a state permits outdoor advertising only at certain locations along major highways, it should cooperate with the industry to ensure that vegetation in the public right-of-way does not render the sites unfit for this legal use of private land. Opponents reply that ensuring visibility of signs on private property is the advertiser's problem, not the state's, and that the owners of outdoor advertising should be required to purchase whatever sight or view easements across the public right-of-way are necessary. Environmentalists disapprove of a federal program, purportedly designed to enhance highway beautification, that not only allows billboards to mar the scenery, but sanctions destruction of some of the natural landscape that the program should protect. To satisfy advertising interests, some states have allowed destruction of some of the very trees planted with public funds in the earlier years of highway beautification programs.[40]

According to a 1984 survey, only 15 states allowed sign owners to cut trees within interstate rights-of-way, and 17 allowed the practice within the rights-of-way of Federal-Aid Primary Highways.[41] Ironically, states that do not allow the practice have felt pressure to do so because of widespread reports of illegal tree and vegetation cutting. Twenty-four states reporting to a General Accounting Office survey[42] reported 253 instances of illegal cutting in their states during fiscal year 1983. Georgia, which does not allow cutting, reported 50 such instances in that year.

North Carolina's policy of allowing owners of adjacent private property to remove or prune vegetation within the public right-of-way dates from 1982. State Department of Transportation rules[43] establish a permit system for allowing removal of vegetation to open the view to outdoor advertising signs, and also to office, institutional, commercial, and industrial developments located directly adjacent to all state highway rights-of-way. The rules allow the removal of trees that predated the sign or business, if a plan for replacement plantings is provided. Vegetation may be cut only within 125 feet of the center of the sign, as that distance is measured linearly along the right-of-way line. But, vegetation planted as a part of a local, state, or federal beautification project may be "controlled" in "exceptional conditions."[44] The regulations do not define such conditions.

## Motorist information alternatives

It is generally recognized that food, auto service, lodging, and similar establishments catering to the needs of travelers often depend on outdoor ad-

39. *See* the discussion of the effects of program funding cutbacks and efforts to control illegal signs in *The Outdoor Advertising Control Program Needs to be Reassessed*, *supra* note 29 at 11-14, 17-20.

40. *Id.* at 32-37.

41. *Id.* at 32.

42. *Id.*

43. 19A N.C. Admin. Code § 2E .0600 *et seq.* (1986).

44. *Id.* § 2E .0633(a)(6) (1986).

vertising, and that on-premises signs may be inadequate to serve their commercial purposes. An idea that has attracted wide-spread attention calls for states to provide "motorist information alternatives" on public property. One variation on this theme calls for a state to establish a so-called "logo sign" program, allowing the department of transportation to license space for business logos on DOT-owned panels located along the shoulders of interstate highways. The North Carolina Department of Transportation has developed such a program, and is already providing logo sign panels at interchanges along Interstate 95, along 83 miles of Interstate 85, and 18 miles of Interstate 40 in the Research Triangle Park area. The current state Transportation Improvement Program includes an additional 14 projects with an estimated cost of just under $5 million. When completed, these projects will provide logo sign service along all the open interstate routes in North Carolina. Under the North Carolina program, logo sign panels are available for four different "classes of service": gas, food, camping, and lodging. Typically, only one "class of service" is the subject of any individual panel, but a single panel can accommodate multiple logos. For a package of four signs at an interchange, the NCDOT charges a fee of $1,000 per year (about $83.33 per month). (In comparison, the charge for a billboard showing at a single interstate location might range from several hundred to several thousand dollars per month.)

Despite outdoor advertisers' early fears, the state logo sign program's effect on them is likely to be marginal. First, the geographic scope of the program, even after planned logo signing projects are completed, is rather restricted. Logos may be displayed only along the corridors of interstate and non-interstate freeway corridors, and even then may only advertise establishments that are located within three miles of the interchange. Second, the "classes of service" for which logos may be displayed are limited to those typically used by non-local traffic. Many outdoor-advertising users (tobacco companies, airlines, banks) are not eligible to participate in the logo program. In addition, the DOT rule that logo sign panels may not be located within 800 feet of each other or of other directional or official signs along the right-of-way limits the use of logos in some areas. Nevertheless, one group has been less enthusiastic about logo sign programs—local restaurant and motel owners who are not franchised by or affiliated with major chains. The logo medium is tailored to establishments with names or logos already familiar to the traveling public and offers the local "Mom and Pop" establishment no good opportunity to distinguish itself from its better-known competitors through the use of elaborate or distinctive advertising.

## Proposals for legislative change

**The federal program.** Since adoption of the Highway Beautification Act of 1965, the outdoor advertising industry has turned repeatedly, and often successfully, to Congress and to state legislatures for statutory protection. Its most important success was in 1978, when the just compensation requirement was extended to signs made nonconformng by local ordinance. But during the past 20 years, the industry has also skillfully seized the initative by introducing legislation calling for more concessions and protection from Congress. For example, in 1982 the industry proposed unsuccessfully that the Highway Beautification Act be renamed the "Freedom of Outdoor Communication Act" and that compensation be required for any outdoor advertising display removed by any level of government, regardless of the sign's location.[45]

This legislative jostling, however, has deflected attention from a series of studies and reports proposing changes in the outdoor advertising program and criticizing its effectiveness. In 1978 The General Accounting Office reported some progress in controlling new signs and removing illegal ones, but the removal of nonconforming signs had been slow, motorists could not see significant results after 13 years of the program, and the Act's objectives would not be accomplished in the near future.[46] In 1981 the National Advisory Committee on Outdoor Advertising and Motorist Information published a final report proposing a number of new ideas for changing the program, many of them calling for cutbacks in its scope.[47] An August, 1984, study by

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45. H.R. 2255, 97th Cong., 2d Sess. (1982).

46. Comptroller General of the United States, General Accounting Office, *Obstacles to Billboard Removal*, (CED-78-38), Mar. 24, 1978.

47. Federal Highway Administration, U.S. Dept. of Transportation, *Final Report of the National Advisory Committee on Outdoor Advertising and Motorist Information*, Sept. 1981.

the Office of the Inspector General of the Department of Transportation concluded that the policy of first compensating sign owners offering their signs for purchase has resulted in little improvement in roadside aesthetics.[48] A widely-quoted General Accounting Office study released in 1985 concluded that the program has been notably ineffective, despite an expenditure of over $200 million, that up to 320,000 new billboards have been erected under the program, and that in 1983 more than three times as many signs were erected as were removed.[49]

In the past several years, the political winds for continuing the program have shifted. Supported by and composed of a number of national organizations, the Coalition for Scenic Beauty has strengthened billboard opponents' lobbying efforts. The movement for reform has attracted not only those interested in advancing environmental interests and aesthetic values, but also a growing number of members of Congress who see the compensation side of the program as an unwarranted drain on the federal treasury in a time of fiscal restraint. This view, consistent with the Reagan philosophy, finds that allowing states to determine matters of compensation is a logical manifestation of deregulation and the return of authority to state capitals.

In 1986 both the United States Senate and House of Representatives passed versions of bills that would have made some fundamental changes in the federal program. When the Senate Committee on Environment and Public Works favorably recommended S 2405 (a highway fund reauthorization bill including highway beautification reforms), and the Senate adopted the bill largely intact last September, it was the first time a bill to tighten billboard controls had cleared a Senate committee since the passage of the Highway Beautification Act in 1965. But, the congressional conference committee appointed to reconcile differences between the Senate- and House-passed versions of the bill failed to do so, and the stalemate resulted in Congress's failure to adopt the highway funds authorization bill in any form.

Some of the major highway beautification changes proposed in the Senate version of the bill, most of which were supported both by the Reagan Administration and the Coalition for Scenic Beauty, are as follows:

(1) The existing requirement of federal law that cash compensation be paid for the removal of nonconforming signs would be eliminated. Signs could be removed by any method allowed by state law, including amortization.

(2) The federal requirement that lawful nonconforming signs be removed would be eliminated. Nonconforming signs lawfully existing on the effective date of the amendments could remain in place so long as they remained lawful under state law.

(3) Although states would not be required to remove nonconforming signs or to pay cash compensation if they did choose to remove them, the federal government would still share with the states the costs of physically removing either nonconforming or illegal signs and of compensating owners of nonconforming signs, if compensation is required by state law.

(4) A new moratorium would be placed on the erection of any new, off-premises signs in commercial and industrial areas after July 1, 1986. Since there would necessarily be a time lag until states enacted conforming legislation, signs erected during the interim period would be treated as nonconforming.

(5) The United States Secretary of Transportation's authority to penalize a state would be made discretionary, and the penalty would be changed from a fixed 10 per cent to an amount between 0 and 5 per cent, as determined by the Secretary.

(6) States would be required to remove illegal or nonconforming signs for which compensation had been paid within 90 days after the date upon which they could first be removed.

(7) States would be prohibited from allowing or undertaking any removal of vegetation or other alteration of the right-of-way to improve visibility of signs located outside the right-of-way.

(8) States would be prevented from acquiring nonconforming signs and then reselling them as salvage to sign companies or other private parties unless the parties agreed not to use the material to construct or reconstruct outdoor advertising signs.

48. Office of the Inspector General, U.S. Dept. of Transportation, *Report on the Highway Beautification Program* (R4-FH-4-158), August, 1984.

49. *The Outdoor Advertising Program Needs to be Reassessed*, *supra* note 29.

(9) States would be prevented from allowing the modification of nonconforming signs to improve their visibility or useful life.

(10) Federal cost-sharing funds for sign removal would come from the Highway Trust Fund rather than the General Fund, and the federal share for sign removal would be increased to 90 per cent for those along the interstate system.

This spring, supporters of billboard reform in the Senate failed in their efforts to attach similar outdoor advertising control provisions to the highway fund reauthorization bill. Although the House version of the highway bill included minor reforms, even these provisions were stripped from the version of the highway bill that emerged from conference committee in the pell-mell effort to get a highway bill adopted. Eventually, this legislation was adopted over President Reagan's veto. There was no indication from the President that the absence of outdoor advertising reform amendments in the bill was a factor in his decision to veto. No other bill proposing reform appears likely to succeed in this year's Congress.

**The North Carolina Program.** North Carolina legislators reviewed the state's outdoor advertising control program during the fall of 1986 under the auspices of the Legislative Research Commission's Outdoor Advertising Study Committee, as authorized in 1985. The Outdoor Advertising Study Committee's recommendations have been included in a final report to the 1987 session of the General Assembly.

The Study Committee considered proposals from citizen and environmental groups for changing North Carolina's outdoor advertising control program, although it was necessary that any changes be consistent with federal requirements. When prospects for major federal program change failed to materialize, however, the Study Committee decided to follow a more conservative course and rejected most of the major reform initiatives.

The Study Committee did, however, make one major recommendation and various minor ones. In spite of proposals at the federal level to cut back the scope of the program, the Study Committee apparently recommended that the state program apply not only to billboards along the interstate and Federal-Aid Primary Highway Systems, but to some or all of the state's secondary highway system as well.[50] The effect of this broader application would be to prohibit and limit the erection of some new signs along secondary roads not controlled by North Carolina local governments. But it could also mean that compensation would have to be paid for the removal of hundreds of nonconforming signs along secondary roads, signs that are being or could be amortized under North Carolina zoning law.

In addition, the proposal sent to the General Assembly recommends tightening several size and spacing standards applying to outdoor advertising signs in zoned and unzoned commercial or industrial areas. Current DOT regulations allow sign panels up to 1,200 square feet in size on each side of an advertising structure, as long as dimensions do not exceed 30 feet high by 60 feet long. Proposed statutory amendments would reduce the cap to 900 square feet. Two large sign panels can presently be mounted on most new sign structures. The largest single panel normally used, however, is 672 square feet plus an additional 10 per cent sign "extension" area beyond the basic rectangle. Nevertheless, the proposed change is unlikely to have any significant effect on the number and nature of future billboards along North Carolina highways.

The LRC proposal would also increase the required minimum distance between outdoor advertising signs. On interstate highways and noninterstate freeways, the required space between signs would increase from 500 to 1,000 feet (as measured along each side of the road), on nonfreeway primary highways outside city limits, from 300 to 600 feet, and on nonfreeway primary highways inside city limits, from 100 to 200 feet. Spacing requirements or signs along secondary roads would correspond to those

50. At its final meeting the Outdoor Advertising Study Committee adopted a motion to recommend a minimum distance between outdoor advertising signs along "secondary" roads. However, no motion or resolution was adopted specifically extending the various other provisions of the Outdoor Advertising Control Act to "secondary" roads generally. Furthermore, it is not clear whether the recommendation is intended to apply only to federal-aid secondary system highways, highways on the state's secondary roads system, or both, or some portion of them. *See* "Findings and Recommendations" (p. 9) and "A Bill to be Entitled An Act to Increase Certain Restrictions on Outdoor Advertising along the Interstate Highways, Federal-Aid Primary Highways, and Secondary Roads," (following p. 10), as included in Legislative Research Commission, Outdoor Advertising, Report to the 1987 General Assembly of North Carolina, December 15, 1986.

set for primary highways. These spacing requirements would probably thin out potential sign sites, perhaps lessening the concentration of signs in certain corridors, and enhancing the value of existing signs and sign locations.

In addition, the report recommends that in its regulations NCDOT specifically define "commercial" and "industrial" in the context of delineating unzoned commercial and industrial areas.

The package also helps to clarify local governments' authority to regulate signs along the Federal-Aid Primary and Interstate Highway Corridors. Included are proposed amendments to the Outdoor Advertising Control Act that would explicitly provide that local governments may adopt zoning or special-purpose sign ordinance standards for new signs that are more restrictive than those established by NCDOT regulations. Local governments would also be provided with clear authority to acquire federal corridor signs made nonconforming by local ordinance and to do so either by negotiated purchase or condemnation. Finally, the proposals would allow local governments to regulate signs within state highway rights-of-way, if regulation is not inconsistent with state law.

## A Look Ahead

The array of proposals considered in Washington and Raleigh last fall suggests that regulation of outdoor advertising is in some flux. The federal outdoor advertising control program has been heavily criticized, but has withstood that criticism, and the advertising industry has blocked reform so far. The outdoor advertising business has become very profitable, and sponsors a well-financed and effective lobbying effort. However, billboard opponents are better organized and financed than in the past, particularly at the local level. In the past three years, more and more local governments have successfully defended against lawsuits by outdoor advertising companies; first amendment protection for outdoor advertising as a medium of speech has proved to be less extensive than first thought (a topic beyond the scope of this article). As a result, the continuing vitality of the outdoor advertising industry appears to depend upon the industry's ability to grow in areas where billboard opposition is weak and upon its ability to protect the federal compensation requirement for nonconforming signs. The struggle between the industry and its opponents continues with no end or clear winner in sight.

# Pretrial Release: *Report on a Study in Durham, North Carolina**

**Stevens H. Clarke**
**Miriam S. Saxon**

At the request of the Senior Resident Superior Court Judge and the Chief District Court Judge, the Institute of Government conducted a study of pretrial release in Durham, North Carolina, in 1985-86.[1] The study examined defendants' opportunities for pretrial release; risks of pretrial release, including failure to appear and new crime; and the court's response to pretrial-release violations, including prosecution and bond forfeiture enforcement. This study focused on Durham County, but it is reasonable to assume that Durham County is typical of urban areas of North Carolina, which has a uniform statewide court system. The suggestions for improvement at the end of this article may therefore be of interest not only to Durham officials but also to members of the General Assembly and the Governor's Crime Commission.

### What is pretrial release?

Also called "bail," pretrial release allows defendants arrested and charged with crimes to remain out of jail during the time before disposition of their charges by the trial court. It allows those accused of crimes to remain free unless they are convicted and is intended to ensure that defendants return to court for hearings as required.

Unless the defendant is charged with first-degree murder, state law[2] entitles him to have conditions of pretrial release determined by a judicial official without unnecessary delay after his arrest. (The judicial official is usually a magistrate, but may also be a judge or clerk of court.) One of four pretrial release conditions may be imposed:

(1) The condition that the defendant sign a written promise to appear in court when required.
(2) The condition that the defendant execute an unsecured appearance bond—a promise to pay a specified sum, the bond amount, if he fails to appear as required.
(3) The condition that the defendant be released in the custody of someone who agrees to supervise him—a relative, volunteer group, or professional pretrial-release program such as the Mecklenburg County Pretrial Release Program or Project Re-Entry in Raleigh. (Durham, like most North Carolina counties, has no such professional program.)
(4) The condition that the defendant execute a secured appearance bond of a specified amount. Such bonds can be

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1. A comprehensive treatment of the study results is available in Stevens H. Clarke & Miriam S. Saxon, *Pretrial Release in Durham, North Carolina* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1987).

2. N.C. Gen. Stat. § 15A-534 (1983).

secured by a cash deposit of the bond amount, by a mortgage of property, by a professional bondsman (licensed by the N.C. Insurance Commissioner) who, in return for a non-returnable fee of up to 15 per cent of the bond amount, co-signs the bond and becomes jointly liable for forfeiting the bond amount if the defendant does not return, or by a nonprofessional bondsman (who has the same responsibility as a professional bondsman would, but receives no fee for his service).[3]

G.S. 15A-534 favors the first three conditions of pretrial release rather than the condition of secured bond. The magistrate or other judicial official must impose one of these first three conditions (rather than secured bond) unless he decides that conditions other than secured bond will not reasonably ensure the appearance of the defendant, will pose a danger of injury to any person, or are likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses. G.S. 15A-534(c) provides that the magistrate, in deciding which conditions to impose, must consider any evidence "relevant to the issue of pretrial release," such as the nature and circumstances of the offense the defendant is charged with; the evidence against him; his family ties, employment, financial resources, character, and mental condition; whether he is so intoxicated that releasing him without supervision would be dangerous; the length of his residence in the community; his record of convictions; and his history of flight to avoid prosecution and failure to appear in court proceedings. The magistrate must consider these factors "on the basis of available information," but is not obliged to conduct an investigation to obtain relevant information, and indeed has little opportunity or capability of doing so.

3. *See id.* §§ 15A-531 through 15A-547 (1983) and ch. 85C (1985).

## What pretrial release conditions are used in Durham?

In our random sample of 937 arrested defendants charged during February through May, 1985, and followed up in official court records for eight months, or until their cases were disposed of, 92 per cent received some form of release—most within 24 hours after their arrest. Only 8 per cent received no pretrial release and were held in detention. Forty-seven per cent were released on secured bond (38 per cent by engaging a professional bondsman, 5 per cent by a nonprofessional bondsman, and 4 per cent by cash deposit), 33 per cent were released on unsecured bond, 9 per cent were released on a written promise to appear, and 2 per cent were released in the custody of a person agreeing to supervise them. (See Table 1.)

*The setting of pretrial release conditions other than secured bond virtually guaranteed release; 100 per cent of defendants with such conditions were released.* Defendants for whom secured bond was set did not do as well; 87 per cent of them managed to secure their bond and obtain release, and the rest remained in detention (jail). When defendants received no release at all and remained in jail, it was usually because of secured bond. Ninety-two per cent of the defendants who remained in jail had secured bond set. Presumably, such defendants did not have enough cash to secure the bond, and in most cases were either unable to pay a bondsman's fee (usually 15 per cent of the bond amount) or were considered too risky for a bondsman to take on as a client.

## What factors were associated with the choice of pretrial release conditions?

To learn how pretrial release conditions were set, we applied to the data collected from court records a statistical technique called *regression analysis*. Regression analysis indicates the association between an outcome—for example, the amount of secured bond set, or whether the defendant received pretrial release—and each of a number of characteristics of the defendant and his case. In regression analysis, the association of each factor with the outcome is estimated *independently* of the association of other factors with the outcome.

Our regression analysis indicated that the magistrates' setting of the secured bond amount was significantly[4] associated with the type and number of current charges against the defendant; whether the defendant was on probation for a previous offense; and the defendant's residence, age, and race. Bonds were significantly higher for nonresidents of the county than for residents, significantly lower for defendants under 21 than for older defendants, and significantly lower for black defendants than for white defendants.

4. A statistically significant association or difference is one that is very unlikely to have been found as an accident of sampling. In this article, when the results of regression models are discussed, only statistically significant relationships are described. A relationship is considered "significant" if the probability of its being found as an accident of sampling is less than .05, and as "marginally significant" if this probability is at least .05 but less than .10.

**Table 1**
**Forms of Pretrial Release Received, by Type of Charge[1]**

| Form of Pretrial Release | Type of Charge: DWI | | Violent Felony | | Nonviolent Felony | | Worthless Check | | Other Misdemeanor | | All Charges |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1. Not released | 9 | (4.4%) | 31 | (27.2%) | 27 | (14.9%) | 6 | (3.9%) | 20 | (7.2%) | (8.3%)[2] |
| 2. Written promise to appear | 2 | (1.0%) | 0 | (0.0%) | 0 | (0.0%) | 29 | (18.7%) | 38 | (13.7%) | (9.3%)[2] |
| 3. Release in someone's custody | 7 | (3.4%) | 2 | (1.8%) | 6 | (3.3%) | 2 | (1.3%) | 3 | (1.1%) | (1.9%)[2] |
| 4. Unsecured bond | 46 | (22.4%) | 13 | (11.4%) | 40 | (22.1%) | 77 | (49.7%) | 107 | (38.5%) | (33.4%)[2] |
| 5. Secured bond: cash deposit by defendant | 17 | (8.3%) | 0 | (0.0%) | 0 | (0.0%) | 5 | (3.2%) | 4 | (1.4%) | (2.7%)[2] |
| 6. Secured bond: cash deposit by person other than defendant | 6 | (2.9%) | 3 | (2.6%) | 0 | (0.0%) | 1 | (0.7%) | 5 | (1.8%) | (1.6%)[2] |
| 7. Secured bond: mortgage of property | 0 | (0.0%) | 0 | (0.0%) | 2 | (1.1%) | 0 | (0.0%) | 0 | (0.0%) | (0.2%)[2] |
| 8. Secured bond: nonprofessional bondsman | 12 | (5.9%) | 23 | (20.2%) | 23 | (12.7%) | 0 | (0.0%) | 5 | (1.8%) | (4.9%)[2] |
| 9. Secured bond: professional bondsman | 106 | (51.7%) | 42 | (36.8%) | 83 | (45.9%) | 35 | (22.6%) | 96 | (34.5%) | (37.8%)[2] |
| 10. *Secured bond: all types* | 141 | (68.8%) | 68 | (59.6%) | 108 | (59.7%) | 36 | (23.2%) | 106 | (38.1%) | (47.2%)[2] |
| 11. Total | 205 | 100.0%) | 114 | (100.0%) | 181 | (100.0%) | 155 | (100.0%) | 278 | (100.0%) | (100.0%)[2] |

[1]Excludes four defendants who received release of an unknown type.

[2]Weighted estimate from stratified sample.

Although blacks had significantly lower secured bonds than whites, they were more likely than whites to have *some* secured bond set.

Regression analyses were also conducted to determine which factors were associated with whether the defendant was released and with the amount of time the defendant was held in detention. These analyses, controlling for the effect of the secured bond amount, indicated that:

(1) Defendants who were nonresidents were less likely to be released than resident defendants and stayed longer in detention;

(2) Defendants charged with violent felonies were less likely to be released than other defendants and stayed longer in detention;

(3) Women were more likely to be released and spent less time in detention than men; and

(4) Blacks were less likely to be released and spent more time in detention than whites, even

though their secured bonds were considerably lower than whites' bonds. (Of all *unreleased* defendants in our sample, 79 per cent were black, while 60 per cent of *all* defendants in the sample were black.)

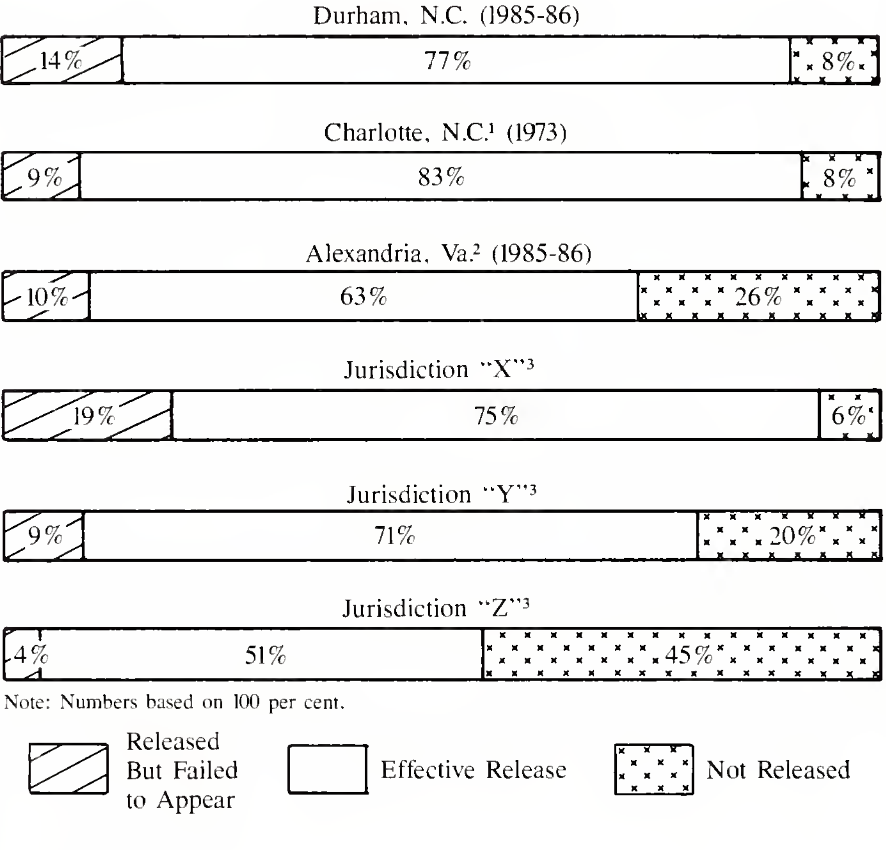
## How well is pretrial release working in Durham?

Pretrial release seems to be working fairly well. Most defendants in our sample were released in a variety of ways, and most returned to court for hearings as required. Magistrates were apparently able to select low-risk defendants for forms of release not involving secured bond.

Professor John Goldkamp of Temple University has suggested a useful measurement of the effectiveness of a pretrial-release system: the percentage of all defendants who are released and do not fail to appear—or, to put it another way, the percentage of all defendants who are "effectively" released.[5] Measured in this way, pretrial release system effectiveness in Durham was 77 per cent. There are no standardized national figures for comparison, but in Figure 1, effectiveness measurements are shown for Durham and for Charlotte, North Carolina (in 1973), Alexandria, Virginia (in 1985-86), and three unidentified American jurisdictions studied by Professor Goldkamp. Durham seems to be doing about as well as, or better than, these other jurisdictions.

5. John Goldkamp, "The Effectiveness of Pretrial Release Practices" (paper presented at the Annual Meeting of the American Society of Criminology, Atlanta, Georgia, October 30, 1986).

**Figure 1**
**Effectiveness of Pretrial Release in Durham, N.C., Compared with That in Other Cities, in Terms of Failure to Appear**




[1]From Stevens H. Clarke, *The Bail System in Charlotte, 1971-73* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1974).
[2]From Richard P. Kern, Virginia Department of Criminal Justice Services, Richmond, Va. (unpublished report, 1986).
[3]From John Goldkamp, "The Effectiveness of Pretrial Release Practices" (presented at Annual Meeting of American Society of Criminology, Atlanta, Ga., October 1986).

## Failure to appear and new crime while on pretrial release

Of the 840 released defendants in our Durham sample, 16 per cent failed to appear. Fourteen per cent of the released defendants were arrested and charged with new crimes (misdemeanors or felonies) that allegedly occurred while they were free on pretrial release—11 per cent were charged with misdemeanors, and 3 per cent with felonies. Failing to appear and new crime were correlated: 33 per cent who failed to appear were also charged with a new crime, and 36 per cent who were charged with a new crime also failed to appear.

While 16 per cent of the released defendants failed to appear, 88 per cent of those who failed to appear

**Table 2**
**Pretrial Release Risk Measures* for Each Type of Pretrial Release (Released Defendants Only)[1]**

| Type of Release | Def. Failed to Appear | Def. Charged with New Crime | Def. Charged with New Felony |
|---|---|---|---|
| 1. Written promise to appear | 5.1% | 1.7% | 0.0% |
| 2. Release in someone's custody | 13.6% | 17.3% | 9.1% |
| 3. Unsecured bond | 15.0% | 9.7% | 2.5% |
| 4. Secured bond: cash deposit by defendant | 16.0% | 3.4% | 0.0% |
| 5. Secured bond: cash deposit by person other than defendant | 20.3% | 2.5% | 0.0% |
| 6. Secured bond: mortgage of property | 0.0% | 0.0% | 0.0% |
| 7. Secured bond: nonprofessional bondsman | 13.5% | 24.0% | 6.3% |
| 8. Secured bond: professional bondsman | 19.3% | 21.2% | 4.4% |
| 9. *Secured bond: all types* | 18.5% | 19.7% | 4.1% |
| 10. Total (all types of release) | 15.8% | 14.2% | 3.2% |

*Of defendants who failed to appear 32.8 per cent were charged with a new crime, and 36.3 per cent of defendants charged with a new crime also failed to appear.

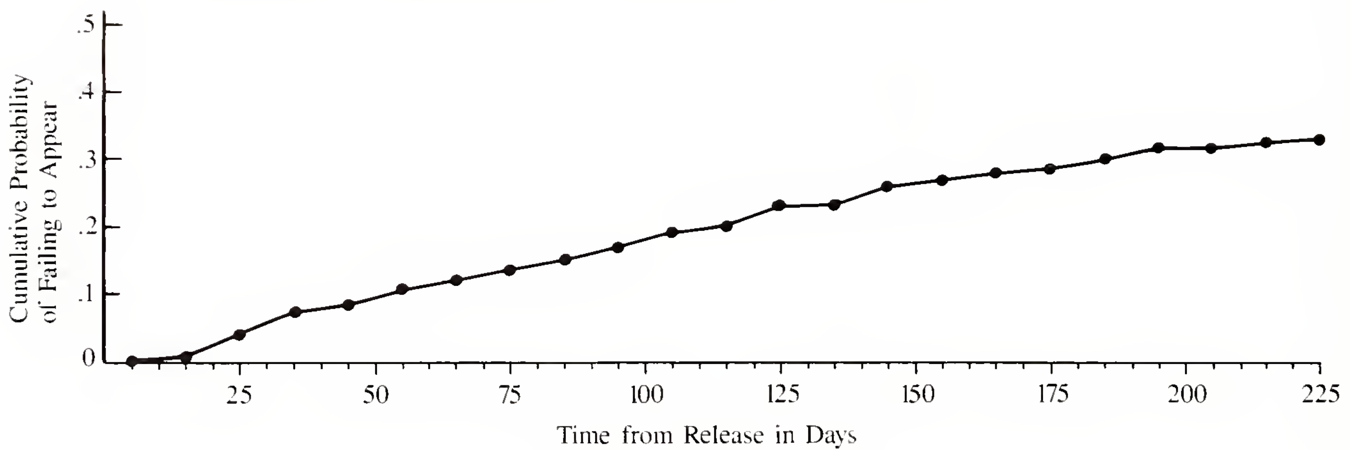
[1]All figures were estimated from the stratified sample. The percentage base is the total of defendants receiving each type of pretrial release. Four released defendants whose type of release was unknown were excluded.

(14 per cent of the total released) eventually returned to court. Thus, only 2 per cent of the released defendants failed to appear and remained absent so that their cases could not be disposed of. *But the defendants who failed to appear and later returned for disposition caused problems for the court.* Regression analysis indicated that their failure to appear increased their arrest-to-disposition time by 155 per cent, and also made their conviction less likely. The delay may have weakened prosecution efforts—for example, by discouraging prosecution witnesses from appearing.

Defendants released on all types of secured bond had a higher nonappearance rate (19 per cent) than those released in other ways (14 per cent). Secured-bond defendants also had a higher new-crime rate (20 per cent) than defendants released in other ways (8 per cent). (See Table 2.)

Applying several techniques of statistical modeling to the Durham court data, we attempted to devise a means of predicting which defendants would fail to appear. One important predictor is time at risk. When we are concerned with failure to appear, time at risk is defined as the time from the defendant's release until either his case is disposed of or he fails to appear, whichever occurs first. (When we are concerned with new crime on release, time at risk is defined as the time from release until either court disposition or the defendant is arrested for a new crime, whichever occurs first.) Time at risk affects the probability of failing to appear in two ways. (1) The passing of time may weaken the defendant's commitment to appear, or allow him to "forget" his obligation, or give him opportunity to make plans to be absent or to "skip town." This may occur even though he has only one or two required appearances, if they are far apart in time. (2) As time elapses from release and his case remains open, the defendant tends to have more required court appearances. (Scheduled appearances occur at irregular intervals; in our sample, the total number of required appearances ranged from one to 16, and the median number was three.) With each successive appearance, the defendant may be less willing to appear because he is more conscious of the possibly unpleasant

**Figure 2**
**Cumulative Probability of Failure to Appear, As a Function of Time at Risk***




*Time at risk is time from pretrial release until either court disposition or failure to appear, whichever occurs first.

consequences of conviction and sentencing. (The total number of appearances is positively correlated with likelihood of conviction and severity of sentence; the extreme example is a case involving the death penalty.) Also, the defendant may simply become confused about his obligation to appear if he is required to do so often enough. Time at risk also affects the probability of committing a new crime, in that the more time the defendant remains free, the more time he has to commit a new crime (and get arrested), if he is so inclined.

The relationship between time at risk and failure to appear can be seen in Figure 2, which shows a graph of the defendant's cumulative probability, over time, of failing to appear. This probability is .08 after 45 days, .17 after 95 days, and .26 after 145 days, and it continues to increase, reaching .33 at 225 days. This is about as far as our follow-up extended, but the probability would probably have continued to increase, although at a slower rate, for more prolonged cases. A graph of probability of failure to appear against number of court appearances (not shown in this article) looks very similar to the one shown in Figure 2.

Predicting time at risk, which can be done with fair accuracy from the defendant's age, type of charge, number of charges, and previous pretrial release status, appears to be the best available means of predicting the individual defendant's risk of nonappearance and new crime, on the basis of information currently available to magistrates.

In assessing the risks of failure to appear and new crime while on release, we think that it is important to consider not only *whether* the defendant fails to appear or commits a new crime, but also *how soon* he does so. That is, a defendant who can only "survive" (remain free without failure) for a short time before "forgetting" his obligation or deliberately absconding is, in our view, more risky than a defendant who can "survive" for a longer time. We performed a regression analysis of expected failure time—the time the defendant is expected to be able to remain free before failing to appear. Of the various factors tested in the regression analysis, four turned out to have a significant association with failure time: age, type of current charge, prior failure to appear, and amount of secured bond. Defendants under 21 had shorter failure times (that is, a higher risk of failure to appear) than did older defendants. defendants charged with felonies or DWI had longer failure times (lower risk) than did defendants charged with misdemeanors other than DWI.

Defendants who had previously failed to appear had shorter failure times (higher risk) than other defendants, but this difference was only marginally significant. The model indicates that failure time increased by about 9 per cent (i.e., the failure risk decreased) for each additional $1,000 of secured bond, but this relationship was only marginally significant; the model suggests that *secured bond was at best a weak deterrent to nonappearance.*

### How did the Durham court respond to failure to appear?

North Carolina law provides two ways of punishing and deterring failure to appear: (1) prosecution for the crime of willful failure to appear,[6] and (2) forfeiture of bond. We found no instances of prosecution for willful failure to appear. One reason may be that the prosecution must prove that the defendant's failure to appear was willful. Another reason may be that if the defendant who fails to appear later returns to court, the prosecutor may be concerned with disposing of his original charge rather than his violation of pretrial release.

Bond forfeitures were not strictly enforced. Of bonded defendants who failed to appear, 87 per cent were not ordered by a court judgment to forfeit any portion of their bonds, primarily because of a policy of forgiving forfeitures if defendants eventually returned to court for disposition. The low forfeiture rate helps to explain our statistical finding that secured bond had little effect on failure to appear.

### How effective were professional bondsmen?

Professional bondsmen were allowed to charge a fee of 15 per cent of each bond. Nineteen per cent of the bondsmen's clients failed to appear, yet bondsmen only forfeited 2 per cent of their total bonds. The data suggest that bondsmen were not especially effective in getting nonappearing defendants who failed to appear back to court. Among defendants who failed to appear and were not "assisted" back to court by police because of an arrest for a new crime, the percentage who never returned to court was much higher for professional bondsmen's clients (26 per cent) than for other defendants (14 per cent). The reason for the higher no-return rate for bondsmen's clients may well be that they were inherently riskier defendants. But the bondsmen's function is to control the risks that their clients present and, if they fail to appear, to get them back to court. Arguably, their clients should be doing better than defendants who do not have bondsmen, but in our sample the reverse was true.

### Suggestions for improvement

While pretrial release in Durham seems to be operating fairly well, on the basis of our study we offer the following eight suggestions for improvement.

**(1) Adopt guidelines for pretrial release that are more specific and objective than those currently in use.** North Carolina law[7] provides for flexibility in its pretrial-release system by requiring the senior resident superior court judge in each of the state's 34 judicial districts, in consultation with the chief district court judge, to issue "recommended policies" to be followed in setting conditions of pretrial release. This law allows flexibility to meet local needs within the framework of the generally applicable state statutes. Durham's current pretrial-release policies, which as far as we know are not greatly different from those in most judicial districts, essentially recapitulate the pretrial-release criteria of N.C. Gen. Stat. § 15A-534(c) (summarized earlier in this article) and suggest minimum bond amounts for each type of offense when the judicial official decides that bond must be imposed. Also, the Chief District Court Judge in Durham requires magistrates to prepare a written statement of factors they consider in setting each defendant's pretrial-release conditions on a form that lists most of the statutory criteria. If these reasonable policies and procedures were extended and made more objective and specific, they might help to reduce racial disparity in opportunity for pretrial release. The extended policies could be based, in part, on this study's results concerning prediction of time from arrest to disposition.

**(2) Reduce court disposition time to reduce failure-to-appear and new-crime rates.** Both prosecution and defense need time to prepare a criminal case. We believe, however, that the time from arrest to disposition can be reduced. Reducing the time during which released defendants are at risk would tend to lower both the failure-to-appear rate and the new-crime rate (reasons for the probable reduction are explained in the preceding section).

**(3) Enforce bond forfeiture more strictly.** Currently in Durham, only a small percentage of bonded defendants who fail to appear actually forfeit any of their bonds. The failure to enforce forfeiture results primarily from the practice of forgiving forfeitures if the nonappearing defendant eventually returns to court for disposition, as most do. *But the obligation of the defendant is to appear as the court directs*

6. N.C. Gen. Stat. § 15A-543 (1983).

7. *Id.* § 15A-535.

*him to appear, not when it happens to be convenient for him.* Legally, he is liable for forfeiture of his bond—as is his bondsman—if he fails to discharge this obligation. As we explain above, failure to appear slows court proceedings enormously, wasting the valuable time of law enforcement officers, attorneys, court officials, and witnesses, and probably weakens prosecution. We suggest *at least partial forfeiture* of bond for each defendant who fails to appear, unless the defendant or bondsman can show that the defendant had a legitimate excuse (such as serious illness), with no exception for the defendant who returns to court after initially failing to appear. Even requiring a 15 per cent forfeiture in all such cases (i.e., granting an 85 per cent remission)[8] would provide a much stronger disincentive to nonappearance than the present practice provides.

(4) **Be stricter in continuing pretrial release with unchanged conditions for defendants who have failed to appear.** Although our court record data do not indicate how often this occurs, court officials who attended one of our early briefings on the results of this study noted that it is common for defendants who fail to appear to be re-released, when they eventually return to court, on the same conditions that they were previously subject to. We think this practice should be re-examined. We suggest that a rule addressing such re-release be added to local pretrial-release policies.

(5) **Consider changing state law to allow release to be secured by depositing a fraction of the bond, while preserving judicial officials' option to require security by full deposit, mortgage, or bondsmen as present law provides.** Release by depositing a fraction of the bond would increase the defendant's incentive to appear in court and would facilitate collecting forfeitures. The bonded defendant could be allowed to deposit with the court 15 per cent of the bond amount (the amount he would otherwise pay a bondsman) to be refunded if he attended all required court hearings. This policy would provide him an incentive to appear (unlike the bondsman's fee, which is not refunded). This policy would also deter failure to appear better than the present bond system, because the 15-per-cent deposit would be automatically forfeited for failure to appear unless the defendant had a legitimate excuse. (As explained above, 87 per cent of bonded defendants in our study who failed to appear forfeited nothing.) It would be easier for the court to collect the 15 per cent deposit as a partial forfeiture since it would already be in the court's control. The court could still seek forfeiture of the balance of the bond, perhaps offering a "discount" (a partial remission) if the defendant returned within a specified period of time.

We also suggest that, in drafting the suggested statutory change, language be considered that would allow the magistrate or other judicial official the option of release on deposit of a fraction of the bond, while preserving the judicial official's discretion to require that the bond be secured—as it may be under present N.C. Gen. Stat. § 15A-534—by full cash deposit, mortgage, or bondsman. There may be occasions when the magistrate justifiably feels that more is needed than a 15 per cent deposit to ensure the defendant's appearance, and that only full cash, a mortgage, or a bondsman will suffice.

(6) **Prosecute some defendants for willful failure to appear.** As we explained above, willful failure to appear in court for a required hearing is a crime under North Carolina law. We found no instance of prosecution for this crime in Durham. Prosecuting even 10 per cent of the defendants who fail to appear for this offense would probably reduce the risk of failure to appear for all defendants. We suggest that prosecution efforts be focused on failure-to-appear cases in which (1) the defendant has a previous record of nonappearance or there is other evidence that the failure was willful, and (2) the defendant's current charge is serious or he has a serious conviction record.

(7) **Release under supervision a select group (no more than 10 per cent) of defendants.** By "supervision" in this context, we mean a court official or bondsman maintaining frequent contact with the defendant (by telephone, mail, or face-to-face meetings) to remind the defendant of his obligation to

8. The court must set aside an order of forfeiture if the defendant makes a timely appearance and satisfies the court that appearing on the scheduled date was impossible or that his failure to appear was without his fault. The court may grant a partial remission of forfeiture if it "determines that justice does not require the forfeiture of the full amount of the bond . . . ." N.C. Gen. Stat. § 15A-544(c) (1983); *see also id.* § 15A-544(e).

appear, of the penalties for not appearing, and that he is under surveillance of the court. We suggest that one or both of two categories of defendants, which we call "Category 1" and "Category 2," be considered eligible for this kind of supervised release. *Category 1 defendants* are those few who have remained in pretrial detention (jail) for at least two days and are therefore unlikely to receive one of the usual forms of pretrial release. *Category 2 defendants* are defendants whose cases are likely to take longest for the court to dispose of; tentatively, we suggest that this category be limited to defendants whose cases are in the longest 10 per cent of disposition times predicted using a four-factor risk score. (There may be considerable overlap between these two categories.)

Who would carry out this supervision? Bondsmen engaged by Category 2 defendants could be asked to supervise these defendants more systematically, using court-recommended procedures, perhaps with oversight by the court. Bondsmen would have more incentive to supervise such defendants if our suggestion that forfeiture be more strictly enforced were adopted. We suggest that consideration be given to hiring one or more court staff to supervise Category 1 defendants, as well as Category 2 defendants who are not released on secured bond. Hiring such personnel would, of course, have a cost, but could eliminate the expense of jailing Category 1 defendants, who would otherwise have jail stays averaging about 50 days. The system used by the Re-Entry Project in Raleigh could serve as a model. Re-Entry Project staff screen defendants who are unlikely to obtain other forms of pretrial release. The screening criteria are similar to those in present N.C. Gen. Stat. § 15A-534(c), summarized earlier in this article. The Re-Entry staff use these criteria to decide whether the defendant is eligible for release under supervision of the project. A district court judge then decides whether to release the defendant under supervision of the project. Failure-to-appear rates for defendants released in this way have been about 10 per cent in Raleigh, comparing favorably to the overall 16 per cent failure rate in Durham.[9] A system like Project Re-Entry's was evaluated in a recent study involving defendants in Miami, Florida; Milwaukee, Wisconsin; and Portland, Oregon. These defendants had failure-to-appear rates averaging 14 percent.[10]

**(8) Make more information available and accessible at all times to magistrates, especially information in existing state data bases concerning defendants' previous convictions, previous failures to appear, and current pretrial release status.** In our study, we were frequently reminded of the lack of consistent and reliable information available for magistrates to use in making important decisions about pretrial-release conditions. Better information is needed for two purposes: (1) to implement extended guidelines concerning the use of alternatives to secured bond (which we believe will help to reduce disparity in pretrial-release opportunity) and (2) to identify higher-risk defendants who would receive post-release supervision (which we expect to help reduce failure to appear).

At the very least, we think magistrates should have reliable and consistent information on: (1) the defendant's criminal history (especially prior convictions in the local county); (2) the defendant's previous failures to appear; and (3) whether the defendant is already on pretrial release in connection with a previous, still-pending charge. This information is essential to magistrates making pretrial release decisions. Our statistical analysis of the Durham data indicates that being on pretrial release in connection with an earlier charge at the time of the current arrest is associated with a longer case-disposition time. It is also associated with an increased risk of committing a new crime during the current pretrial release period. Prior convictions are associated with increased risk of committing a new crime. Previous failure to appear is associated (at a marginal level of statistical significance) with increased risk of failure to appear. Two of these three items of information (previous failures to appear and previous convictions) are among the factors required by G.S. 15A-534(c) to be considered in making the pretrial release decision, and the third (current pretrial release status) is clearly relevant to that deci-

9. Conversation with Ms. Louise Davis, Director of Project Re-Entry, December 17, 1986.

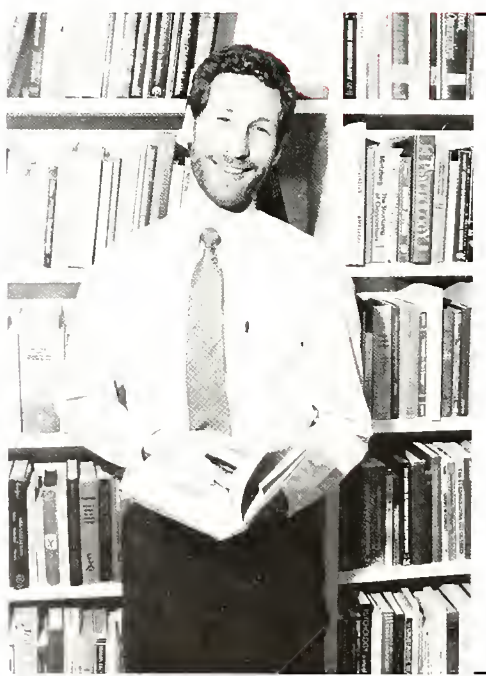
10. See James Austin, Barry Krisberg, & Paul Litsky, "The Effectiveness of Supervised Pretrial Release," *Crime and Delinquency*, 31, No. 4, 519-537 (October 1985).

sion. In addition, in view of the importance to public safety of the pretrial release decision, we think it essential that magistrates know, when setting pretrial release conditions, whether the defendants they are dealing with have (or do not have) records of criminal conviction and failure to appear in court.

How can this additional information be provided? We recommend that two information systems—the state's computerized criminal history system and the court system's criminal case-tracking system—be made accessible to magistrates and that they be trained in retrieving information from these systems. In Durham, this suggestion is already being implemented in part. The criminal history system is maintained by the Division of Criminal Information (DCI) of the State Bureau of Investigation, formerly "PIN." The coverage of this system is continually being improved through diligent field auditing by the DCI. The Chief District Court Judge in Durham recently asked the DCI's Director for assistance in getting access to the DCI criminal history system. The DCI Director responded by arranging for DCI personnel to train Durham magistrates in the use of the DCI terminal, and by agreeing to provide a computer terminal to gain access to the DCI system.

The case-tracking system, formally known as the Court Information System, or CIS, is maintained by the State Administrative Office of the Courts (AOC) and clerks' offices, with the latter adding information daily. We think that access to the AOC case-tracking system may prove to be even more valuable to the magistrates than access to the DCI system, although both are desirable. The AOC system can provide information on *all* cases in Durham filed since August 1982, when the system began, including pending cases and past convictions. The DCI criminal history system, although statewide, is limited to arrests and court dispositions concerning charges for which the defendant was fingerprinted (fingerprinting is not required for some charges), and the system is not designed to include up-to-date information on pending cases. ꟼ

## New Institute Faculty Member



Roger M. Schwarz is a *magna cum laude* graduate of Tufts University and received his M.Ed. degree from Harvard University and his A.M. and Ph.D. degrees from The University of Michigan. His doctorate is in organizational psychology. Before joining the Institute of Government, he was a visiting assistant professor in the Department of Psychology at The University of North Carolina at Chapel Hill.

Mr. Schwarz has served a number of government agencies and corporations as a consultant in participative decision making and organizational change. He has also served as project director of a study of five incentive pay programs in a federal agency.

At the Institute of Government, Mr. Schwarz will teach in the various management programs. His research interests include group processes, organizational change, and motivation and decision making in organizations.

# Changes in the North Carolina Administrative Procedure Act

**Robin W. Smith**

## Introduction

In its 1985 session, the North Carolina General Assembly adopted a major revision of the state's Administrative Procedure Act (APA)—the statutes that set out procedures for state agencies to follow in adopting regulations and conducting administrative hearings. Several influential lawmakers, in the belief that executive branch agencies had exceeded their statutory authority in both areas, introduced House Bill 52, an attempt to limit the rule-making and quasi-judicial powers of those agencies.

The bill's sponsors identified three specific concerns: (1) adoption of rules beyond the scope of statutory authority; (2) creation of criminal offenses by administrative rule rather than by act of the legislature; and (3) questions of fairness raised by the practice of an agency's acting as both legislator (by adopting administrative rules) and judge (in conducting administrative appeals under those rules). As introduced, H 52 proposed to subject all administrative rules to veto by a legislatively-appointed commission and to strip state agencies of the power to decide contested cases. The final bill did not go quite so far; it did create a new Administrative Rules Review Commission (ARRC) with power to veto administrative regulations under standards set out in the APA, and it established an Office of Administrative Hearings (OAH) to conduct appeal hearings for state agencies, but the agencies retained final decision-making power in those appeals.

The bill went far enough, however, to prompt another round of debate (and litigation) between the Governor and the legislature on the issue of separation of powers. The controversy focused on two provisions in the bill: (1) legislative appointment of the Administrative Rules Review Commission and (2) delegation of authority to the Chief Justice of the North Carolina Supreme Court to appoint the director of the Office of Administrative Hearings.

In response to criticism that both provisions violated the separation of powers doctrine (by giving ultimate authority over executive actions to appointees of the legislative and judicial branches), the General Assembly wrote into the bill a method of resolving the constitutional issues. The bill directed that the President of the Senate and the Speaker of the House join in requesting that the North Carolina Supreme Court issue an advisory opinion on the constitutionality of the disputed sections. The sections of the APA creating the Administrative Rules Review Commission were not to become effective until the Court ruled on their constitutionality, and the bill included an alternative delegation of authority to the Attorney General to appoint the OAH director in the event that section was struck down by the Court.

The two provisions came to different ends, at least in the short term. Stating that it would be inappropriate to insinuate itself into the legislative process, the North Carolina Supreme Court on October 28, 1985, refused to issue the requested advisory opinion. As a result, the Administrative Rules Review Commission never came into existence in the form proposed by H 52. During the 1986 session,

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the General Assembly reformulated the Commission, this time with power only to note objections to agency regulations and to report those objections to the legislative leadership.

Exercising the power of appointment delegated to him by the new APA, the Chief Justice of the North Carolina Supreme Court appointed the director of the Office of Administrative Hearings in December of 1985. The Governor decided to pursue the separation of powers debate on that point in the courts and filed suit on March 19, 1986, to challenge the constitutionality of the appointment. The delegation was upheld by the Wake County Superior Court on December 2, 1986.

Beyond the constitutional debates that were sparked, the APA revisions made some significant changes in the procedures state agencies will be required to follow in adopting administrative regulations and conducting contested-case hearings.

## Rule making

Changes in the procedures for adopting administrative rules primarily have lengthened the process from a minimum of two months to a minimum of five months (from public notice of rule making to effective date of the new rule). Allowing for filing deadlines and delays that may result from review by the Administrative Rules Review Commission, the time required for rule making often will be considerably longer. At the same time, the circumstances in which emergency rules may be adopted have been severely circumscribed.

## What is a rule?

The definition of a rule is reworded slightly in the revised APA, but the thrust is the same. A rule is any agency regulation, standard, or statement of general applicability that implements or interprets state or federal law or describes the procedure or practice requirements of the agency.[1] In amending the definition, the General Assembly expanded the list of exceptions to the definition by adding the following:

—budgets and budget policies and procedures;
—"nonbinding interpretive statements" that explain the meaning of a statute or precedent;
—forms and instructions for completing forms;
—policy statements made in the context of another proceeding (including declaratory rulings and orders establishing rates or tariffs);
—scientific, architectural or engineering standards; and
—criteria used by the agency in conducting audits, investigations or inspections, in settling financial disputes or negotiating financial arrangements, or in the defense, prosecution, or settlement of cases.[2]

The definition retains exceptions for policies communicated to the public by signs (broadened to include signs posting the boundaries, hours of operation, and safety rules for public facilities) and for internal management policies. The effect of the exceptions is to exempt these policies and standards from the rule-making requirements of the APA.

## Rule-making authority

The APA revisions were prompted in large part by the perception that state agencies had exceeded or abused their rule-making authority in the past. As a result, several provisions intended to restrict, or at least more clearly define, that authority were added. The APA now states that no agency is authorized to adopt rules implementing a statute unless the statute expressly confers on the agency the power, duty, or authority to carry out its provisions.[3] As a corollary to that general rule, the APA now also expressly prohibits an agency from enlarging the scope of a trade or profession subject to licensing.[4] For example, the statutes concerning licensing of real estate brokers define a real estate broker in terms of what he does. The North Carolina Real Estate Commission has no authority to enlarge the group of people subject to licensing as "real estate brokers" by administratively adding services or transactions to the statutory definition.

It does not appear that the Act requires a specific delegation of *rule-making* authority to an agency, since it speaks instead of a more general authority to "carry out the provisions of the statute." A broad delegation of power to *implement* a statute may be sufficient to create an implied power to adopt regulations necessary to effect its purposes and thereby satisfy the requirements of G.S. 150B-9(b).[5] Ironically, the question of how much statutory authority is enough arose almost immediately as the Office of Administrative Hearings began its operations. OAH was given the duty to carry out the rule-filing and contested-case provisions of the Administrative Procedure Act, but was not expressly authorized to adopt regulations.

1. N.C. Gen. Stat. § 150B-2(8a) (1986).
2. *Id.*
3. *Id.* § 150B-9(b) (1985).
4. *Id.*
5. State v. Frinks, 284 N.C. 472, 201 S.E.2d 858 (1974).

Acting under its implied powers, the Office of Administrative Hearings adopted regulations relating both to rule-filing and contested-case proceedings.

The APA revisions also codified the principle that only the legislature has the power to determine what will constitute criminal behavior. State agencies are now prohibited from adopting rules imposing criminal penalties unless the General Assembly has authorized the use of criminal sanctions and specified a penalty.[6]

## Contents of rules

In an effort to thin the North Carolina Administrative code, the revised APA prohibits adoption of the verbatim text of any North Carolina statute or any federal statute or regulation as an administrative rule and directs instead that those texts be adopted by reference. State agencies had been directed to eliminate existing rules that repeated statutory provisions as part of an earlier rules-review process mandated by the General Assembly. It had been common practice for state agencies to include statutory standards and procedures in their administrative rules as a way of setting out the complete regulatory structure for a given activity.

The APA now requires adoption of rules describing all formal and informal agency procedures available to the public, including a list of all forms required by the agency (although the forms themselves are specifically exempted from the APA's rule-making requirements).[7]

## Special requirements

In G.S. 150B-11, the APA retains a requirement for disclosure to the public of any written statement of policy or interpretation used by an agency in carrying out its functions, but adds "except those used only for internal management of the agency." The scope of the exception is not entirely clear; similar language appears in G.S. 150B-2(b)a, where the legislature, in defining a rule, excludes "statements concerning only the internal management of an agency" unless the statement affects the rights of people outside the agency. Policy and procedure manuals are the only examples cited there.

The disclosure requirement should be read in conjunction with the Public Records Act;[8] some policies and statements that are exempt from disclosure under G.S. 150B-11 may be subject to public inspection under G.S. 132-6, and the opposite may also be true. There has been some concern that G.S. 150B-11 diminishes the scope of attorney-client privilege as applied to state agencies. For example, guidelines for audits; investigations; inspections; financial transactions; and the prosecution, defense, or settlement of cases appear to be subject to disclosure under G.S. 150B-11. To the extent that agency documents fall within the attorney-client privilege recognized by G.S. 132-1.1, agencies may argue that the Public Records Act controls. The scope of the privilege recognized there is limited to confidential communications between an attorney and the client-agency about a specific case or transaction. Read together, G.S. 150B-11 and G.S. 132-1.1 probably mean that while an attorney-client communication about a settlement offer or litigation strategy may be privileged, agency policies concerning the conduct of litigation or settlement of cases are subject to disclosure. By way of keeping all of this in perspective, it is important to remember that a disclosure requirement *with no exceptions* existed before the APA revisions of 1985 and 1986; the amendment, if anything, narrowed the statute's scope.

The revised APA continues the requirement that agencies submit any proposed rule requiring the "expenditure or distribution of State funds" to the Budget Director for approval of the expenditure before publishing the notice of public hearing. It now also specifies that rules submitted to the Budget Director must be accompanied by a fiscal note stating the rule's effect on the "revenues, expenditures or fiscal liability of the State or its agencies or subdivisions."[9]

## Procedures for rule adoption

Nearly every step in the rule-making process will take significantly more time as a result of the 1985 amendments. Public notice of proposed rule making must now be given at least 30 days before the public hearing and 60 days before action on the rule,[10] compared to 10 and 20 days previously. The public hearing record must remain open for comments for at least 30 days, but that period may run either before or after the hearing date. A provision also was added to prohibit changes in the draft rule between notice and hearing.[11] The APA time

6. N.C. GEN. STAT. § 150B-9(c) (1985).
7. *Id.* § 150B-2(8a).

8. *Id.* § 132-1 *et seq.* (1986).

9. *Id.* § 150B-11(3) (1985).
10. *Id.* § 150B-12(a) (1986).
11. *Id.* § 150B-12(e) (1985).

periods apply only in the absence of an applicable statute; if an applicable statute specifies a shorter notice period, that period applies—the APA does not provide that the stricter rule controls.

The legislature also amended the public notice procedures to require publication of the full text of a proposed rule or amendment rather than a summary. This change was tied to the creation of a *North Carolina Register* (in the image of the *Federal Register*) for administrative regulations. Notice must now be given in the *Register* as well as by publication as directed by any applicable statutes. At present, publication in the *Register* adds another two weeks to the rule-making process, since it is published only on a monthly basis, and public notices must be submitted two weeks before publication date. Although a newspaper notice may be published as well, the public hearing cannot be held until 30 days after publication in the *Register*.

The General Assembly adopted several new provisions exempting certain types of rules from the public notice and hearing requirements. Public notice and hearing will not be required for rules that simply describe agency forms and instructions or for certain technical amendments that do not change the substance of the rule.[12] The statute provides several examples: relettering or renumbering; substitution of one name for another when an organization or position is renamed; correction of a statutory citation that is no longer accurate; or a change in the agency's address or telephone number. In a somewhat murkier section, the Act also now exempts from those requirements the repeal of a rule if repeal is "specifically called for" by the Constitution of the United States, the Constitution of North Carolina, any federal or North Carolina statute, any federal regulation or court order.[13] Since the courts, in either holding a rule to be unconstitutional or in staying its application, rarely call expressly for its repeal, the statutory language allows a great deal of discretion in deciding when to use the provision. The agency will have to decide both when a court decision or federal agency action has "specifically called for" the repeal of a rule and when that action carries such weight that it is appropriate to repeal a rule without public notice. The statute makes no attempt to distinguish among an order issued by the Superior Court of North Carolina, a decision handed down by the Supreme Court of the United States, and a regulation adopted by the United States Environmental Protection Agency—all are accorded the same weight. The decision to repeal without notice, particularly where an environmental regulation is concerned, could be extremely controversial according to the strength or weakness of the basis for that action.

## Temporary rules

The General Assembly has narrowed the circumstances in which an agency may adopt temporary or "emergency" rules. The earlier standard for adoption of temporary rules allowed an agency to use an abbreviated rule-making procedure when immediate adoption was "necessitated by the public health, safety or welfare." The revised statute now requires that the agency show "[a] threat to public health, safety or welfare resulting from any natural or man-made disaster or other events that constitute a life-threatening emergency."[14] This more stringent language will make it impossible to use temporary rules as they have most often been used in the past—to ensure that large numbers of people cannot take advantage of the time involved in the normal rule-making process to avoid a new regulation in a way that could adversely affect the public health, safety, or welfare.

The APA retains a 120-day limitation on the effectiveness of temporary rules. With the longer notice periods and additional time required to have rules approved by the Administrative Rules Review Commission before filing, adopting permanent rules that will become effective within 120 days will be extremely difficult.

## Petition for adoption of rules

The APA continues to provide a procedure by which a citizen can petition an agency to adopt, amend, or repeal a rule and require the agency to respond to that request. The statute, G.S. 150B-16, has been amended to allow more time for boards and commissions to respond. It continues to require an agency response within 30 days except that boards and commissions (which often meet on a bimonthly basis) may act at their next regularly scheduled meeting, but no later than 120 days after receipt of the request.

## Administrative Rules Review Commission

The Administrative Rules Review Commission (ARRC) in its present form was first proposed by the

12. *Id.* § 150B-12(g).

13. *Id.* § 150B-12(h).

14. *Id.* § 150B-13 (1986).

legislature in H 52. The Commission's composition raised one issue in the separation of powers debate that accompanied the APA revisions because H 52 proposed to give a legislatively appointed commission veto power over rules adopted by agencies in the executive branch. When the North Carolina Supreme Court refused to issue the requested advisory opinion on the constitutionality of the proposal, the sections creating the ARRC became void. In the 1986 session, the General Assembly tried again, this time creating an Administrative Rules Review Commission of the same composition, but with power only to delay the filing of administrative rules, rather than to veto them.[15]

Rules effective after September 1, 1986, must be submitted to the Administrative Rules Review Commission for review after adoption and before filing with the Office of Administrative Hearings. The eight-member Commission is directed to review rules under three criteria:

1. Whether the rule is within the authority delegated to the agency by the General Assembly;
2. Whether it is clear and unambiguous; and
3. Whether it is reasonably necessary to enable the agency to perform a function assigned to it . . . or to enable or facilitate the implementation of a program or policy . . . .[16]

The Commission must complete its review within 60 days, although by majority vote it can extend the review period by an additional 60 days. A routine review can be expected to add six to eight weeks to the rule-making process.

If the Commission objects to a rule, it can delay the filing of that rule for up to 90 days. During that time, the Commission is to inform the agency of its objection, and the agency then has 30 days in which to revise the rule to address the Commission's concern or return the rule to the Commission without change. The Commission must send the rule back to the agency with a notation of objection if the agency revisions (or lack of them) fail to resolve the problem. The agency can then file the rule, and the rule will become effective, but under the cloud of a continuing ARRC objection that will be reported to the President of the Senate and the Speaker of the House. The Act specifically states—probably unnecessarily—that if the General Assembly enacts legislation disapproving the rule, the rule will no longer be effective.

Although the 90-day delay could add significantly to the time required for rule adoption, in at least one respect it is unrealistically short; it will be difficult, if not impossible, for an agency to revise a rule within 30 days. As the legislature has recognized in setting other deadlines, many state boards and commissions meet only on a bimonthly basis and would need to schedule a special meeting to comply with the statute. Meeting the deadline would be made still more difficult by APA rule-making requirements. If the requested change were substantive, the agency would probably find it necessary to publish a new public notice and hold an additional public hearing.

State agencies also have been put on notice, in G.S. 143B-30.2(h), that submission of a proposed regulation to the Administrative Rules Review Commission will place the entire rule being amended before the Commission for review. The ARRC has no authority to suspend a rule that is already in effect, but it can object to an existing rule and thereby draw it to the attention of the legislature. That alone has caused some agencies to think carefully about proposals to amend regulations that may be controversial.

Rules already in effect on September 1, 1986, will be subject to review by the ARRC under the same standards. Those rules will expire on June 30, 1988, unless approved by the Commission.

## Contested-case procedures

House Bill 52, as originally introduced, proposed the creation of an Office of Administrative Hearings staffed with administrative law judges who would both conduct and decide administrative appeals of state agency actions. As a result of a number of amendments and committee substitutes, the final bill gives the administrative law judges only as much authority as agency hearing officers had—that is, authority to conduct the hearing and to recommend a decision to the agency.

H 52 in its final form also allows the appellant to waive the right to an administrative law judge and request that the hearing be conducted by an agency hearing officer. With the final decision still in the hands of the agency, many appellants have elected to request an agency hearing officer, particularly in instances where the hearing officer will be a member of the board or commission that makes the final decision. Appellants seem to be weighing the advantages of an independent hearing officer against those of a hearing officer with greater expertise in the subject and possibly more credibility with the other board or commission members. Some attorneys with administrative law experience feel that agency hearing officers are also more likely to

15. *Id.* § 143B-30 *et seq.* (1986).
16. *Id.* § 143B-3.2.

give weight to policy arguments and to the equities of a case than are administrative law judges who may know only the black letter law on the subject.

The revised APA prescribes two sets of hearing procedures—Article 3 (G.S. 150B-23 et seq.) sets out the general contested case procedures; Article 3A (G.S. 150B-38 through 42) provides slightly different procedures to be used by banking, insurance, and occupational licensing agencies. In the 1985 legislation, there were also slight variations in procedures for cases in the Department of Human Resources, but the General Assembly eliminated those special provisions in the 1986 session, when DHR failed to show the legislature any convincing reason to treat its hearings differently from other contested cases. Some minor modifications in the general hearing procedures remain in place for personnel actions.

## Petition for hearing

Under G.S. 150B-23, all contested cases (except those involving insurance, banking, or occupational licensing agencies) must be commenced by filing a petition with the Office of Administrative Hearings. For the first time, the APA specifies the content and form of a petition. A petition filed by a party other than a state agency must now be supported by an affidavit stating facts tending to show that the agency has:

(a)
1. deprived the petitioner of property; or
2. ordered him to pay a fine or penalty; or
3. has otherwise substantially prejudiced his rights; and

(b)
1. exceeded its authority or jurisdiction; or
2. acted erroneously; or
3. failed to use proper procedure; or
4. acted arbitrarily or capriciously or
5. failed to act as required by law or rule.

A copy of the petition also must be served on the state agency involved. Appeals before banking, insurance, and occupational licensing boards must be filed with the agency, since those agencies will continue to conduct their own contested-case hearings.

## Hearing officer

All hearings will be conducted by the Office of Administrative Hearings unless the appellant expressly waives that right; if the appellant does waive an OAH hearing, the hearing will be conducted by the state agency under APA procedures. H 52 left the choice of forum entirely to the appellant. One of the clean-up amendments adopted in the 1986 session makes clear that the choice of hearing officer belongs to the non-agency party, so that in actions brought by an agency, the respondent will have the choice. If there are multiple respondents, the hearing will be conducted by OAH unless all respondents consent to a waiver. The new language does not clearly resolve the question of whether a respondent who is joined as a necessary party in an action brought by a non-agency appellant can insist on an OAH hearing, even though the appellants waive that right. For example, if a citizen's group appeals the issuance of a Coastal Area Management Act permit, it appears that the appellants will select the forum, and the developer, who will be a necessary party-respondent to the hearing, will have no voice in the matter. The right to waive the OAH hearing is unavailable to appellants who are contesting personnel actions under Chapter 126 of the General Statutes; all hearings in personnel cases will be conducted by the Office of Administrative Hearings.

## Notice

The APA now requires that the appellant be given 15 days' notice of hearing.[17] A party served with notice must then file a response, with copies to all parties, not less than ten days before the hearing. Although the use of administrative law judges can be expected to make the appeal process more formal and to involve more attorneys, the time periods set out in the statute are extremely short.

## Venue

The venue provisions of G.S. 150B-24 now state simply that the hearing shall be conducted in the county where the person whose rights are being adjudicated has his principal residence. A hearing may be held in the county where the state agency has its main office only if the case does not affect an individual or if it concerns the property or rights of residents of more than one county. The hearing officer, however, has the authority to designate any other county as the appropriate venue when necessary to "promote the ends of justice or better serve the convenience of witnesses."[18] The APA also now states that a party waives the right to object to the venue by proceeding with the hearing; previously, the Act specifically provided that proceeding with the hearing would not serve as a waiver.

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17. *Id.* § 150B-23.
18. *Id.* § 150B-24 (1985).

## Powers of the hearing officer

In revising the APA, the General Assembly granted hearing officers some additional powers. First, the hearing officer is authorized, and in fact required, to stay any contested case on motion of the state agency if the agency is involved in either litigation or an administrative proceeding with a federal agency, and the outcome of that action will affect the state agency's position. The hearing officer also has been given power to stay the contested agency action pending the outcome of an administrative hearing under the standards set out in Rule 65 of the North Carolina Rules of Civil Procedure (Injunctive Relief).

The APA, in G.S. 150B-33, now sets out the standards by which a hearing officer may determine that an administrative rule as applied in the case is void. To do so, the hearing officer must find that the rule:

—is not within the agency's statutory authority; or
—is not reasonably clear and unambiguous; or
—is not reasonably necessary to enable the agency to perform a function assigned to it by statute or to enable or facilitate implementation of a program or policy.

The standards are the same as those prescribed for the Administrative Rules Review Commission in reviewing new regulations. The last ground appears to give the hearing officer a great deal of latitude, allowing him to substitute his judgment on a policy matter for that of the agency. If the final standard was intended to provide for closer scrutiny of agency regulations at the administrative level, its impact has been mitigated by the legislative compromise that left the final contested case decision with the agency that adopted the rules. It does not appear that the legislature gave the hearing officer any greater authority on this issue than on any other—the hearing officer can only recommend a finding that the rule is void to the agency; the agency will make the final decision.

If a contested case hearing is conducted by a hearing officer rather than by the state agency officials who will make the final decision, the hearing officer must prepare a recommended decision containing proposed findings of fact and conclusions of law, objections, and written arguments.[19] These documents will become part of the official record of the contested case to be forwarded to the agency for consideration in making the final decision. Although the agency has final decision-making authority, if it does not accept the hearing officer's recommendation, the reasons must be stated in the final order. The APA no longer specifically provides for oral argument before the agency. Although the agencies are likely to continue to allow the parties to make oral arguments, it may be prudent for attorneys to make a formal request to do so.

## Judicial intervention

G.S. 150B-44 provides a means for any party to seek a court order compelling action in the case of "unreasonable delay" by the hearing officer or agency. In the 1986 session, the statute was amended to state that failure to issue a decision within 60 days after the agency receives the official record from the hearing officer (or at the next regularly scheduled meeting of a board or commission) will constitute unreasonable delay.

19. *Id.* § 150B-34.

## Judicial review

The petitioner now has the option of filing for judicial review by the Superior Court either in Wake County or in his county of residence.[20] The rule concerning introduction of new evidence on appeal has changed significantly. Previously, judicial review was on the administrative record, and the reviewing court was directed to remand the case to the state agency to take additional evidence only if the evidence was material, not cumulative, and could not reasonably have been presented at hearing. The new rule allows the court to take new evidence directly as long as the new evidence is not repetitive.[21] Given the liberal rule on introduction of new evidence, the court may well reverse an agency decision on the basis of evidence that was not available to the agency either at the time the contested action was taken or at the time the agency issued its final decision in the administrative appeal.

In G.S. 150B-51, specific grounds for modifying or reversing an agency decision have been deleted, leaving only the statement that the court may affirm, reverse, modify or remand the case to the agency for further proceedings.

## Conclusion

Although not as radical as the sponsors of H 52 might have hoped, the 1985-86 APA revisions accomplished at least one of their purposes—administrative rule making will be a more difficult and more time-consuming process. Revisions in the contested-case procedures have left the state with

20. *Id.* § 150B-45.
21. *Id.* § 150B-49.

parallel hearing systems in the Office of Administrative Hearings and the individual agencies. It is likely that the APA will be refined further as the state agencies gain more experience with the new requirements and as the separation of powers issue is dealt with in the courts. ꟼ

# Latchkey Children *(continued from page 27)*

## *Phase Four:* The Second Year and Beyond

The participants for the second year of the two-year SACC project include the schools, the YMCA, and a residential children's home. The ASEP has expanded to 17 sites serving 47 schools and over 900 children. Fees have risen to $28 per week, including ten full days of care on teacher work-days and during Easter vacation. Care during part of Christmas vacation is optional. The YMCA operates programs in three recreation centers as well as in the Y branch supported in 1985-86, with a total of 66 children enrolled. A new program operated by a residential children's home (entirely separate from their residential program) serves 13 children, four of whom have special needs. The Council's grants are used largely for financial aid. *The Charlotte Observer* publicized the project through an article in August, and WCCB-TV aired public service announcements in September and October.

Summer care options for school-age children have increased substantically. ASEP will pilot a program of full-day care in five schools for a fee of $58 per week. The YMCA's extensive program of day camps will offer optional care before and after regular day camp hours to accomodate working parents. Mecklenburg County's Park and Recreation Department will staff an extended-hour day camp at one or more additional ASEP School sites.

## Prospects for the Future

The project envisioned that programs would be self-supporting after two years. Currently, only the schools and one of the four Y programs are self-sufficient. It may take more than two years for new non-school programs to become viable.

The schools' ASEP program will undoubtedly continue to expand, probably at a slower rate than between its first and second year. The costs will probably continue to rise, but at a slower rate. This high-quality program will be increasingly available, but all families will not be able to afford it. Thus, supplementary funds to institute a sliding-fee scale will be more important. Paradoxically, the potential for expansion of the ASEP may have the unintended effect of discouraging smaller agencies from experimenting with after-school care.

Managers and program directors from the schools, the YMCA, and Park and Recreation have cooperated in the project to coordinate program and training efforts. All are committed to continue. Involving other agencies interested in school-age programs could help to offset the perception of school domination of the field as well as to increase effectiveness of the community's response to the needs of school-age children. The Council's demonstration SACC Project has pointed the way toward a community solution of a community problem. ꟼ

# State Economic Development Policies
## *Review of Four Reports*

Charles D. Liner

Economic development has always been of significant concern in North Carolina and other southeastern states. In recent years other states have become more concerned with economic development policies because their economies have been adversely affected by major economic changes—the decline of manufacturing employment, increased competition from abroad, falling prices of oil and other natural commodities, and depression in agriculture. The widespread concern about state economies is reflected in the recent release of four reports concerning state economic development policies. One report is from the perspective of corporate executives, another is concerned with development in the southeastern states, and two reports recommend policies for North Carolina.

***Leadership for Dynamic State Economies*** was released by the Committee for Economic Development (CED), a nonprofit organization that represents large business corporations.[1] Not surprisingly, the report recommends that state economic policies be designed primarily to foster a vibrant free market economy that can change and adapt in response to market forces. The state report argues that officials should ensure that government policies "facilitate change and support innovation in the private sector." It further advises that state strategies give priority to investing in the "foundations" that support the private sector, namely (1) a well-trained work force, (2) adequate physical infrastructure (public facilities such as highways and water systems), (3) well-managed natural resources, (4) up-to-date knowledge and technology, (5) access to capital, (6) an attractive quality of life, and (7) a sound state and local tax structure.

The report is said to be based on case studies of economic development in seven states, but those case studies are not published in the report, and references to them are relatively scant and unenlightening. The report is full of general advice for state leaders (for example, each state should have a strategy that consists of "diagnosis, vision, and action"), and it provides some examples of programs that various states have tried, but on the whole it offers little new in the way of substantial, concrete recommendations for state leaders to consider.

***The CED report*** criticizes states for defining economic development too narrowly and for equating it with the activities of state agencies that are concerned with industrial recruitment. That criticism may be justified, but the CED also takes a narrow view by asking state leaders to concentrate on enhancing the private sector. One cannot dispute the report's assertion that "[T]he primary energy and innovation for strong state and regional economies must come from the private sector." But the broader responsibilities of state leaders do not permit them to accept the notion that enhancing the private sector and its ability to change constitutes by itself a sufficiently adequate strategy for improving

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1. Research and Policy Committee, Committee for Economic Development, *Leadership for Dynamic State Economies* (New York: Committee for Economic Development, 1986).

economic well-being in their states. In reality, the economic problems that states face are often caused by changes and innovations that occur in the private sector. State governments are called upon to help people and communities that are hurt by those changes, and to help those who, because of handicap or other circumstances, are not able to benefit directly or fully from the private sector. A comprehensive definition of economic development must also acknowledge that economic well-being necessarily depends on the public services that state and local governments are responsible for providing to all their citizens.

A much broader concept of economic development is apparent in ***Halfway Home and a Long Way to Go,*** the report of the 1986 Commission on the Future of the South to the Southern Growth Policies Board, an interstate agency representing the southeastern states and Puerto Rico.[2] This report is refreshing in the way it maintains the perspective that economic development policies are supposed to benefit people, not institutions. In fact, the Commission concludes that the best investments for the future are investments "in the lives of Southerners themselves." Accordingly, four of the ten recommended goals for southeastern states concern education, and a fifth goal calls for increased aid to families whose poverty and lack of education and health care may prevent them from benefiting from economic progress. Other goals include increasing the South's capacity to generate and use technology, enhancing the region's natural and cultural resources, improving the ability of state and local governments to provide services, fostering "homegrown" business and industry, and developing leaders with global vision.

The report includes a number of specific recommendations. In education, it calls for increased spending for public schools, improvement in the quality of teachers, more and better pre-school programs, measures to increase school attendance, state task forces and community college programs to deal with adult illiteracy, the revamping of vocational education, improved child care, and an increased economic development role for institutions of higher education. To aid "at risk" families, it calls for increasing the level of welfare assistance, school-based health clinics, and extended Medicaid coverage.

Specific recommendations for achieving other goals call for new graduate programs in science and technology, state funding of technological research, assistance to entrepreneurs, stronger partnerships between business and colleges and universities, special efforts to help rural areas attract industry, better environmental management and facilities planning, cabinet-level state planning, and a sorting out of federal, state, and local government roles.

***North Carolina's Blueprint for Economic Development*** (subtitled "A Strategic Business Plan for Quality Growth") is a report of the North Carolina Economic Development Board, most of whose members are appointed by the Governor and whose purpose is to advise the Secretary of Commerce on the formulation of a state program of economic development.[3] According to that report, the role of the state "should be to take care of its responsibilities primarily in the areas of education, infrastructure, regulatory oversight, institutional management, and [to] 'clear the decks' so that the private sector can get on with further successes in economic development diversification."

The most important ingredient needed for future progress, the report says, is a "dramatic improvement" in the public school system and a program to reduce adult illiteracy. The Board does not endorse any current programs and proposals for improving the public schools, saying that the responsibility for devising solutions rests with others. The other two of the "big three items" emphasized in the report are infrastructure and labor training. The report recommends that the state get on with the task of providing for hazardous and radioactive waste disposal, but it recommends that coordinating infrastructure policies and other state activities that affect economic development be left to a task force composed of Cabinet secretaries and Council of State members. To enhance labor training, the report endorses the role of community colleges and

2. Commission on the Future of the South, The Southern Growth Policies Board, *Halfway Home and a Long Way to Go* (Research Triangle Park, N.C.: The Southern Growth Policies Board, 1986).

3. North Carolina Economic Development Board, *North Carolina's Blueprint for Economic Development* (Raleigh, N.C., 1986).

makes several recommendations regarding worker training, coordination of occupational demands, and high school dropout prevention.

The Board rejects the idea that financial inducements should be offered to potential economic development clients (at least for the time being), but it recommends that North Carolina's tax policy "must be to keep rates as low as reasonably possible" and that the inventory and intangible property taxes be repealed (the report does not discuss the reasoning behind these recommendations, other than to say that some taxes are "intrinsically counterproductive").

Other recommendations concern rural and small business development. However, most of the specific recommendations that call for new legislative action have to do with the state's traditional recruiting function. The Board proposes to "target" recruiting efforts more toward specific industries and sectors (such as overseas, service sector, high technology, and defense firms), to expand export promotion, to intensify international recruitment, to increase promotion within the film industry, and to try to bring international air flights to the state.

**The North Carolina Commission on Jobs and Economic Growth** was created by the 1985 General Assembly.[4] Its members were appointed by Lieutenant Governor Robert B. Jordan, III. The Commission, in its report released in November 1986, contends that the state's traditional strategy of recruiting industry is not likely to continue to be as effective as in the past, and therefore recommends, as a complement to industrial recruiting efforts, a "growth from within" strategy emphasizing support for expansion of existing firms, encouraging the start-up and growth of new businesses, and better education and training of the work force. It also calls for new initiatives based on partnerships between state and local governments, including educational institutions, and the private sector.

The Commission's report makes more than a dozen recommendations in each of four areas: (1) labor force development, (2) natural resources and public facilities, (3) job development, and (4) rural development. These recommendations call for a wide range of initiatives. Like the two previous reports, this report places substantial emphasis on education. It advocates full implementation of the Basic Education Program, reduction in adult illiteracy, an upgrading of community colleges, improvements in day care, continued initiatives to reduce the number of high school dropouts, better coordinated job training, an increased emphasis on "entrepreneurship education" in the public schools and institutions of higher education, and other measures.

Other recommendations, to name a few, call for a clean water grant and loan program, increased planning for public facilities, financing and assistance programs for new businesses, the creation of a Rural Economic Development Center, a tax credit for firms that create jobs in distressed rural areas, and several initiatives to promote the forestry and fisheries industries.

### *Summary*

The four reports reviewed here offer different perspectives on economic development policies, but one is struck more by the similarities than by the differences. All of the reports recognize that state economic development policies must extend far beyond the traditional emphasis on industrial recruiting. All of the reports emphasize the importance of the role of state and local governments in providing the public facilities and services that are needed to provide a base for economic development and to enhance the quality of life. But the most striking similarity of the reports is in their emphasis on education and training, both as the means for improving the state's attractiveness to industry and as the means by which individuals can improve their economic well-being. Many of the specific recommendations in these reports may require further debate and consideration, but there seems to be no disagreement that the key to economic development is improvement in the state's education system. ꟼ

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4. Report of the North Carolina Commission on Jobs and Economic Growth, Raleigh, N.C., Office of the Lieutenant Governor, November 12, 1986.

# *Marjorie S. Bounds Retires*

An era ended on January 31, 1987, when Marjorie S. Bounds retired after more than 26½ years of service as head of the Institute's registration office. Although her duties varied from time to time, including those of personnel officer, supervisor of the housekeeping staff, and major-domo of classroom and training facilities, she has been known to thousands of officials as the hostess and adviser who greeted them on arrival and helped with a myriad of problems.

Mrs. Bounds is a Durham County native who spent her early years on a farm near today's Research Triangle Park. After travels as a service wife in World War II, she settled in Raleigh for 15 years before coming to the Institute in 1960. In 1966 she married V. L. Bounds, former Institute professor who served as the state's Commissioner of Correction and as a Kenan professor in the University's Department of Political Science until his retirement last summer. Mrs. Bounds plans to divide her retirement years between their homes in Chapel Hill and Oriental, North Carolina, giving primary attention to overseeing the development of her two lovely grandchildren.

—Philip P. Green, Jr.

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