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Popular Government

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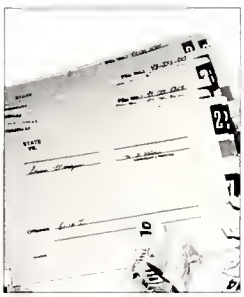

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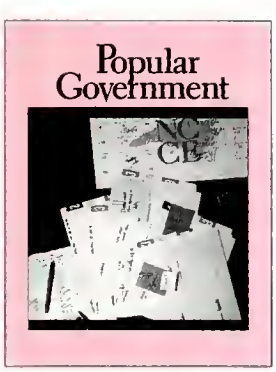

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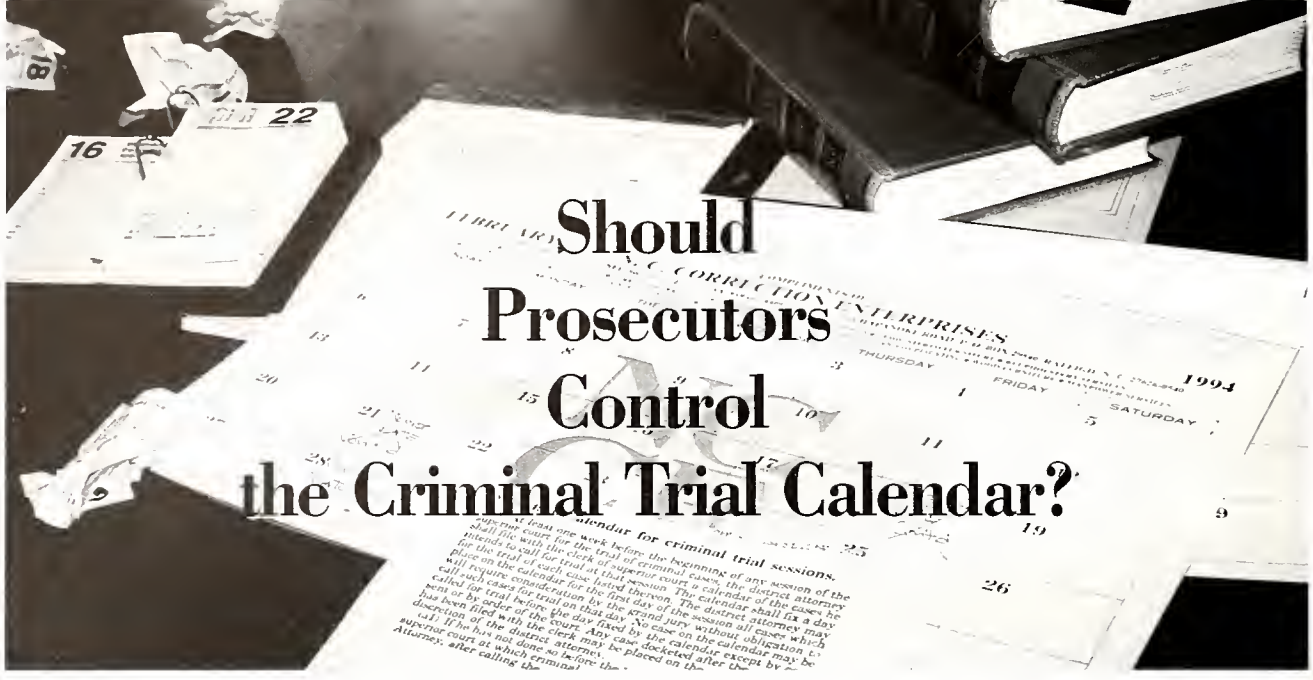
On the cover North Carolina's prosecutors exercise greater control over the criminal court calendar—and thus judge selection—than those in any other state. Photo by Bob Donnan.



Courtesy M. Smith

Should Prosecutors Control the Criminal Trial Calendar?

Stanley Hammer

Because the prosecutor is an adversary party, any degree of direct prosecutorial participation in case scheduling can lead to an appearance of abuse.

—Commentary, *American Bar Association Speedy Trial Standards* § 12-1.2.

North Carolina stands alone in granting prosecutors the sole authority to determine when a defendant charged with a crime will be tried. This system, in effect for nearly half a century, was designed for laudable ends—the orderly calendaring of cases and the convenience of prosecuting witnesses. But today the system represents an indefensible concentration of power that is ineffective in meeting its original goals, damaging to the integrity of the criminal justice system, and arguably unconstitutional.

Although the broad discretion possessed by North Carolina district attorneys has been the subject of occasional criticism from the organized bar,[1] it has received only meager scrutiny by the appellate courts[2] and slight exposure in the press.[3] Nevertheless, a system that vests a prosecutor with the power to determine the time of a defendant's trial and the judge before whom it will be heard merits close examination.

In fact, reconsideration of prosecutorial control of the criminal trial calendar is under way, both by the legislature and the courts (see "Current Reviews of Calendaring System," page 8). This article attempts to demonstrate why—as a matter of law, policy, and simple justice—the current system should not be allowed to continue.

The author is an assistant public defender in High Point, North Carolina. He hopes that the views he expresses in this article will contribute to public debate on the subject.

How We Got Here

Until the middle of this century, North Carolina's criminal court calendaring system was no system at all but a series of unrelated and uncoordinated local practices. Between 1915 and 1937, for example, the General Assembly enacted separate, local calendar statutes for twenty-one counties.[4] Most of these acts empowered the clerk of superior court to set the trial calendar and notify the prosecutor and defense lawyers of the order of cases.

Many of these calendar statutes set priorities for the calling of cases. For example, the 1921 act for Guilford and Rowan counties required that the clerk compile the calendar ten days before a term of court, placing cases in the following order:

- Cases in which the defendants had been bound over by the inferior courts and were in jail in default of bail
- All other cases in which the defendants were in jail
- All cases in which defendants were not in jail
- All other cases[5]

The act also required that the cases be called in the order in which they appeared on the calendar.

While the local acts for most counties placed control of the calendar in the clerk, a handful of counties (Columbus, Craven, Cabarrus, Cumberland, and Greene) gave the prosecutor that control. In Burke County the clerk had general calendar authority, but the prosecutor, upon proper notice, could set a case for a day certain.[6]

This hodgepodge of criminal court calendaring arrangements was only one example of the disarray of the criminal justice system generally. In 1947 the General Assembly established a commission with the formidable

task of recommending legislation "for the Improvement of Justice in North Carolina."[7] Chaired by Sam Ervin, then a justice of the state supreme court, the commission recommended several pieces of legislation to the 1949 General Assembly,[8] including a bill that provided for a uniform system of criminal trial calendaring in Superior Court, to be administered by prosecutors.[9] The commission focused on the plight of witnesses who were "inconvenienced . . . by being forced to wait in court for days to give testimony"; the commission sought to eliminate this inconvenience and to ensure that cases were set as "near as possible to the day of trial."[10] The commission's proposal was introduced as House Bill 157 and quietly ratified on February 28, 1949.

Since that day North Carolina's prosecutors have administered the criminal trial calendar. But the grant of this power to prosecutors appears to have been incidental to the legislature's primary goals of establishing uniformity in calendaring and avoiding inconvenience to witnesses. The legislature could not have envisioned the ways in which prosecutors would be able to exercise their authority.

Prosecutorial Practices Today

Currently, the authority of prosecutors over the criminal calendar is codified at Sections 7A-61, 7A-49.3, and 15A-931 of the North Carolina General Statutes. Taken as a whole, these statutes empower prosecutors in North Carolina to prepare the calendar of criminal cases to be tried at each session of court; decide the order in which cases on the calendar are called for trial; and dismiss pending cases, whether or not set for trial, and reinstate them at a later time. The concentration of these powers in one party's hands has strained the values that are fundamental to a fair adversarial criminal process. Equally important, the current system actually disserves the purpose for which it supposedly was designed: the efficient management of cases.

By simply calling a case for trial during one week of court rather than another, prosecutors can place a case before a judge considered more likely than another to rule in their favor. Prosecutors also can use their calendaring authority to coerce criminal defendants to waive their rights to trial and accept a plea bargain offer: defendants unable to make bond can languish in jail for a year or more awaiting trial if they refuse to accept a plea bargain offered by the prosecutor. Defendants fortunate enough to secure pretrial release may not face any better a fate. The prosecutor can place a defendant's case on the trial docket repeatedly without actually calling it for trial, forcing the defendant to appear each time or accept the prosecutor's plea bargain offer. (A few examples of these practices and the hardships they generate are highlighted in "Abuses of the Calendaring System," page 4.)

Furthermore, lengthy delays are the natural consequence of a system in which one party can continue cases without leave of court, or dismiss them and reinstate them at a later date. Delay not only hampers the ability of criminal defendants to mount their defense, it also disserves the public, with lengthy case backlogs, inefficient use of court time, and increased costs to the state. The one person in the courtroom to whom both the accused and the public would expect to look for relief—the judge—is often in no position to grant it.

Criminal Trial Calendaring Elsewhere in the United States

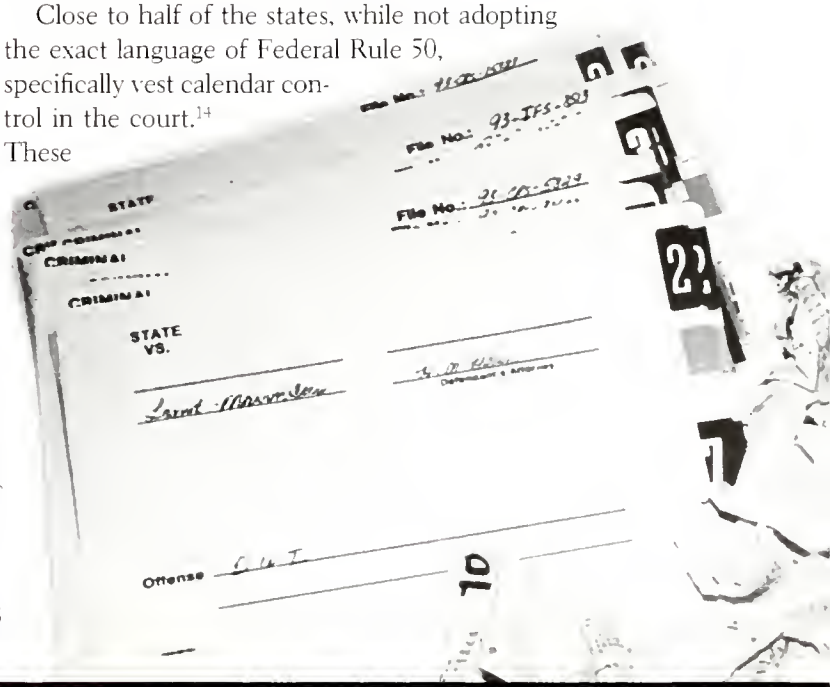
Throughout the United States, the court (that is, the presiding judge) sets the order of criminal trials in state and federal courts alike. Rule 50(a) of the Federal Rules of Criminal Procedure, for example, provides:

> The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable.[11]

Moreover, under the Federal Speedy Trial Act, trial dates are required to be set by the court at an early stage of the proceedings.[12]

Several states, including Arkansas, Tennessee, and West Virginia, have adopted rules or statutes with language parallel to Federal Rule 50(a),[13] vesting the court with control of the criminal trial calendar. In those states, as in the federal courts, local rules of practice dictate the exact procedure for setting criminal trials.

Close to half of the states, while not adopting the exact language of Federal Rule 50, specifically vest calendar control in the court.[14] These



Courtesy M. Smith

Abuses of Calendaring System

Although the control of the criminal trial calendar by prosecutors has received little public attention, those who work within the criminal justice system or who have studied it are well aware of the system's shortcomings.

In a 1978 study of the criminal calendaring process in North Carolina, the National Center for State Courts concluded that district attorneys use their calendaring powers to coerce plea agreements and to obtain continuances without leave of court. The study also concluded that North Carolina prosecutors hold excessive power over the trial calendar and recommended that the court bear responsibility for calendaring cases.

Between August and December 1983 the Fund for Rural Justice studied the courts in Robeson County, North Carolina, and offered a report of its findings to the Chief Justice of the North Carolina Supreme Court. The report referred to "calendar manipulation," noting:

> The Fund for Rural Justice has documented numerous cases in which the defendant appeared in court over thirty times. The assistant prosecutor's practice is to periodically survey the courtroom and, upon noticing that a "regular" is absent, call that case. The defendant is cited for failure to appear. Often it is because the defendant has gone to the rest room or to make a phone call. With bail revoked or raised beyond his ability to pay, the defendant goes to jail. After repeated court appearances the defendant's job is lost or placed in jeopardy.

In 1992 a superior court judge sitting in Guilford County, while rejecting a defendant's claim that he had been denied a speedy trial as a result of calendar manipulation, made the following findings:

> Notwithstanding the provision by the legislature for victim witness co-

states include Alabama, Georgia, Maryland, Mississippi, Texas, and Virginia.

Illinois, Maine, and South Carolina have no specific provision governing control of the criminal trial calendar. However, decisional law in these states establishes the inherent authority of the court to control the calendar.[15]

A majority of jurisdictions have speedy trial statutes,[16] many of which direct the court to set a firm trial date at arraignment[17] or upon demand by the defendant.[18]

In Arizona and Nebraska the prosecuting attorney advises the court of relevant facts in determining the order of cases on the calendar.[19] Likewise, the Alabama Court of Appeals has held that although a prosecutor may have input in decisions concerning the positioning of cases on the calendar, the responsibility of compiling the calendar is that of the clerk.[20]

Ohio, New York, and Louisiana have adopted rules by which criminal cases are assigned randomly to a judge who controls all matters, including setting dates for hearing and trial.[21]

North Carolina Practice at Odds with Model Codes

The power North Carolina concentrates in the hands of the prosecutor exceeds even that recommended by the National District Attorneys Association (NDAA), which advocates that the trial calendar be controlled jointly by the court and the prosecutor. The NDAA standards also provide that at the time of arraignment a "date certain" should be set for trial.[22]

The North Carolina practice is similarly inconsistent with the American Bar Association (ABA) Standards for Criminal Justice, a compilation of standards recommended as a "desirable minimum" in the administration of criminal justice. The ABA Standards canvass the field of criminal procedure and contain recommendations under headings such as Prosecution and Defense Functions, Fair Trial and Free Press, Guilty Pleas, Sentencing, Appeals, and Postconviction Remedies.[23] The prosecution standards recommend: "Control of the trial calendar should be vested in the court. The prosecuting attorney should advise the court of facts relevant in determining the order of cases on the court's calendar."[24]

The commentary to these standards notes that the purpose of vesting control of the calendar in the court is to avoid the appearance of "lack of fair and even-handed administration of justice."[25] Likewise, the commentary to the speedy trial standards provides:

> The trial court should be vested with absolute (not merely ultimate) responsibility over the trial calendar. This judicial responsibility should not be delegated in any way to the prosecution, even if the ultimate responsibility clearly remains with the court. Because the prosecutor is an adversary party, any degree of direct prosecutorial participation in case scheduling can lead to an appearance of abuse.[26]

ordinators, victims frequently complain about not knowing when their cases are to be tried. At least one letter has recently appeared in the *Greensboro News and Record* to that effect. Defendants almost never know when their cases are to be called and frequently gamble that their cases will not be called and leave the courthouse. The confidence of the public in the criminal courts is waning. The calendaring process is one of several reasons for such decline in confidence. More attention must be paid to those defendants held in jail awaiting trial. The delay in the trial of jail cases has reached a crisis in such places as Guilford County, both in High Point and in Greensboro, Forsyth and Durham counties. [State v. Caple, No. 92-CRS 3609, Guilford County]

In the Durham County case of *Simeon et al. v. Hardin* (see "Current Reviews of Calendaring System," page 8) in which the plaintiffs are challenging the constitutionality of North Carolina's criminal calendaring system, several former prosecutors and superior court judges submitted affidavits setting forth the problems they had experienced. One former superior court judge stated:

> The unilateral ability to determine when a case is calendared for trial, when a case is called for trial, when a charge is dismissed for later recharging and recalendaring constitutes the ability to determine when some particular judge either hears a case or some particular judge does not hear a case. This cannot be a fair and impartial proceeding with the scales of justice evenly balanced. [affidavit of the Honorable Robert A. Collier]

Another former judge noted:

> I have also known the prosecutors to use the calendaring power to select the presiding judge. For example, in one county where I presided, I noticed that I got all the cases for trial, while another judge presiding in a different courtroom got all the guilty pleas. I found out later from the prosecutor that because I was considered to be a more severe sentencer than the other judge, it was the prosecutor's common practice to tell defense counsel that their client could either plead guilty in front of the other judge, or be tried in front of me. Evidently, this was considered an incentive to plead guilty. [affidavit of the Honorable James H. Pou Bailey]

Finally, the Uniform Rules of Criminal Procedure, drafted by the National Conference of Uniform State Laws, contain a provision derived from the ABA rule on calendaring. In addition to placing calendar control in the court, the uniform rules suggest that courts determine the priority of cases on the calendar by weighing several factors, including whether the defendant is incarcerated.[27]

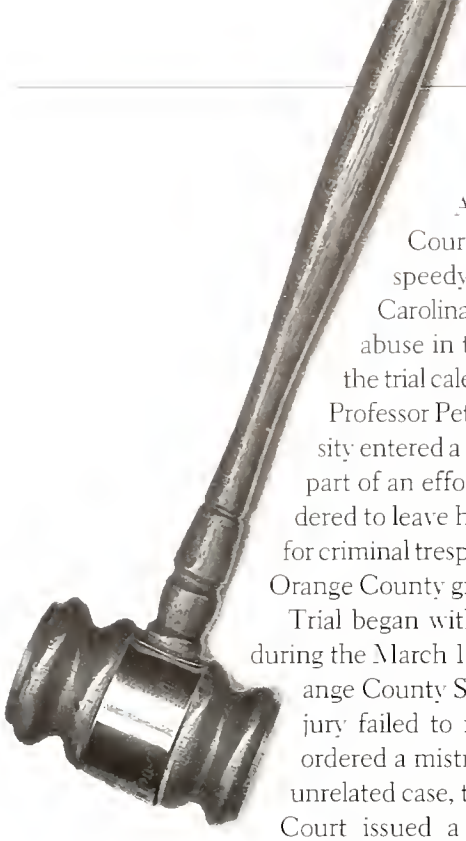
Constitutional Problems with North Carolina's Practice

Until recently Louisiana gave its prosecutors calendaring powers similar to those granted to prosecutors in North Carolina. In 1989, however, the Louisiana Supreme Court found the system unconstitutional.[28] North Carolina's system suffers from similar constitutional infirmities. Placing total control of the criminal court calendar in the hands of the prosecutor makes too easy the denial of a criminal defendant's right to a speedy trial, undermines a defendant's due process rights, and compromises the inherent constitutional powers of the judiciary.

The Right to a Speedy Trial

When prosecutors can decide when to place a case on the calendar—and when not to—they need never seek a continuance or articulate a reason for delay. The accused, with criminal charges pending, waits in jail or suffers a cloud of uncertainty while out on bail. This practice can undermine a criminal defendant's right to a speedy trial, guaranteed by the Sixth Amendment to the United States Constitution and applicable to the states by force of the Fourteenth Amendment.[29] The Declaration of Rights in the North Carolina Constitution contains a similar guarantee of a speedy trial, providing that justice "will be administered without favor, denial or delay."[30]

The United States Supreme Court has identified four factors in evaluating whether a defendant has been denied a speedy trial: length of delay, reason for delay, prejudice resulting from delay, and whether the defendant demanded a speedy trial. No single factor is controlling when weighing a defendant's claim that his or her right to a speedy trial has been denied.[31] Indeed, prejudice to the defendant's case is not even the chief consideration. Why? Because, as the U.S. Supreme Court has recognized, "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to the accused's defense."[32] Those evils are "the possibility of lengthy incarceration prior to trial, . . . [the] impairment of liberty imposed on an accused while released on bail, . . . [and] the disruption of life caused by arrest and the presence of unresolved criminal charges."[33]



A landmark U.S. Supreme Court case on the right to a speedy trial, originating in North Carolina, illustrates the potential for abuse in the prosecutor's control of the trial calendar.[34] On January 3, 1964, Professor Peter Klopfer of Duke University entered a restaurant in Chapel Hill as part of an effort to integrate it. When ordered to leave he refused. He was arrested for criminal trespass and later indicted by an Orange County grand jury.

Trial began with "admirable promptness" during the March 1964 criminal session of Orange County Superior Court.[35] When the jury failed to reach a verdict, the court ordered a mistrial. That December, in an unrelated case, the United States Supreme Court issued a decision that effectively barred criminal prosecution of civil rights demonstrators such as Klopfer.[36] Nonetheless, the prosecutor refused to dismiss Klopfer's case, yet he did not place the matter back on the trial calendar.

When the calendar for the August 1965 session of court did not list Klopfer's case, he filed a motion to have the matter "permanently concluded," noting that the pendency of the action interfered with his professional activities and his travel plans. The trial court considered Klopfer's motion but ultimately granted a *nolle prosequi* with leave, that is, gave the prosecutor permission to dismiss the case with the right to reinstate it at a later time, at the prosecutor's discretion and without approval of the court.[37]

On appeal to the North Carolina Supreme Court, Klopfer argued that the entry of a *nolle prosequi* with leave deprived him of a speedy trial. In a two-page opinion, the court summarily rejected this contention and held that the right to a speedy trial does not afford protection for unjustified postponement of trial of an accused *not in custody*.[38]

The U.S. Supreme Court reversed, focusing on the oppressive nature of the North Carolina *nolle prosequi* practice. Chief Justice Warren observed for the majority:

> The pendency of the indictment may subject [a defendant] to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, association and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the "anxiety and concern accompanying public accusation," the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial.[39] (footnote omitted)

Justice Harlan, in a short concurring opinion, wrote that he voted to find the North Carolina procedure unconstitutional not on speedy trial grounds but because

> This unusual North Carolina procedure, which in effect allows state prosecuting officials to put a person under the cloud of an unliquidated criminal charge for an indeterminate period, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment.[40]

Although the *nolle prosequi* with leave procedure is no longer part of North Carolina criminal procedure, the vice that the Supreme Court condemned survives in the criminal calendaring statutes. Prosecutors can still dismiss cases before trial only to reinstate them later. And nothing prevents a prosecutor from moving a case on and off the trial calendar. Likewise, no provision protects a defendant, especially an unrepresented defendant, from the disruptive effects of repeated court appearances. Were Professor Klopfer prosecuted today, he could be subjected to oppressive measures similar to those used against him in 1964.

Unfairness and Due Process

North Carolina's rule permitting the prosecutor to choose the date on which a case will be tried—and consequently the judge before whom it will be heard—severely tests the fairness component of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

The Due Process Clause requires fundamental fairness, that is, a fair trial in a fair tribunal.[41] As the Supreme Court of Louisiana held in finding unconstitutional the prosecutor's power to control criminal trial calendars:

> Capital and other felony cases must be allotted for trial to the various divisions of the court, or to judges assigned criminal court duty, on a random or rotating basis or under some other procedure adopted by the court which does not vest the district attorney with power to choose the judge to whom a particular case is assigned.[42]

The result reached by the Louisiana Supreme Court is consistent with the U.S. Supreme Court's long-standing recognition that "justice must satisfy the appearance of justice."[43] A prosecutor must be permitted to enforce the law with zeal,[44] but adversarial fairness requires that he or she play no part in selecting the judge before whom a matter will be heard. A wealth of case law makes clear that no litigant has a right to choose the judge who will hear his or her case.[45]

Reciprocity of advantage between the prosecutor and defendant is a key element of adversarial fairness. For

example, statutes that require disclosures by the defendant in the discovery process (part of the pretrial stage of a legal action) without requiring similar disclosures by the prosecution have been held to violate due process.[46] It follows that neither party should hold an advantage with respect to selection of judges and court dates.

Interference with Judges' Powers under State Constitution

Judges in North Carolina are state constitutional officers. So are prosecutors. The constitution both establishes and limits their authority. The constitution also contains a "separation of powers" clause protecting the judiciary's power from interference by other branches of government. It provides: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a coordinate department of government."[47]

The statutes granting control of the criminal trial calendar to prosecutors arguably violate this separation of powers provision. As U.S. Supreme Court Justice Benjamin Cardozo observed, there is

> power inherent in every court to control the disposition of cases on its docket with economy of time and effort for itself, for counsel and for litigants. How this can best be done calls for the exercise of judgment which must weigh competing interests and maintain an even balance.[48]

The scheduling of cases is widely recognized as a power that "rightfully pertains" to the judiciary. Prosecutors obviously are not judges—their function is to prosecute cases, not preside over them. Nor are prosecutors subject to direct judicial supervision as trial court administrators are—the office of district attorney is an independent constitutional office.[49]

Perhaps because there is wide acceptance that courts—not prosecutors—should control dockets, there are few cases addressing the tension between control by the court and control by the prosecutor. One arose in New York.[50] The judges in one county there adopted a rule that the presiding judge was to assign cases for trial. The district attorney, who traditionally had selected the judge in each case, challenged the rule. The New York court treated the question as one of "power, not policy."[51] It reviewed the constitutional and statutory grants of authority to the district attorney and the courts. As in North Carolina, the district attorney had the statutory duty to conduct criminal prosecutions, whereas judges were judicial officials with the power to regulate trials. The district attorney maintained that in preparing the calendar he assessed the experience and diligence of the trial judges. The court responded:

> It is the people's prerogative, not the District Attorney's to say who will preside over the County Court of Kings County. If the people want a lenient judge, or a severe one, it is for them to determine, not the District Attorney. It can never be the duty or prerogative of the District Attorney to weigh the experience and diligence of the judges before whom he appears as attorney for one of the litigants.[52]

In addition to defining the limits of the district attorney's authority, the court set forth cogent reasons for denying the district attorney any authority over the trial calendar:

> A court dealing with the life and liberty of the people must be free from outside control. Just because Kings County has an honest, efficient and fair District Attorney, and that he will deal with individual rights justly is no guarantee that one less efficient, less honest, less fair would not use unusual power to further his own ends, be they political or otherwise. That a judge should ever be burdened with the thought that his assignment depended on the district attorney is unthinkable in American jurisprudence. Ours is a government of laws and not of men, as John Adams wrote in the Massachusetts Constitution, pt. 1, art. 30.[53]

The New York court's reasoning applies with equal force in North Carolina, which has long subscribed to the constitutional theory of separation of powers. Separation of powers is an empty guarantee when a prosecutor may determine that a duly elected superior court judge is not competent to preside over a given case because of its complexity or because the judge is too lenient in sentencing.

The current calendar statute, with no obligation on the prosecutor to place a case on the calendar, effectively allows unilateral judge shopping by the prosecution. Former superior court judges attest to this practice.[54] (See "Abuses of Calendaring System," page 4.) Assigning to the prosecutor control of the criminal calendar unconstitutionally deprives judges of power as members of a co-equal branch of government. Regardless of whether the prosecutor is considered "quasi-judicial" or a member of the executive branch, control of the criminal calendar, indeed the work of the court, is the province of the judiciary, and such power should not be delegated to the prosecutor.

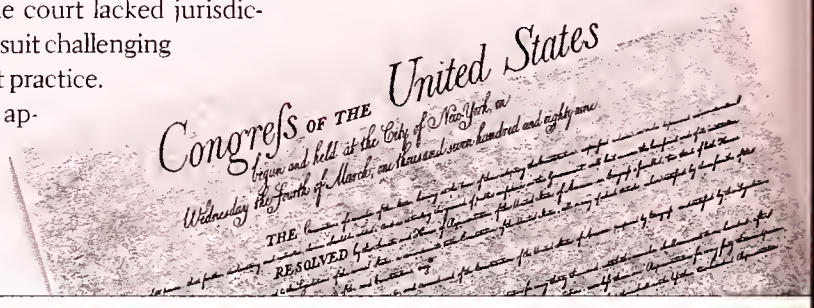
Proposals for Reform

Because most jurisdictions have adopted criminal trial calendar systems that do *not* vest absolute power in the prosecutor, there is a wealth of precedent from which

Current Reviews of Calendaring System

Two reviews currently under way—one legislative and one judicial—could result in changes in North Carolina's system of criminal case calendaring. The legislative review, conducted by the General Assembly's Legislative Research Commission, was begun in September 1993 and may report suggested changes in the law to the 1995 legislative session.

The other effort is ongoing in the courts. In October 1992 a class action suit was filed challenging the calendaring practices of the Durham County District Attorney's Office. (Originally Simeon et al. v. Stephens, No. 92-CVS-4318, Super. Ct., the case name was changed to Simeon et al. v. Hardin to reflect the name of the new district attorney in Durham County.) Brought on behalf of all persons subject to criminal prosecution in Durham County, the suit alleges that the district attorney's calendaring practices violate both the United States and North Carolina constitutions. Technically, the suit is limited to Durham County, but it seeks broad injunctive and declaratory relief and, if successful, would affect calendaring practices throughout the state. Following a hearing in March 1993, the trial court dismissed the case on the ground that the court lacked jurisdiction over a civil suit challenging a criminal court practice. The case was appealed to the North Carolina Court of Appeals (No. 93-14SC589, Ct. App.), but before the court could rule, the North Carolina Supreme Court assumed jurisdiction of the case (No. 267PA93, S. Ct.). The North Carolina Bar Association, the North Carolina Academy of Trial Lawyers, and the National Association of Criminal Defense Attorneys have filed *amicus* briefs with the supreme court in support of the plaintiffs' claims. No decision has been issued yet.



North Carolina can draw reforms. Reforms can be tailored to address the major concerns that have been raised about prosecutor control of the criminal calendar: adversarial fairness and the system's failure to dispose of cases swiftly and efficiently.

Empirical studies demonstrate that calendar control is best vested in the court, either in judges or in professional trial court administrators who are answerable to judges. (North Carolina already has trial court administrators in several judicial districts for the purpose of scheduling civil cases.) Where the court is active in case management—including setting pretrial hearings and firm trial dates—delay is minimized. Also, "breakdowns" in the calendar (that is, days when no cases are ready to be tried and precious court time is wasted) are reduced.[55] Court-directed calendars would not inconvenience witnesses; in fact, if courts controlled the calendaring process, the timely trial of cases would be more likely to occur. Furthermore, the North Carolina General Assembly already has enacted legislation creating victim and witness coordinators for each prosecutorial district, thus eliminating the most compelling reason for permitting prosecutors to control the trial calendar.[56]

Calendar reform can be accomplished by legislation, court rule, or both. Consider the following proposals:

Place control of the criminal trial calendar in the trial court administrator. Trial court administrators, already in place in several counties, could be given authority to set the trial calendar, within set guidelines. Minnesota's statute directs the trial court administrator to prepare a calendar of pending indictments and directs the order in which cases are to be tried, with priority assigned to cases in which a defendant is in custody.[57]

Place control of the criminal calendar in the clerk of superior court. In counties that do not yet have a trial court administrator, the superior court clerk could prepare the trial calendar. Clerks had this responsibility before enactment of the present statute. In Alabama, Nevada, and Virginia, statutes specifically assign to the clerk the duty of compiling a docket or calendar.[58]

Adopt a calendar statute modeled on Rule 50 of the Federal Rules of Criminal Procedure. Rule 50 simply requires courts to provide for placing proceedings on appropriate calendars, with preference for criminal matters. Such a rule clearly establishes the court's authority over the trial calendar while leaving to each district the responsibility for developing a plan for the prompt disposition of criminal cases. Several jurisdictions have adopted a version of Rule 50. Tennessee's version provides the following:

> Trial courts shall provide by rule for the setting of cases for trial. . . . The trial of defendants in custody and defendants whose pretrial liberty is reasonably believed to present unusual risks shall be given preference over other criminal matters.[59]

Permit use of assignment judges. Some jurisdictions use assignment judges who determine at arraignment which judge will hear a case.[60] The judge assigned is then responsible for setting trial dates and determining when motions will be heard.

Set discovery deadlines, motion deadlines, pretrial conferences, and firm trial dates at the time of arraignment. If all deadlines are set at arraignment,[61] all parties know the status of the case and the likelihood of realistic plea bargains is enhanced.

Permit the court in each district, in consultation with the bar, to establish local calendar rules. Because the size of dockets varies throughout the state, local rules may better accommodate the needs of defendants, defense counsel, and district attorneys. These rules should follow statewide guidelines on the priority of various kinds of cases.[62]

Establish a preference for the trial of defendants in custody. Regardless of whether the clerk, court administrator, or other person prepares the calendar, there should be a stated preference for the trial of defendants who are in custody.[63]

Establish rules that ensure the prompt trial of defendants not in custody. Cases of defendants not in custody should be placed on the calendar only if there is a reasonable likelihood that they will be called for trial. If a case is not called for trial during a certain session, its level of priority should be advanced for succeeding trial calendars. If a case is not called for, say, three sessions, it should be removed from the calendar for six months (or some other designated time) except that if the defendant is in custody or requests that the case remain on the calendar, the case should continue to advance in priority.

Enact a "speedy trial by demand" statute. For several years North Carolina had a speedy trial statute that proved unwieldy and largely ineffective. Rather than burden the prosecution with time periods in every case, North Carolina should adopt a speedy trial statute that is triggered only when the defendant files a "certificate of readiness." At that time, the court would set a firm date for trial.[64]

Permit defendants to remain on standby status during sessions in which their cases are awaiting trial. As mentioned earlier, the current system allows prosecutors to require repeated, unnecessary appearances in court by defendants not in custody. A defendant whose case is not fixed for a day certain should be allowed to be placed on call on the condition that he or she will appear in court within an hour.

Permit a defendant to have motions calendared and heard. Under the present system there is no mechanism by which a defendant may have pretrial motions calendared and heard. Because prosecutors control the trial calendar, they effectively determine when and if bond motions will be heard. Defendants should be permitted to be heard on bond and other issues upon filing a motion with reasonable notice to the prosecutor.

Conclusion

North Carolina prosecutors are granted, indeed required to exercise, a power over the criminal docket that is unmatched in the United States. The current system, aside from its inefficiencies, likely violates the guarantees of speedy trial and due process that protect all citizens. Moreover, a system by which the prosecutor selects the judge who will hear a case effectively permits unelected assistant district attorneys to pass upon the qualifications of duly elected superior court judges, violating constitutional separation of powers.

As the public increasingly demands swift and efficient administration of justice, it is time to reform our criminal trial calendaring practice so that courts may control their own criminal dockets. The proposals described above are by no means exhaustive but rather suggest possible avenues of reform. Reforming the calendar system would enhance the integrity and effectiveness of the entire criminal justice system. ❖

Notes

1. National Center for State Courts, *Case Docketing and Calendaring and Rotation of North Carolina Superior Court Judges, Final Report* (National Center for State Courts, Southern Regional Office, Aug. 1978) (conducted for the North Carolina Bar Association Foundation).

2. *See* State v. Mitchell, 298 N.C. 549, 259 S.E.2d 254 (1978) (Carlton, J., concurring).

3. *See* "Deadliest DA Stays Unfazed by Accusations of Unfairness," *Wilmington Sunday Star-News*, May 12, 1985; "Prosecutors Too Powerful" (editorial), *News and Observer* (Raleigh), Oct. 12, 1992, 8A.

4. 1915 N.C. Pub.-Local Laws ch. 60 (Rockingham); 1917 N.C. Pub.-Local and Private Laws ch. 375 (Forsyth); 1921 N.C. Pub. Laws ch. 195 (Guilford and Rowan); 1921 N.C. Pub. Laws ch. 150 (Durham); 1921 N.C. Pub. Laws, Ext. Sess. ch. 30 (Davidson); 1921 N.C. Pub. Laws, Ext. Sess. ch. 54 (Alamance); 1923 N.C. Pub. Laws ch. 153 (Surry); 1924 N.C. Pub., Pub.-Local and Private Laws, Ext. Sess. ch. 139 (Harnett); 1925 N.C. Pub.-Local and Private Laws ch. 407 (Chatham); 1925 N.C.

Pub.-Local and Private Laws ch. 55 (Catawba); 1927 N.C. Pub. Laws ch. 105 (Caswell); 1927 N.C. Pub. Laws ch. 112 (Orange); 1929 N.C. Pub. Laws ch. 22 (Randolph); 1933 N.C. Pub.-Local and Private Laws ch. 313 (Columbus); 1935 N.C. Pub.-Local and Private Laws ch. 70 (Burke); 1935 N.C. Pub.-Local and Private Laws ch. 140 (Craven); 1935 N.C. Pub.-Local and Private Laws ch. 219 (Cleveland); 1935 N.C. Pub-Local and Private Laws ch. 242 (Cabarrus); 1935 N.C. Pub-Local and Private Laws ch. 275 (Cumberland); 1937 N.C. Pub.-Local and Private Laws ch. 211 (Greene).

5. 1921 N.C. Pub. Laws ch. 195.

6. 1935 N.C. Pub.-Local and Private Laws ch. 70.

7. S. Res. 23, 1947 N.C. Sess. Laws.

8. "The Improvement of the Administration of Justice in North Carolina: Report of the Special Commission," *Popular Government* 15 (Jan. 1949): 1 (hereinafter cited as Report of the Special Commission).

9. A BILL TO BE ENACTED TO REQUIRE A CALENDAR FOR ALL TERMS OF THE SUPERIOR COURT FOR THE TRIAL OF CRIMINAL CASES.

SECTION 1. At least one week before the beginning of any term of the Superior Court for the trial of criminal cases, the solicitor shall file with the Clerk of the Superior Court a calendar of the cases he intends to call for trial at that term. The calendar shall fix a day for the trial of each case included thereon.

SECTION 2. The solicitor may place on the calendar for the first day of the term all cases which will require consideration by the grand jury without obligation to call such cases for trial on that day.

SECTION 3. No case on the calendar may be called for trial before the day fixed by the calendar except by consent or by order of the court.

SECTION 4. All cases docketed after the calendar has been made and filed with the Clerk of Superior Court may be placed on the calendar at the discretion of the solicitor.

SECTION 5. All witnesses shall be subpoenaed to appear on the date listed for the trial of the case on which they are witnesses.

SECTION 6. Witnesses shall not be entitled to prove their attendance for any days prior to the day on which the case in which they are witnesses is set for trial unless otherwise ordered by the presiding judge.

SECTION 7. Nothing in this Act shall be construed to affect the authority of the court in the call of cases for trial.

SECTION 8. All laws and clauses in conflict with this Act are hereby repealed.

10. Report of the Special Commission, 14.

11. Fed. R. Crim. P. 50(a).

12. Federal Speedy Trial Act, 18 U.S.C. § 3161.

13. Alaska R. Crim. P. 45; Ark. R. Crim. P. 27.2; Colo. R. Crim. P. 50; Del. R. Crim. P. 50; Haw. R. Penal P. 50; Idaho R. Crim. 50; N.D. R. Crim. P. 50; S.D. Cod. Laws. Ann. § 23A-44-11 (1988); Tenn. Ct. R. 50; W. Va. R. Crim. P. 50; Wy. R. Crim. P. 50.

14. Ala. Code § 15-14-1 (1982) (duty of clerk to set cases for particular day), Ala. R. Crim. P. 8.2 (prosecutor to inform court of facts relevant in determining order of cases on docket); Ariz. R. Crim. P. 8.1 (sets forth priorities for cases on criminal calendar); Cal. Penal Code § 1048 (Deering 1993) (preference given to cases where defendant in custody); Cal. R. Ct. 227.4 (court sets date for trial and motions at arraignment); Conn. R. Ct. 977–78 (court sets trial date); D.C. Sup. Ct. R. 101 *et seq.* (provides for calendar control judge); Ga. Code Ann. § 17-8-1 (Michie 1990) (cases on criminal docket shall be called in order in which they stand on docket unless the defendant is in jail or otherwise in the sound discretion of the court); St. Josephs County Indiana Super. Ct. R. 7 (judge maintains trial calendar); Iowa Code Ann. §813.2, R. 27 (1994); Iowa R. Crim. P. 8.1 (court or its designees shall set the date and time for trial); Md. Ct. R. 4-271 (trial date set by circuit court); Mich. Ct. R. 6.004(b) (trial court has responsibility to establish and control a trial calendar with preference to cases where defendant in custody, or where defendant's liberty presents great risk); Minn. Stat. Ann. §§ 630.35–36 (West 1994 Pocket Part) (court administrator prepares calendar; trial priority to cases where defendant in custody); Miss. Unif. Crim. R. Cir. Ct. Proc. (docket prepared by clerk); Nev. Rev. Stat. Ann. §§ 178.592–94 (Michie 1992) (clerk prepares calendar; priority to cases where defendant in custody); N.H. Sup. Ct. R. 96-A (court sets schedule in each case, including deadlines for discovery, plea negotiations, and trial); N.J. Rules Governing Crim. Practice 3:25-2 (assignment judge may order case upon specific day); N.Y. Unif. R. Trial Ct. §§ 200.11–12 (assignment judge sets forth date for completion of discovery, hearing of motions, and trial); Ohio R. for Superintendence of Cts., R. 4 (assignment judge); Or. Unif. Tr. Ct. R. 7.010 (court sets date); Pa. R. Crim. P. 1100 (1993) (court calls cases for trial); Tex. Code Crim. Proc. Ann. § 33.08 (Vernon 1989) (courts have control over dockets as to settings of criminal cases); Va. Code Ann. §§ 19.2-240–41 (1990) (clerk prepares criminal docket, court fixes day for trial); Vt. R. Crim. P. 50 (administrative judge to establish how criminal cases shall be scheduled); Wash. Crim. R. 3.3(f) (trial judge sets date); Wis. R. Crim. P. 971.10 (court to schedule case upon demand by defendant).

15. People v. Stanley, 452 N.E.2d 105 (Ill. App. Ct. 1983) ("it is the trial judge, not the State's Attorney, who has discretion to grant or deny a continuance"); State v. Wells, 443 A.2d 60 (Me. 1982) (court's inherent authority to dismiss for failure to prosecute); State v. Ridge, 236 S.E.2d 401 (S.C. 1977) (solicitor has authority to call cases subject to the overall broad supervision of the trial judge).

16. Ariz. R. Crim. P. 8.2; Ark. R. Crim. P. 28.1; Cal. Penal Code 1049.5 (Deering 1993); Colo. Rev. Stat. § 18-1-405 (1993 Cum. Supp.); Conn. R. Ct. 956B; Fla. R. Crim. P. 3.191 (1993); Ga. Code Ann. 17-7-70 (Michie 1990); Haw. R. Penal P. 48; Idaho Code § 19-3501 (1979 and 1992 Supp.); Ill. Rev. Stat. ch. 38:103–5 (1980 and 1992 Supp.); Ind. R. Crim. P. 4; Iowa Code Ann. § 813.2 R. 27 (1994); Kan. Stat. Ann. 22-3401 *et. seq.* (1975); La. Code Crim. P. § 701 (1981 and 1994 Supp.); Md. Ann. Code § 27-591 (1993); Mass. R. Crim. P. 36; Mich. Ct. R. 6.004; Miss. Code Ann. § 99-17-1 (1991); Mo. Ann. Stat. § 545.890 (West 1987); Neb. Rev. Stat. § 29-1207 (1989); Nev. Rev. Stat. § 178.556 (1992); N.M. R. Crim. P. 5-604; N.Y. Crim. Pro. Law § 30.20 (West 1992); Ohio Rev. Code Ann. § 2945.71 (Anderson 1987); Pa. R. Crim. P. 1100; S.D. Cod. Laws Ann. § 23A-44-5.1 (1993 Pocket Part); Va. Code Ann. § 19.2-243 (1990); Wash. Crim. R. 3.3; Wis. R. Crim. P. 971.10.

17. *See, e.g.*, Conn. R. Ct. § 977 (judicial authority to set trial date upon entry of not guilty plea).

18. *See, e.g.*, Fla. R. Crim. P. 3.191(a)(1) (if demand for speedy trial lodged, trial court to hold calendar call for the express purpose of setting a trial date); *see also* R.I. R. Crim. P. 12 (when motion for speedy trial filed, same will be heard on daily criminal calendar).

19. Ariz. R. Crim. P. 8.1; Neb. Rev. Stat. § 29-1205 (1989) (duty of county attorney to advise court of relevant facts in determining order of cases to be tried).

20. Bishop v. State, 482 S.2d 1322 (Ala. Crim. App. 1985).

21. Ohio R. for Superintendence of Courts, R. 4 (assignment by lot to judge who controls all matters); N.Y. Unif. R.—Trial Courts § 200.11 (1992) (upon commencement of action clerk assigns case to judge by method of random selection authorized by chief administrator; thereafter, assignment judge conducts preliminary conferences and sets forth deadlines and date for commencement of trial); State v. Simpson, 551 So. 2d 1303 (La. 1989).

22. Prosecution Standards § 15.1(c) (National District Attorneys Ass'n 1977).

23. American Bar Association Standards for Criminal Justice (2d ed. 1986); *see also*, William J. Jameson, "The Beginning: Background and Development of the ABA Standards for Criminal Justice," *American Criminal Law Review* 12 (1974): 255.

24. Prosecution Function Standards § 3-5.1 (American Bar Association 3d ed. 1993) (hereinafter cited as ABA Prosecution Function Standards).

25. ABA Prosecution Function Standards.

26. Speedy Trial Standards § 12-1.2 Commentary (American Bar Association 2d ed. 1986).

27. Unif. R. Crim. P. § 721, 10 U.L.A. 153 (1992 Supp.).

28. State v. Simpson, 551 So. 2d 1303 (La. 1989).

29. U.S. Const. amend. VI; Klopfer v. North Carolina, 386 U.S. 213 (1967).

30. N.C. Const. art. I § 18.

31. Barker v. Wingo, 407 U.S. 514 (1972).

32. United States v. Marion, 404 U.S. 320 (1971).

33. United States v. MacDonald, 456 U.S. 1 (1982).

34. Klopfer v. North Carolina, 386 U.S. 213 (1967).

35. *Klopfer*, 386 U.S. at 217.

36. Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

37. The procedure permitting a *nolle prosequi* with leave was codified in former G.S. 15-175, which was repealed in 1973.

38. State v. Klopfer, 266 N.C. 349, 145 S.E.2d 909 (1966).

39. *Klopfer*, 386 U.S. at 221–22.

40. *Klopfer*, 386 U.S. at 226–27.

41. Turner v. Louisiana, 379 U.S. 466 (1965).

42. State v. Simpson, 551 So. 2d 1303 (La. 1989); *see also* State v. Payne, 556 So. 2d 47 (La. 1990) (finding method of criminal case allocation unconstitutional where state has authority to make unchecked motions for trial dates, thereby selecting the judge to try the matter).

43. Offutt v. United States, 348 U.S. 11, 14 (1954).

44. Marshall v. Jerrico, Inc., 446 U.S. 238 (1980).

45. *See* State v. Peterson, A.2d 672, 678 (Md. 1989) (collecting cases).

46. Wardius v. Oregon, 412 U.S. 470 (1973).

47. N.C. Const. art. IV § 1.

48. Landis v. North American Co., 299 U.S. 248, 254–55 (1936).

49. State v. Camacho, 329 N.C. 589, 593, 406 S.E.2d 868, 870 (1991).

50. McDonald v. Goldstein, 83 N.Y.S.2d 620 (N.Y. Sup. Ct. 1948), *aff'd*, 79 N.Y.S.2d 690 (N.Y. App. Div. 1948). *See also* Note, *Columbia Law Review* 48 (1948): 613; *In re* Pending Cases, Augusta Judicial Circuit, 215 S.E.2d 473 (Ga.1975) (separation of powers not violated by superior court order to district attorney to furnish list of cases in which indictment has been returned).

51. *McDonald*, 83 N.Y.S.2d at 625.

52. *McDonald*, 83 N.Y.S.2d at 626.

53. *McDonald*, 83 N.Y.S.2d at 626.

54. *See* Simeon et al. v. Hardin (originally Simeon et al. v. Stephens), 92-CVS-4318 (Super. Ct.) (Affidavit of the Honorable Robert Collier).

55. John Goerdt, *Examining Court Delay: The Pace of Litigation in 26 Urban Trial Courts* (Williamsburg, Va.: National Center for State Courts, 1989), 88; Thomas W. Church, *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (Williamsburg, Va.: National Center for State Courts, 1978); Barry Mahoney and Dale Anne Snipes, "Toward Better Management of Criminal Litigation," *Judicature* 72 (June/July 1988): 29.

56. G.S. 7A-347; *see also* G.S. 15A-825(8), which directs that prosecutors make a reasonable effort to notify witnesses that a court proceeding to which they have been subpoenaed will not occur as scheduled.

57. Minn. Stat. Ann. §§ 630.35–36 (1992 Pocket Part).

58. Ala. Code § 15-14-1 (1991); Nev. Rev. Stat. Ann. § 178.592 *et. seq.* (1986); Va. Code Ann. § 19.2-240 (1990).

59. Tenn. Ct. R. 50.

60. *See* N.J. R. Governing Crim. Practice, 3:25-2; N.Y. Unif. R.—Trial Cts. § 200.11 (1992) (provides that clerk upon commencement of action assigns case to judge by method of random selection; thereafter, assignment judge sets dates for hearing motions and fixing a date for trial).

61. N.H. Ct. R. 96-A (providing for case scheduling orders to encompass discovery and motion deadlines).

62. *See* Commentary to Tenn. Ct. R. 50 (directing that courts establish local rules to account for variations in local practices, subject to state-mandated priorities).

63. *See, e.g.*, Ark. R. Crim. P. 27.1 (priorities in scheduling cases); Cal. Penal Code § 1048 (granting trial preference to defendants in custody); Mass. R. Crim. P. 36(a)(2) (court determines sequence of trial calendar after cases are selected by the district attorney; priorities are given to those in custody and those whose pretrial liberty presents unusual risks); Mont. Code Ann. § 46-16-101 (1991) (prosecutions against those in custody must be disposed of prior to prosecutions of those on bail, unless otherwise determined by the court for good cause).

64. *See, e.g.*, Fla. R. Crim. P. 3.191 (demand by accused for trial shall be a pleading that he or she has investigated the case and is ready for trial; the court will set trial date not less than five days nor more than forty-five days from demand); Mo. Ann. Stat. § 545.780 (West 1987) (if defendant announces he is ready for trial, the court shall set trial date as soon as reasonably possible thereafter).

A Consumer's Guide to Hiring and Working with a Group Facilitator

Roger M. Schwarz

Have you ever been on a committee that just could not work effectively? Or served on a board where relationships among members grew worse over time? Or worked in a group in which your personal needs simply were not met? Have you ever dreaded an upcoming meeting, secretly wishing that someone could help the group stay on track, discuss the issues constructively, and solve problems effectively?

People in all kinds of groups share these problems and concerns—all clear indicators that the group would benefit from working with a group facilitator. This article describes what a group facilitator is, how a facilitator helps groups, and how to hire and work with a facilitator. When organizations make office purchases, for example, they usually know exactly what they need and often require vendors to show how the product will meet those needs. But hiring the services of a facilitator typically is a very different matter. Groups may not know exactly what they want to accomplish, what kind of help they need, and what questions to ask to determine how well a particular facilitator could help them. The purpose of this article is to help groups become better-informed consumers. By hiring an effective facilitator, a group increases its ability to identify and accomplish its objectives.

The author is an organizational psychologist and Institute of Government faculty member whose areas of specialization include developing effective groups and managing conflict. He is the author of The Skilled Facilitator: Practical Wisdom for Developing Effective Groups *(Jossey-Bass, 1994), on which this article is based.*

The Basics of Facilitation

The Facilitator's Role

A group facilitator's role is limited: he or she helps the group improve the way it identifies and solves problems and makes decisions, in order to increase the group's effectiveness. The term *problem* includes not only negative situations but also those in which there is simply a gap between the group's current and desired situations. For example, the members of a governing board may realize that they have never agreed on a set of goals or expectations. Or an agency may have a slower than desired response time for citizen complaints.

Helping the group improve the way it identifies and solves problems and makes decisions means helping the group to improve its process. This is the facilitator's main task, and it is important because groups become more effective as their process becomes more effective. *Process* refers to *how* a group works together: how members talk to one another, how they identify and solve problems, make decisions, and handle conflict. In contrast, *content* refers to *what* a group is working on, and the facilitator, for the most part, figures very little in that. Whenever a group meets, it is possible to observe both its content and process. For example, in a discussion about ways to provide higher quality service, a suggestion to install a citizen hotline or to give more authority to frontline workers with citizen contact reflects the content. However, during the discussion, whether members interrupt one another, stay on track, openly discuss conflict, or fail to identify their assumptions are facets of the group's process.

The essential characteristics. To succeed, a facilitator must exhibit three characteristics:

1. The facilitator must be acceptable to all members of the group, because, as a basic proposition, the facilitator works for all of the members, not just the group leader or the members who initially contacted him or her. If even one member does not find the facilitator acceptable, the facilitator will not have the trust necessary for the job.
2. The facilitator must be substantively neutral, that is, not share his or her opinions or state any preferences about the topics under discussion, except under special conditions, which will be described later.
3. The facilitator must have no decision-making authority regarding the group's content.

These last two characteristics ensure that the facilitator does not influence group members' opinions about the content of their discussions.

The Kinds of Facilitation

I divide facilitation into two types based on the objectives of the client: basic and developmental. In *basic facilitation* the client group seeks the aid of a facilitator to *temporarily* improve its process in order to solve a substantive problem, such as developing an incentive pay program or establishing long-term goals. When the group has solved that problem, the facilitation objective has been achieved. The group will probably not have learned, however, how to improve its process effectiveness without a facilitator, so that if another difficult substantive problem arises, the group will likely again require a facilitator.

In *developmental facilitation*, the client group seeks to *permanently* improve its process while solving a substantive problem. The group uses a facilitator to learn how to improve its process and then applies its newly developed process skills in solving its substantive problem. When the group has accomplished its facilitation objectives, it will—as in basic facilitation—have solved its substantive problem. But, just as importantly, the group will have improved its ability to manage its process. If another difficult substantive problem arises, the group will be less dependent on a facilitator. It takes considerably more meetings to accomplish the goals of developmental facilitation than it does for basic facilitation.

What a Facilitator Is *Not*

The role of a facilitator might be clarified if we consider what it is *not*. First, a facilitator is not a *group member*. The facilitator has little or no role in the content of the group's decisions. For example, if the group is establishing funding priorities for the next five years, the facilitator would not suggest that a new park should take priority over new computer equipment. The facilitator neither agrees nor disagrees with any group member's substantive ideas and usually does not add his or her own ideas for the group to consider.

Second, a facilitator is not a *content expert* consultant. Some content expert consultants provide advice on particular subjects. For example, if an organization believes it needs to reorganize its structure, an expert consultant will analyze the current structure and recommend a more effective one. Serving as a content expert may prevent a facilitator from being substantively neutral.

Third, a facilitator is not a *mediator*, either between group members or between the group and other members of the organization. Rather than shuttling between parties, the facilitator meets with all members of the client group at once to solve problems. The group members and other members of the organization are responsible for their own communication with one another.

Both facilitators and mediators help clients by influencing the process that the clients use to work with one another, but mediators typically exert greater control over the process, while facilitators and their clients share responsibility for the process of facilitation. Mediators help parties settle a particular conflict they have been unable to settle themselves, but facilitators help a group improve its process for solving problems and making decisions so that it can achieve its goals. Dealing with conflict can be a significant part of facilitation, but it is not always the primary focus.

People often use the words *facilitator* and *mediator* interchangeably. There are similarities as well as differences between the two, and there is no single, agreed-upon definition of facilitator or mediator. Some people who call themselves "facilitators" may act more like "mediators" and vice versa. The important thing is not the label but how the person helps the group.

Finally, a facilitator is not an *arbitrator* or *judge*. The group is responsible for making its own decisions and ultimately resolving its own conflicts.

How Facilitators Help Groups

The facilitator helps the group to structure discussions by helping the members decide (1) what they want to accomplish as a group, (2) how to proceed effectively, (3) what to place on the agenda, (4) how long to talk about each issue, (5) who should attend its meetings, (6) what roles members should play in meetings, and (7) where

Figure 1
How Facilitators Help Groups

Facilitators help groups to

- identify what they want to accomplish;
- develop an agenda, time frames, and methods to accomplish objectives;
- decide who should attend meetings;
- decide what ground rules they want to follow;
- identify the causes of their problems;
- develop solutions that the group supports;
- stay on track;
- be specific;
- clarify how members' views are similar and different;
- understand the members' assumptions; and
- openly and constructively discuss conflicts.

Figure 2
Questions to Ask Prospective Facilitators

1. What are the basic assumptions and principles that guide your approach to facilitation?
2. What ground rules, if any, do you recommend that the group use?
3. How do you put these assumptions, principles, and ground rules into practice? What kinds of things will you do and not do as a facilitator?
4. What kind of facilitator experience and training have you had?
5. What are your fees and expenses?
6. What do you need to know about our group to decide whether and how you can help us?
7. How would you help us prepare for the meeting?

meetings should be held. During a meeting, the facilitator helps the group improve its ability to solve problems and make decisions by focusing on the group's process. The facilitator helps group members decide what ground rules they want to follow and then helps the group to follow them. For example, the facilitator points out when members seem to be getting off track, helps members be specific, and identifies when members are making assumptions that prevent them from solving a problem.

In groups that face conflicts, effective facilitators do not smooth over conflicts or try to prevent members from expressing negative feelings toward one another. Instead, facilitators help members share their different views openly and constructively, so members clearly understand what others think and feel, and why. Often, with the facilitator's help, members learn things about one another that lead them to change their views of one another and change how they work together. For example, by discussing their situation, two group members may learn that their conflict is caused by the way their jobs are set up, not because each is trying to make things difficult for the other. Consequently, the group may change how the jobs are set up and relieve the problem.

Although the facilitator can help, he or she has no magic wand. Ultimately each group member decides whether to make the effort and take the risks necessary to try to improve the way the group functions. (See Figure 1.)

How Do You Find Facilitators?

Group facilitators are available from a variety of sources. At universities and colleges, faculty members from departments such as business, public administration, social work, law, public health, psychology, and planning often provide facilitation on a consulting basis. Private consultants of various types, including organization development consultants, management consultants, and mediators, may also offer facilitation services. Some local dispute settlement centers offer facilitation services, too. Certain regional organizations such as councils of governments provide facilitation services as do some professional associations. Organizations sometimes have facilitators on their staff to help groups in their own organization. For North Carolina governments, the Institute of Government provides inexpensive facilitation but is able to fulfill only some of the requests it receives.

Anyone can call himself or herself a facilitator. There are no specified courses of education, no exams that facilitators must pass, no licensing boards. Merely knowing that a person is a facilitator tells you nothing about his or her background or qualifications. Consequently, clients must make some effort to determine whether a prospective facilitator can serve the group effectively.

Questions to Ask Prospective Facilitators

In a process known as *contracting*, a prospective facilitator and a group explore whether they will work together and under what conditions. The primary purpose of this process is not to develop a contract in the legally binding sense but to develop an agreement so that the facilitator and group clearly understand what will be expected of each other and how they will work together. This process is critical, because ineffective contracting almost always results in problems that arise later in the facilitation process, reducing the group's ability to accomplish its goals. The contracting process must involve members of the group who will be participants in the facilitated discussions, so this responsibility cannot be delegated to a secretary or staff member, because only

group members have the relevant information necessary to contract.

There are seven basic questions to ask prospective facilitators (see Figure 2).

1. What are the basic assumptions and principles that guide your approach to facilitation? A group needs to be aware of a facilitator's basic assumptions and principles, because they guide all of the facilitator's actions. An effective facilitator should be able to briefly explain them. For example, when I serve as a facilitator, I assume that my basic task is to help groups generate valid information and make free and informed choices so that members will be internally committed to the choices they make. This means that I encourage members to (1) share all the relevant information they have about the topic they are discussing, (2) reach decisions only after they feel adequately informed, and (3) commit to a solution only if they can support it.

Groups should avoid hiring a facilitator whose assumptions or principles include withholding relevant information from others, preventing the group from making its own decisions, or attempting to unilaterally control or manipulate the behavior of others. In my experience, these assumptions and principles are inconsistent with effective group process.

2. What ground rules, if any, do you recommend that the group use? To help groups become more effective, facilitators often use ground rules. The ground rules are behaviors that group members agree to use during the facilitated sessions. Facilitators intervene in the group when group members act inconsistently with the ground rules they have committed to using. Intervening consists of making statements and asking questions in order to help the group improve its process. (See Figure 3 for a set of ground rules that I use when working with groups.)

Knowing a facilitator's suggested ground rules helps group members understand the kind of interventions the facilitator will probably use with the group. Whatever the facilitator's suggested ground rules, an effective facilitator should ask group members whether they are willing to follow the ground rules; he or she should not impose them on the group. Because a facilitator is supposed to be a model of effective behavior, the facilitator should also follow the ground rules, within the limits of the facilitator role.

3. How do you put these assumptions, principles, and ground rules into practice? What kinds of things will you do and not do as a facilitator? The answers to these two questions provide members with specific examples from which to judge whether the facilitator acts consistently with the principles espoused. For example, a facilitator's principles and actions are inconsistent with one another if the facilitator states that he or she believes in letting the group make its own decisions about how to spend its time but then tells the group it must move to the next topic, even though the group has not finished its discussion.

Figure 3
Ground Rules for Effective Groups

1. Test assumptions and inferences.
2. Share all relevant information.
3. Focus on interests, not positions.
4. Be specific—use examples.
5. Agree on what important words mean.
6. Explain the reasons behind your statements, questions, and actions.
7. Disagree openly with any member of the group.
8. Make statements; then invite questions and comments.
9. Jointly design ways of testing disagreements and solutions.
10. Discuss undiscussable issues.
11. Keep the discussion focused.
12. Don't take cheap shots or otherwise distract the group.
13. All members are expected to participate in all phases of the process.
14. Exchange relevant information with nongroup members.
15. Make decisions by consensus.
16. Do self-critiques.

Source: Roger M. Schwarz, *The Skilled Facilitator: Practical Wisdom for Developing Effective Groups* (San Francisco: Jossey-Bass, 1994).

Note: These ground rules are also described in an earlier *Popular Government* article: Roger M. Schwarz, "Groundrules for Effective Groups," *Popular Government* 54 (Spring 1989): 5–30. (Both the article and book are available through the Institute of Government.)

The second question helps group members find out whether the facilitator will also act as a content expert or decision maker or in other roles that are usually inconsistent with the facilitator role. Sometimes a facilitator will have expert knowledge about a topic that a group is discussing—reward systems or service quality, for example. If a group agrees to it, the facilitator can state that he or she is temporarily leaving the facilitator role, share the expert knowledge, and return to the facilitator role. Still, a group should be prudent in asking a facilitator to provide expert knowledge, because it increases the likelihood that members will not consider the facilitator neutral.

If the group has previously used a facilitator, this is a good time to find out whether the prospective facilitator would do any of the things that the previous one did that the group found either helpful or not helpful. If the group anticipates that the facilitator will need to intervene in a specific kind of situation, this is an appropriate time to ask how this facilitator would deal with it. For

Figure 4
Questions for the Prospective Clients

1. Who (what group) is seeking the facilitation services? Are you (the contact person) a member of the group?
2. Has the group committed to particular times for this facilitation work? How much has the group already planned for this work?
3. What objectives does the group want to accomplish?
4. What problems is the group experiencing? What are some specific examples?
5. What are the consequences of these problems? What are some specific examples of these effects?
6. What do you think are the causes of the problems? What have you seen or heard that leads you to think these are the causes?
7. What is the history of the group? How has the membership and leadership changed?
8. What things has the group tried to do to improve the situation? What were the results?
9. What are the reasons each member wants to work with a facilitator? How motivated is each member to have this session?
10. What are the group's strengths? How does the group act in ways that are effective?
11. Has the group ever used a consultant or a facilitator either for this situation or for others? What role did the consultant or facilitator play? What were the results? What did the consultant do that members liked or disliked?
12. What has led the group to contact someone now? What has happened or is about to happen in the group or organization?
13. How did the idea to call this particular facilitator come about? Who initiated it? How was it received by other group members?
14. How do you envision the facilitator helping the group to accomplish its objectives?

example, you might mention that the group members sometimes keep talking long after having made their point, and ask the facilitator exactly what he would say or do when this happens.

How the facilitator acts in the initial conversation is an excellent indicator of how he or she would facilitate a group. Even in this conversation, the facilitator should be using facilitation skills. If, for example, the facilitator is vague or unclear, makes assumptions about your group without checking to see if they are warranted, or does not invite questions from you, he or she is likely to do the same kinds of things when facilitating.

Whatever assumptions, principles, and ground rules a prospective facilitator uses, make sure group members understand and agree with them.

4. What kind of facilitator experience and training have you had? Because facilitators help the group focus on process rather than content, it is not necessary that a facilitator have detailed knowledge of or experience in the substantive topics that your group will discuss. But it is helpful if the facilitator understands the context in which the group works and the substantive issues in general so that he or she does not continually have to slow down the group by asking what basic terms mean. It is helpful, too, if the facilitator has facilitated groups similar to yours (for example, governing board, top management team, multi-organizational committee), so that the facilitator understands the general kinds of process issues that your group might face. Asking for references from prior clients (ideally from people whose judgment you trust) will also help you assess the facilitator and give you another person's perspective. It also might be helpful to ask for a resume, especially if you are not familiar with the facilitator's references.

Again, there is no single course of education that people take to become a facilitator. And having an advanced degree, or even facilitator training, is no guarantee of competence. If a prospective facilitator has graduate degrees, find out what courses he or she has taken that relate specifically to facilitation. If a facilitator has had facilitator training, find out what the course covered and what organization or person offered it.

5. What are your fees and expenses? Facilitators' fees vary greatly, ranging from a couple of hundred dollars per day to several thousand dollars or more. Find out what the fee covers. Does it include preparation and planning time for the session or payment for anyone assisting the facilitator, such as a cofacilitator or recorder? Check whether the group must pay the fee in the event that the facilitation is canceled. Ask also what expenses might be incurred. In addition to charging for travel-related expenses, some facilitators charge for materials (such as self-awareness questionnaires that members complete to gain insight into behavior) that the group uses in the session.

6. What do you need to know about our group to decide whether and how you can help us? A skilled facilitator does not simply accept the client's view of what kind of help the group needs. Instead, he or she makes an assessment after asking a series of questions to identify the problems that the group wants to solve and how the facilitator may be helpful. (As mentioned earlier, the term *problem* here describes any situation in which there is a gap between what the group's current situation is and what the group wants that to be.)

Figure 4 lists some of the questions I usually ask prospective clients. You should be prepared to answer similar questions from any facilitator and should note

whether the questions are raised. A facilitator who asks few or none of these kinds of questions may be less effective in helping clients meet their needs.

7. How would you help us prepare for the meeting? A skilled facilitator does not simply walk into a meeting and begin facilitating a group. Instead, he or she helps clients prepare for the facilitated session by clarifying what the group wants to accomplish, how it will spend its time, who will attend, and what roles the participants will play. This planning session increases the chance that the group will use its time efficiently and effectively in the facilitated meeting.

Facilitators use different approaches for planning the facilitation. I believe that, ideally, the facilitator should meet with the entire group to plan the facilitation. This ensures that the facilitation is planned in a way that addresses the different needs and concerns of all group members. Sometimes a meeting of the entire group is not feasible, in which case a subset of the group should be selected. That subset should still represent the various concerns of the full group. For groups that include members of a board and a manager who reports to the board, the planning session should include, at the very minimum, the board chair, a board member who has different views from those of the chair, and the manager who reports to the board.

Some facilitators prefer to develop the agenda after meeting individually with group members, and groups sometimes prefer to have the facilitator do this. This encourages members to share information with the facilitator that they might not have shared in a group meeting, but it shifts responsibility and ownership for developing the agenda from the group to the facilitator. It does not encourage members to openly discuss their differences, and it can reduce the group's commitment to accomplishing the agenda.

When the planning session or sessions are over, the facilitator and the group should have developed an agreement that expresses clearly their understanding of what they expect of each other and how they will work together. (See Figure 5 for a list of questions that facilitators and clients should answer to develop an effective agreement.) Having the facilitator send a copy of the written agreement to each group member before the facilitation allows members to check to see if the written agreement reflects what they thought they had agreed to with the facilitator during the planning session, to identify any concerns they may have about the agreement, and to learn how they can have those concerns addressed. It also updates members who did not attend the planning session.

Figure 5
Questions for Developing an Effective Agreement

1. Who is the client group and who will attend the meeting?
   - Will there be others present who will provide expert information?
   - Will there be any other observers?
   - Will news media representatives attend?
   - Will all participants who are needed for identifying and solving the problems be included?
   - Will any participants be included who are not needed for identifying and solving the problems?
2. What are the objectives of the meeting?
   - Do the objectives meet the needs of all participants?
3. What are the agendas for the meeting?
   - Do the agendas meet the needs of all participants?
   - Do the agendas make effective use of the facilitator's skills and the presence of all participants?
4. Where and how long will the group meet?
   - Do the location and facilities encourage full uninterrupted attendance without distractions?
   - Is the location considered an acceptable site by all participants?
   - Are the facilities informal enough to encourage open discussion yet formal enough to concentrate on the work?
   - Is the location consistent with the image the organization wants to project?
   - Is the amount of time allocated sufficient to accomplish the objectives?
5. What roles will the different parties play during the meeting?
   - Facilitator
   - Leader
   - Members
6. What ground rules will the group follow?
   - What set of ground rules do participants themselves need to follow in the meeting?
   - Will the group make decisions—and how will it do so?
   - What limits, if any, will the facilitator and members put on confidentiality?
7. How will the group assess its progress?
8. How will the facilitator's performance be assessed?
9. What are the facilitator's fees and other charges?
10. How long will the agreement be in effect?
11. How and when can the agreement be changed?
12. How and when will the tentative agreement be conveyed to all parties?

The agreement reached during the planning session thus should be considered tentative. Because the agreement sets conditions under which the group and facilitator will work together, all members involved directly in the facilitation ultimately need to agree to the terms of the agreement.

Deciding Which Facilitator to Hire

Asking the questions described above will give group members a lot of relevant information about a prospective facilitator's assumptions, principles, and methods. Group members should also consider whether, as a result of the discussion, they feel comfortable with, have confidence in, and trust the prospective facilitator. This is critical, because the facilitator cannot help the group without the trust of all the members. Group members should not hesitate to talk with a number of facilitators until they find one whom they trust and who they believe will be effective.

Giving Feedback during the Facilitation

Once the group has agreed to work with a facilitator, group members are still responsible for telling the facilitator when his or her actions are not meeting the group's expectations or needs. If, during the facilitation, the facilitator does something that any group member does not find helpful or simply does not understand, the member should raise this issue with the facilitator and the group as soon as possible. By briefly discussing the issue, the group and the facilitator can decide whether to modify what they are doing and consequently can ensure that the group will use its time more effectively and efficiently.

Conclusion

Hiring a facilitator may seem like a mysterious process, because groups often do not know exactly what a facilitator does or how to evaluate the skills of a prospective facilitator. By following the approach described in this article, groups can generate the information necessary to make an informed choice about hiring an effective facilitator. The approach takes some time but is worth the investment. ❖

Local Government Minority- and Women-Owned Business Programs: Questions and Answers

Frayda S. Bluestein

Question 1: Are North Carolina local governments required to have programs that provide for participation by minority- and women-owned business enterprises (M/WBEs) in public contracts?

Answer: Yes, but only if the unit will be awarding contracts for building projects for which the cost of the entire job exceeds $100,000.

Section 143-128 of the North Carolina General Statutes (hereinafter G.S.) sets specification requirements for construction or repair contracts involving buildings and estimated to cost more than $100,000. In 1989 the North Carolina General Assembly amended the statute to add an M/WBE program requirement. The statute by its explicit terms applies only to cities and counties, although school systems and other units of local government also generally have considered themselves bound by its requirements. Thus there is an M/WBE requirement for these local governments but only for contracts within the scope of G.S. 143-128. Some units have implemented additional or different programs under federal programs (see discussion under question 10) or by special authority granted in local acts. In addition, some units have other kinds of M/WBE programs without additional statutory authority (see discussion under question 11).

Question 2: What are local governments required to do with respect to M/WBEs?

Answer: Local governments must adopt a percentage goal for M/WBE participation in covered contracts and establish guidelines to ensure "good faith efforts" in recruiting and selecting M/WBEs.

The first step is to establish the goal. Following notice and a public hearing, local governments must adopt an "appropriate verifiable percentage goal" for participation by M/WBEs in the total value of the work for contracts awarded under the statute.[1] The statute can be interpreted to require that the goal be a percentage of a *particular contract*, of particular *kinds of contracts* (plumbing, electrical, general, HVAC—heating, ventilation, and air conditioning), or of *all contracts* awarded over a particular time period. Goals related to particular contracts or kinds of contracts probably are more reasonable than goals set for overall contracting, because the availability of M/WBEs varies for different kinds of work. The statutory term for M/WBE is "minority-owned business," defined in the statute as a business that is at least 51 percent owned as well as managed and controlled in its daily operations by a "minority." The statute defines minorities as blacks, Hispanics, Asian Americans, American Indians, Alaskan Natives, and women. A woman-owned business is a minority-owned business under North Carolina's statute.[2]

Once the goal has been established, the local government must adopt written guidelines specifying the actions that will be taken to ensure a *good faith effort* in the recruiting and selection of M/WBEs for participation in contracts awarded under the statute. *The statute does not require that the percentage goal actually be met, only that guidelines be established to ensure a good faith effort.* In the case of a single-prime contract (a single contract between the unit and a general contractor who subcontracts with other contractors), the general contractor must make good

The author is an Institute of Government faculty member whose specialties include local government contracting.

faith efforts when subcontracting work and must document those efforts to the awarding authority. For multiprime contracts (separate contracts between the unit and contractors for general, HVAC, plumbing, and electrical work), the good faith effort requirement falls upon the unit itself and also can be interpreted to require multiprime contractors to make good faith efforts in contracts with subcontractors and suppliers.[3]

Question 3: What constitutes good faith efforts?

Answer: The statute does not define "good faith efforts" but leaves to the awarding authority the responsibility for developing guidelines to ensure that good faith efforts will be made.

Guidelines adopted under the statute include steps to be taken by the local government and by contractors. Steps for the local government typically include

- obtaining, maintaining, and publishing for bidders a current list of available M/WBEs along with their areas of work;
- publicizing contracting opportunities in trade association and minority focus media;
- notifying M/WBEs of contracting opportunities;
- reviewing projects during the design stage to determine the feasibility of dividing contracts to increase opportunities for M/WBE bidders;
- holding prebid conferences and informational sessions regarding the unit's contracting process and M/WBE program;
- designating a contact person within the unit for M/WBEs;
- certifying M/WBEs; and
- evaluating and enforcing good faith effort requirements of prime contractors.

For prime contractors the steps typically include

- soliciting bids for subcontracts from M/WBEs;
- advertising the availability of subcontracting work in minority focus media;
- making prompt payment to contractors;
- reducing retained payments to ease contractors' cash flow difficulties; and
- providing documentation of good faith efforts with bids.

The statute gives no guidance to local governments on the question of what efforts are sufficient under the statute. This issue is discussed further in the answers to the next two questions.

Question 4: How does the good faith effort requirement fit in with the requirement to award contracts to the "lowest responsible bidder"?

Answer: The local government must still award contracts to the lowest responsible bidder. The statute implies, however, that a bid from a contractor who fails to make the good faith effort is not eligible for award.

The last paragraph of G.S. 143-128 states that nothing in the statute requires contractors or awarding authorities to award contracts to or make purchases from M/WBEs that do not submit the lowest responsible bids. That paragraph also states that contracts are to be awarded without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition. Thus the M/WBE requirement does not modify the basic standard for awarding contracts.

The statute does not explicitly state what is to happen if a contractor fails to make any efforts or if the local government concludes that the efforts are insufficient. The statute requires contractors to document to the local government actions taken to ensure good faith efforts. Local governments generally require bidders to complete and submit with their bids a certificate or affidavit delineating their efforts.[4] Most local governments have interpreted submission of this documentation as an element of responsiveness and state in their specification that bids may be rejected for failure to submit the documentation. This interpretation seems reasonable, because the statute requires the local government to establish guidelines to ensure that a good faith effort is made. If the unit does not have the authority to enforce those guidelines by rejecting bidders who fail to comply, the requirement would become voluntary. On the other hand, a disappointed bidder who does not comply with the M/WBE guidelines might argue that if the unit rejects his or her bid, it will violate the requirement in the statute that contracts be awarded without regard to race or sex.

On balance it seems most reasonable to assume that local governments have the authority to reject bids that do not comply with the M/WBE guidelines and that such bids are simply not eligible for award. In addition, since the statute requires a good faith effort and not attainment of the goal, as long as all contractors comply with the M/WBE program guidelines, even if one contractor obtains a higher M/WBE participation than the lowest responsible bidder, the award must be made to the lowest responsible bidder—not the one with the highest M/WBE participation.

Question 5: Is North Carolina's M/WBE requirement constitutional?

Answer: No court has decided the issue, but it seems likely that contract award decisions under G.S. 143-128's M/WBE requirements, if challenged, would receive strict scrutiny by a court.

In 1989 the United States Supreme Court held that the city of Richmond's minority business enterprise program violated the Equal Protection Clause of the United States Constitution, because it discriminated against nonminority contractors.[5] The program required nonminority contractors to subcontract at least 30 percent of the dollar amount of contracts to minority-owned businesses. The court rejected the city's argument that the discrimination was for a "benign" purpose—to remedy past discrimination—and held that any kind of racial discrimination is subject to "strict scrutiny" under the Constitution. As such it must be justified by a compelling governmental purpose and be narrowly tailored to accomplish that purpose. The court held that the city could not rely on general societal discrimination as a justification for its program. The city would have to show that the city itself had discriminated in awarding contracts in the past (or had been a passive participant in a discriminatory contracting industry) and that there was a market of qualified minority contractors who had been denied contracts because of that discrimination. The Constitution requires specific evidence of past discrimination, along with a program narrowly tailored to remedy the discrimination.

The court invoked strict scrutiny in the Richmond case because Richmond's program *treated contractors differently on the basis of their race*. North Carolina's program is not a quota or set-aside in the same sense that Richmond's was, and it does not explicitly create a preference for one group of contractors over another. The good faith effort requirement, on its face, applies equally to all who compete for public contracts. As such it could be argued that it is not race-based and therefore not subject to strict scrutiny. While there is no case evaluating an M/WBE law exactly like North Carolina's, several courts have suggested that a less exacting degree of scrutiny should apply to such programs.[6] Nonetheless the majority of courts deciding cases after Richmond's have applied strict scrutiny when reviewing a variety of M/WBE programs, including some that function essentially like North Carolina's.[7] In the most recent United States Supreme Court case on the subject, which addressed the question of whether a contractors' association has standing to challenge M/WBE programs, the Court held that an M/WBE program discriminates on the basis of race if it creates any different requirements for white as opposed to minority- or women-owned businesses in their efforts to bid on public contracts.[8]

So, does North Carolina's requirement discriminate on the basis of race in a way that would invoke strict scrutiny? Suppose a contractor's bid is rejected because the contractor failed to make sufficient good faith efforts. The contractor, arguing that the rejection was unconstitutional, probably could demonstrate that the rejection was caused by a program designed to promote M/WBEs. But is that demonstration sufficient to prove that the program is race-based? After all, the requirements apply to all contractors.

The answer may well be that the program *is* sufficiently race-based to invoke strict scrutiny, because minority and women bidders usually are entitled to use their own status toward satisfaction of the good faith effort requirement. As such it can be argued that minority and women bidders are treated differently from white male bidders in a way that triggers strict scrutiny.[9] Indeed, it would seem odd not to allow M/WBEs to use their own status in bidding under a program designed to increase participation by just such firms. A recent federal court decision noted a difficulty inherent in this result, but ultimately the court was restrained by the precedent established in the Richmond case. The court stated:

> Although we believe that any affirmative action program which essentially forbids a beneficiary from accepting its benefits would be a meaningless program, it appears that by employing the "race-conscious" standard, the [Richmond] court meant for strict scrutiny to be applied to nearly all affirmative action.[10]

Thus, depending on how the program is implemented, developing case law in this area suggests that M/WBE programs under G.S. 143-128 may be subject to strict scrutiny.

Question 6: How can local governments implement the statutory requirements without violating the Constitution?

Answer: If the requirements of G.S. 143-128 are considered race-based and subject to strict scrutiny, they cannot be implemented constitutionally unless they are supported by evidence of past discrimination and are narrowly tailored to remedy that discrimination.

Local governments throughout the country have conducted disparity studies (discussed in more detail below) to establish the factual and legal support for M/WBE programs as required in the Richmond case and its prog-

eny. No comprehensive study was done before the enactment of North Carolina's M/WBE statute although several jurisdictions have since contracted for studies individually.[11] The majority of North Carolina local governments have relied on the presumptive validity of the statute and have implemented M/WBE programs without additional support. Some units, aware of potential constitutional challenges, have treated the requirements as voluntary and have refrained from rejecting bids that either do not contain evidence of a good faith effort, or that demonstrate only minimal or pro forma compliance.

At least two lawsuits have challenged the validity of M/WBE programs in North Carolina on constitutional and other grounds. One was filed against the Raleigh-Durham Airport Authority and the other against the State Department of Transportation.[12] In both cases contractors alleged that the contracting authority rejected bids for failure to make sufficient good faith efforts to meet the M/WBE goal. Neither lawsuit has resulted in a final decision on the constitutional question, and both jurisdictions have since conducted disparity studies.

Question 7: What are disparity studies, and are local governments required to have them?

Answer: Disparity studies are designed to document any past discrimination in the awarding of contracts by a particular jurisdiction as well as in the industry in general. Local governments are not required to have them, but they may work to support the constitutionality of a local government's M/WBE program.

Disparity studies have developed out of the Richmond decision as the mechanism for complying with the requirements of strict scrutiny. They are intended to establish the factual evidence of past discrimination that supports the local government's program to increase M/WBE participation. If a local government's M/WBE program is challenged on constitutional grounds, and if a court determines that the program is race-based, then the program must be supported by evidence of past discrimination in order to withstand strict scrutiny.

Greatly simplified, a disparity study evaluates the past contracting practices of a local government that proposes to implement an M/WBE program, the market area from which the contractors doing business with the unit are drawn, and the availability of qualified M/WBE contractors within that market area in the trades used by the unit. The study then analyzes whether there is a statistically significant disparity between the firms available to and those used by the local government. Such a disparity is evidence of discrimination. A disparity study also evaluates anecdotal evidence of discrimination in the trades generally to determine if the unit was a passive participant in industrywide discrimination. Evidence may be drawn from census data, the records of the unit being studied, federal studies, public hearings, surveys, and interviews.

A number of private consulting firms have developed expertise in conducting disparity studies. The studies can be costly (ranging from $50,000 to hundreds of thousands of dollars, depending on the size of the unit), time consuming, and demanding for local government staff. For example, assembling the unit's past contracting records can be difficult, and quite often those records do not identify the race or sex of the contractor. In addition, it can be an uncomfortable experience for a unit's officials and employees, and for the community as a whole, to oversee documentation of past discrimination within the jurisdiction. Another problem with the analysis of disparity is the inability to document discrimination that may have prevented minority businesses from coming into existence; that is, to account for the lack of available M/WBEs in the market being studied. It is also difficult to develop meaningful data for newly created entities, such as a recently merged school system.

It seems clear that not all disparity studies will satisfy the requirements of the Richmond case, but a number of studies that have been reviewed in the federal courts have met with approval.[13] Indeed in a recent United States Supreme Court case, Justice O'Connor (the author of the plurality opinion in the Richmond case), dissenting from the majority opinion, noted with approval the use of disparity studies and other efforts taken by the city of Jacksonville to satisfy the requirements enunciated in the Richmond case.[14]

Question 8: Can a local government rely on a disparity study conducted by a nearby unit?

Answer: It is unlikely that a unit could rely solely on another unit's disparity study to support a race-based M/WBE program.

One federal appellate court has approved a county's use of evidence from a city and other units having coterminous boundaries with the county but not evidence from an adjacent county.[15] The county in that case also developed evidence of its own, however. To justify its need for an M/WBE program and also to show that the program is narrowly tailored, a local government must present evidence about firms seeking work *in that unit* as well as the contracting practices of the unit. These requirements cannot be met by using another unit's study.

Question 9: Is there a requirement that M/WBEs be certified?

Answer: No, but the statute implicitly authorizes certification as a method of carrying out the statutory mandate.

Some local governments have established certification programs to identify M/WBEs that fall within the definition under the statute. Under most certification programs M/WBEs are required to provide information about the ownership and operation of the business so that contractors and the unit can ensure that the business legitimately qualifies as an M/WBE. M/WBEs that do not qualify or do not wish to become certified are still free, of course, to submit bids to general contractors and to the unit without being identified as M/WBEs.

There are advantages and disadvantages to certification programs. Certification can help guard against fraud and can generate an up-to-date source of available M/WBEs. The process of certification, however, adds to the effort of contracting for M/WBEs, sometimes requiring them to provide and thus expose financial information not required of other contractors. In addition, certification requirements are not uniform around the state. Local governments have different requirements for certification, although some recognize certification by other jurisidictions. Several state agencies also maintain M/WBE certification lists in connection with state M/WBE programs.[16]

For an analysis of certification programs in North Carolina, see "Certification Programs for Minority- and Women-Owned Businesses," page 27.

Question 10: Can local governments implement federal M/WBE programs required as a condition of receiving federal funds?

Answer: Yes.

A number of cases have held that the strict scrutiny standard of the Richmond case does not apply to local government implementation of M/WBE programs when the programs are required by the federal government as a condition of receiving federal funds.[17] The United States Supreme Court has held that programs under federal M/WBE set-aside laws do not require the same level of detailed proof of past discrimination as that required under the Richmond case. The federal government simply has greater authority under the Constitution to implement race-based programs than do local or state governments.[18] Thus state and local governments can rely on federal authority when implementing federal programs. Local governments are still subject to strict scrutiny for projects that involve only state or local funds, however, or if in implementing the federal M/WBE program they exceed the federal requirements. Thus local governments that receive federal money sometimes have both an M/WBE program for contracts under G.S. 143-128 involving state or local money and a separate M/WBE program (also called DBE—disadvantaged business enterprise) for contracts involving federal money. Cities and counties also have specific statutory authority to agree to and comply with federal M/WBE requirements and to incorporate compliance with such requirements into the criteria for awarding competitively bid contracts.[19]

Question 11: Assuming that a disparity study is either completed or determined by a court not to be necessary, can a local government implement an M/WBE program for contracts outside the scope of G.S. 143-128?

Answer: It is not clear whether local governments have the authority under state law to do so. A unit may need the express authorization of the General Assembly.

Suppose a local government has conducted a disparity study and has established the factual basis for remedying past discrimination in contracting. It may wish to include in its M/WBE program construction or purchase contracts that are not subject to G.S. 143-128 (like small building projects, road construction, or purchase of equipment). This proposition raises an issue of local government authority under state law rather than one of federal constitutional law. Local governments function under authority delegated by the General Assembly and can undertake only those activities expressly authorized or reasonably necessary or expedient to carry out those that are expressly authorized.[20] Although cities and counties have express general authority to contract,[21] the only specific authority for M/WBE programs in North Carolina is that contained in G.S. 143-128.

An argument that local governments have implicit authority to establish more extensive M/WBE requirements is problematic. The presence of explicit M/WBE authority for only certain kinds of contracts—those under G.S. 143-128—suggests that there is no authority for M/WBE programs in other kinds of contracts. If local governments had implicit authority to implement M/WBE programs outside G.S. 143-128, then the specific authorization for those under G.S. 143-128 would not have been necessary. Also, if the General Assembly had intended to authorize such programs for other types

of contracts, it easily could have done so. On the other hand, it could be argued that the authority in G.S. 143-128 is simply a mandate for a minimum requirement that all units must implement and not a limitation on broader implementation.[22]

There is also the question of whether an M/WBE program conflicts with the "lowest responsible bidder" standard of award when that standard applies—that is, for contracts costing more than $5,000 either for construction or repair or for purchase of apparatus, supplies, materials, or equipment.[23] G.S. 143-128 implicitly authorizes rejection of bids for failure to comply with M/WBE requirements, but for contracts outside the scope of that statute, the lowest responsible bidder standard is the exclusive basis upon which contracts may be awarded. If an M/WBE program permits rejection of bids for failure to comply with the M/WBE requirements, the program arguably adds a basis for awarding contracts not present in the lowest responsible bidder standard. In contrast, when the General Assembly authorized local governments to implement anti-apartheid requirements, it specifically authorized altering the standard of award to include compliance with such requirements.[24]

A number of cases from outside North Carolina have held that M/WBE programs do conflict with state laws requiring contracts to be awarded to the lowest responsible bidder.[25] Cases from other jurisdictions have gone both ways on the question of whether local governments have the authority to include social responsibility in determining the lowest responsible bidder.[26] In these cases, courts evaluated all of the statutes affecting contracting along with more general statutes prohibiting discrimination or allowing affirmative action to determine whether there was authority for the M/WBE program. Although in North Carolina the General Assembly has enacted general laws expressing the state's policy of encouraging the use of M/WBE contractors,[27] this broad statement is probably insufficient to modify the more specific requirements in the competitive bidding laws.

For contracts to which lowest responsible bidder requirements do not apply, such as service contracts, local governments may have broader authority to implement M/WBE programs.

If a disparity study has been completed and has demonstrated past discrimination, the local government may believe that it has a constitutional mandate to implement an M/WBE program designed to remedy the past discrimination, even if the remedy would necessarily involve contracts outside the scope of G.S. 143-128. The local government may feel somewhat exposed (in the political if not the legal sense) if it does not implement a comprehensive program to address the results of the study. It is not clear whether a court would find that such a "constitutional mandate" would overcome the need for state statutory authority. A court might still hold that the state legislature has the responsibility to define as a matter of state law what type of program local governments may undertake. Of course, local governments can overcome a lack of statutory authority by seeking legislation authorizing a particular program.

Question 12: Given the legal issues here, aren't local governments better off just not getting involved in M/WBE programs of any kind?

Answer: No. G.S. 143-128 requires some involvement, and there are additional steps that can be taken with very little risk.

The General Assembly has declared that it is the policy of the state "to encourage and promote the use of small, minority, physically handicapped and women contractors"[28] and has shown its intent by making some involvement mandatory under G.S. 143-128. Indeed, the Richmond decision itself approved of the city's desire to avoid being even a passive participant in a discriminatory industry. The opinion states, "It is beyond dispute that any public entity . . . has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[29]

There is a clear need for, and there are clear benefits from, M/WBE programs. Disparity studies universally have shown some degree of inequity in past contracting practices, and past societal discrimination has resulted in disproportionately low numbers of successful, competitive, or even available minority- and women-owned firms. In addition, developing all sectors of the business community not only is good policy for local governments, it increases competition, which results in more reasonable prices on competitively bid public contracts.[30] It is also consistent with the notion that competitive bidding statutes are designed, in part, to ensure that all sectors of the taxpaying populace have an opportunity to compete for contracts through which those tax dollars are spent. Local governments have a responsibility to ensure that contracts are awarded fairly.

Nonetheless, the problems with M/WBE programs are daunting. They often disrupt traditional patterns of contracting, particularly in the construction industry, and thus sometimes are met with resistance. The programs must comply with constitutional and statutory requirements that are sometimes prohibitive. As in other

areas in which some kind of affirmative action is used, it is a challenge to develop programs to increase participation by specific groups without engendering antagonism toward those same groups. It is important to recognize that under the standard enunciated by the Supreme Court in the Richmond case, M/WBE programs must be limited in duration so that they do not remain in place any longer than necessary to eliminate the effects of past discrimination.[31] Certainly, eliminating the need for M/WBE programs is the ultimate goal of any such program.

Some steps can be taken at very little risk to promote participation by historically underutilized businesses. First, as the United States Supreme Court pointed out in the Richmond case, a local government can prohibit discrimination. It can also establish race-neutral programs designed to benefit small businesses generally, including both M/WBEs and small local businesses, which often are also a source of local government concern. Such programs can involve making special efforts to identify small businesses and make them aware of contracting opportunities, providing training opportunities to educate businesses about procedures for contracting with public entities, providing referrals for businesses seeking to subcontract or start joint ventures with small businesses, and providing incentives for such partnerships. Units can make a special effort to identify small contracts and projects that may provide more realistic contracting opportunities for small local businesses and M/WBEs than the larger projects under G.S. 143-128. Local governments also have some flexibility in waiving bid bonds and performance bonds, which sometimes are a barrier to new or small businesses that have difficulty obtaining bonding. The formal bidding statute provides that the governing body can waive the 5 percent bid bond requirement for purchase contracts under $100,000. The same statute authorizes the governing body to waive the performance and payment bond requirement for all purchase contracts.[32] Again, when this is done, it applies to all bidders and therefore is race-neutral. Finally, local governments can support community-based programs and others aimed at local and minority economic development. ❖

Notes

1. The statute establishes a 10 percent goal for contracts awarded by the state.

2. Goals may be established for each group or for M/WBEs collectively.

3. The statute is written in the passive, placing the burden on the unit to specify actions that "will be taken," but it does not specify by whom. *See* G.S. 143-128(c)(3).

4. In some cases the documentation is requested only after the bids are opened and then only from the apparent low bidder.

5. City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

6. Contractors Ass'n of Eastern Pennsylvania v. Philadelphia, 945 F.2d 1260, 1268 (3rd Cir. 1991) (Higginbotham, J., concurring); Concrete Works of Colorado v. Denver, 823 F. Supp. 821 (D. Colo., 1993).

7. *See* Contractors Ass'n v. City of Philadelphia, 6 F.3d 990 (3rd Cir. 1993) (applying strict scrutiny to the racial component of the program, intermediate scrutiny to the women-owned business component, and minimal scrutiny—the "rational relationship test"—to the handicapped-owned business component); Associated General Contractors of California v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992); Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 875 (1992); Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir.), *cert. denied*, 111 S. Ct. 516 (1990); Associated General Contractors of Connecticut v. City of New Haven, 791 F. Supp. 941 (D. Conn. 1992).

8. Northeastern Florida Chapter of AGC v. City of Jacksonville, 113 S. Ct. 2297 (1993) (holding that the association has standing even without showing that any particular contractor was denied a contract, because the association demonstrated that the program prevents minority and nonminority contractors from competing on an equal basis).

9. *See* Cone Corporation v. Florida, 5 F.3d 1397 (11th Cir. 1993) (holding that because the percentage requirement was decreased for minority contractors who do more than 50 percent of their own work, the program was subject to strict scrutiny).

10. *Concrete Works of Colorado*, 823 F. Supp. at 830.

11. Units that have completed disparity studies include Durham (city and county), Greensboro, Charlotte, Asheville, Raleigh-Durham Airport Authority, and the State Department of Transportation.

12. Watco Corp. v. Raleigh-Durham Airport Authority, No. 92-CVS-09656 (Wake County Super. Ct. filed Sept. 16, 1992) (settled out of court); Dickerson Carolina, Inc. v. Harrelson, No. 93-10SC296 (N.C. Ct. App. May 17, 1994). In Dickerson, the North Carolina Court of Appeals affirmed the trial court's grant of summary judgment for the defendants (members of the N.C. Board of Transportation and officials in the Department of Transportation). The court held (1) plaintiff's equal protection claim is moot, because the department suspended and then modified the challenged M/WBE program after conducting a disparity study, and (2) the defendants cannot be sued in their official capacity under 42 U.S.C. § 1983 and are entitled to qualified immunity from individual liability for complying with a "presumptively valid state statute" (slip. op. at 12–13).

13. *See* AGC of California, Inc. v. City and County of San Fransisco, 950 F.2d 1401 (9th Cir. 1991); *Concrete Works of Colorado*, 823 F. Supp. 821.

14. Northeastern Florida Chapter of AGC v. City of Jacksonville, 113 S. Ct. at 2307–8 (1993) (O'Connor, J., dissenting).

15. Coral Construction Co. v. King County, 941 F.2d 910, 917 (9th Cir. 1991). *But see* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 505 (1989) ("We have never approved the

extrapolation of discrimination in one jurisdiction from the experience of another.").

16. Separate certification programs are administered by the state Departments of Administration and Transportation.

17. *See* Harrison & Burrowes Bridges Constructors, Inc. v. Cuomo, 981 F.2d 50 (2nd Cir. 1992); Ellis v. Skinner, 961 F.2d 912 (10th Cir. 1992); Tennessee Asphalt Co. v. Farris, 942 F.2d 969 (6th Cir. 1991); Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419 (7th Cir. 1991).

18. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); Fullilove v. Klutznick, 448 U.S. 448 (1980).

19. G.S. 160A-17.1(3a).

20. Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte, No. 93-133PA (N.C. April 8, 1994); G.S. 160A-4, 153A-4.

21. G.S. 160A-11, 153A-11.

22. *See Homebuilders*, slip op. at 10–11.

23. *See* G.S. 143-129 and 131.

24. *See* G.S. 160A-197, 153A-141. These statutes specifically alter the standard of award by providing that awards may be made to the lowest responsible bidder meeting the anti-apartheid requirements and other specifications. Similar language is used in G.S. 160A-17.1(3a) authorizing local governments to comply with federal MBE requirements.

25. Domar Electric v. City of Los Angeles, 23 Cal. Rptr. 2d 857 (Cal. App. 1993) (M/WBE outreach program established by executive order held invalid because inconsistent with charter provision requiring award to lowest and best regular responsible bidder); S. J. Groves & Sons v. Fulton County, 920 F.2d 752 (11th Cir.), *cert. denied*, 111 S. Ct. 2893 (1991); Owen v. Shelby County, 648 F.2d 1084 (6th Cir. 1981).

26. *Compare* Associated General Contracts of California v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (social responsibility not encompassed in award standard), *with* S. N. Nielsen Co. v. The Public Building Commission of Chicago, 410 S.E.2d 40 (Ill. 1980) (social responsibility permissible consideration in awarding contracts).

27. G.S. 143-48(a).

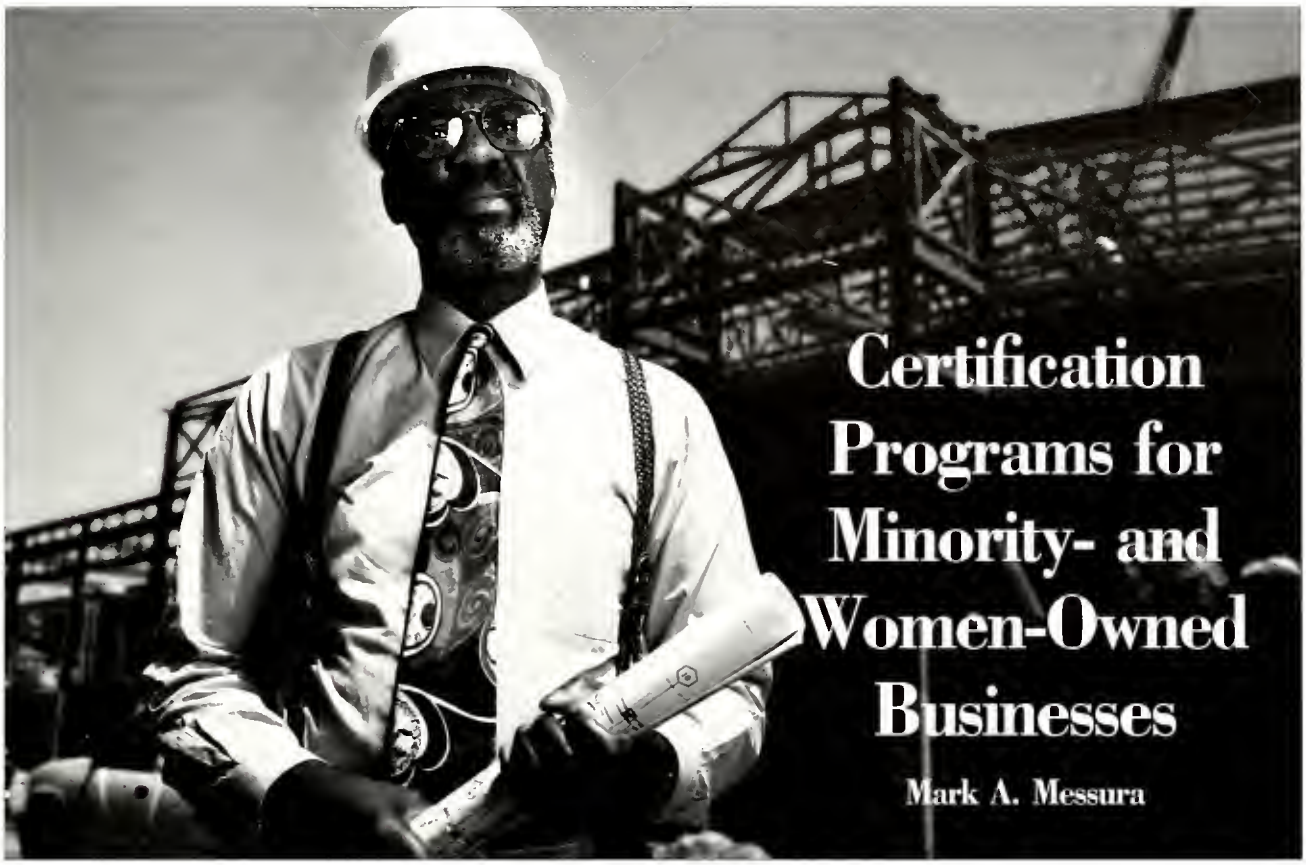
28. G.S. 143-48(a).

29. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 492 (1989).

30. Mullen v. Town of Louisburg, 255 N.C. 53, 33 S.E.2d 484 (1945).

31. *See Croson*, 488 U.S. at 510 (deviation from norm of equal treatment must be temporary); North State Law Enforcement Officers Ass'n v. City of Charlotte, 802 F. Supp. 1361 (W.D.N.C. 1992) (affirmative action promotion policy in city police department invalid after department reached 20 percent goal established in earlier consent order).

32. *See* G.S. 143-129(b), (c).



Bob Donnan

Marshall Isler, president of Unicon Contractors, Inc., stands in front of the new Durham ballpark, a municipal construction project. Isler's business, certified by the city of Durham as a "DBE" (Disadvantaged Business Enterprise), was awarded a subcontract to lay some of the concrete (sidewalks, etc.) for the project. Certification programs identify eligible businesses to promote minority participation in government contracting.

Certification Programs for Minority- and Women-Owned Businesses

Mark A. Messura

Throughout North Carolina, local governments take extra steps to help businesses owned by minorities and women participate in government contracting. Typically those extra steps are *not* set-asides or special preferences; they are simply good faith efforts to identify minority- and women-owned business enterprises (M/WBEs), to encourage those businesses to bid on government contracts, and to help them position themselves to compete for bid awards as the "lowest responsible bidder."

To focus the extra steps on *bona fide* minority- and women-owned businesses, many jurisdictions have developed certification programs. Certified businesses are then recognized by the local government and become eligible—without further paperwork or proof of status—for the government's extra efforts.

In November 1993 the North Carolina Institute of Minority Economic Development[1] commissioned a study designed to identify the similarities and differences of the various certification programs and to evaluate them as a means of encouraging minority-business participation in government contracting.[2] This article summarizes the results of that study.[3]

The study, which was not intended to be exhaustive, focused on eight certification programs in the state's larger metropolitan areas (with their consequently larger governmental purchasing markets): Asheville, Charlotte, Durham, Fayetteville, Greensboro, New Hanover County, Raleigh, and Winston-Salem. The study also included two certification programs operated by state agencies—the Department of Administration (DOA) and the Department of Transportation (DOT)—and certification programs in other states and municipalities outside North Carolina.[4]

Businesses Eligible for Certification

All certification programs are voluntary. Minority businesses are not required to obtain certification as a prerequisite for doing business with a government. Certification may be necessary, however, for businesses to qualify for the extra help that certification programs provide to eligible businesses. Certification programs typically cover one or more of three types of businesses:

Mark A. Messura is a Raleigh-based private consultant who specializes in economic and policy analysis; he prepared the report of the study on which this article is based.

Minority-Owned Business Enterprises (MBEs). For purposes of this article, MBEs are businesses that are owned, managed, and controlled by minorities. For partnerships, joint ventures, or corporations, at least 51 percent of the ownership and voting rights must be held by minorities. This definition is consistent with the statutory definition of "minority-owned business" in the North Carolina statute that requires good faith efforts at including minority- and women-owned businesses in certain governmental building construction.[5] The term *minority* under that statute includes blacks, Hispanics, Asian Americans, American Indians, and Alaskan Natives.

Women-Owned Business Enterprises (WBEs). WBEs are owned, managed, and controlled by women. For partnerships, joint ventures, or corporations, at least 51 percent of the ownership and voting rights must be held by women. The North Carolina "good faith efforts" statute discussed above also includes women within the definition of minority.

Disadvantaged Business Enterprises (DBEs). DBEs are owned, managed, and controlled by citizens who are socially and economically disadvantaged. Socially disadvantaged individuals are defined as

> persons who have been subjected to racial or ethnic prejudice or cultural bias as a result of their identity as a member of a group, without regard to their individual qualities.[6]

Economically disadvantaged individuals are

> socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and competitive market area who are not socially disadvantaged.[7]

This classification is used in connection with governmental contracts involving federal money and is not typically used in local government certification programs. However, it is used by the city of Durham and by New Hanover County (the latter certifies businesses as either MBE or DBE).

Unlike other certifying agencies, the North Carolina Department of Administration uses a DBE classification for *disabled* business enterprises, a classification that includes businesses owned and controlled by individuals who are physically disabled.

Purposes of Certification Programs

Identification of eligible enterprises. Certification programs are intended primarily to allow governments to identify and categorize potential contractors as businesses eligible for the extra efforts governments make for businesses that have historically been underrepresented. A certification program allows a governmental unit to increase the size of the minority contractor pool; certification does not guarantee a business that it will receive or participate in government contracts.

Avoiding abuse. A second purpose of certification programs is to ensure that the extra efforts of local governments are focused on businesses that are in fact eligible. All of the program administrators interviewed for the Institute of Minority Economic Development study reported that they had encountered businesses applying for certification that were not legitimately owned and controlled by minorities or women. In such instances, information on the certification application may be deliberately manipulated, omitted, or misrepresented to make the business appear to be an MBE or WBE. Certification staff commonly refer to these businesses as "fronts."

The experience of the Office of Minority Business Development of the Commonwealth of Pennsylvania dramatically illustrates the problem with fronts. When the Pennsylvania certification process required only self-reporting by applicants, with little or no review or verification by program staff, more than 11,000 businesses were classified as MBEs. After the state implemented a rigorous certification process that included a detailed application form and site visits, the number dropped to less than 1,900. The program staff attributed most of the decline to a decrease in the number of fronts, which previously had taken advantage of the easy certification process.[8]

The Certification Process

Responsibility for the certification process may be located within any of several governmental departments, such as the purchasing office, the county or city manager's office, or the planning or economic development departments. (See Table 1 for the location of the programs in the Institute of Minority Economic Development study.)

The Application

The certification process begins with the application. To receive applications from as many eligible MBEs and WBEs as possible, certification program administrators often conduct outreach activities such as seminars, conferences, and advertising programs to inform the business community about certification.

The application forms of all programs in the study require information in three categories: general business

information and documentation, ownership-related information, and management-related information. Program administrators reported receiving a significant proportion of incomplete applications (some estimates run as high as 25 percent). They attributed this phenomenon largely to two factors. First, a front that is merely "testing the waters" may submit an incomplete application, deliberately omitting information that may lead to a denial of certification. Once it becomes apparent that the application will not be processed as submitted, the front typically will withdraw the application or simply never send additional information. Second, businesses sometimes are reluctant to reveal financial information. In almost all of these instances, the applications are completed after administrators explain the need for the information.

Applicants are notified by letter if any required information is missing. Most programs have a fixed response period within which applicants may forward the additional information. Applications that remain incomplete beyond the response period are removed from consideration or placed in an inactive file.

Approval or Denial

Program administrators review the completed applications for compliance with the program's criteria for MBE, WBE, or DBE status. In some instances—typically only where the information indicates a need for further scrutiny—program administrators may conduct a site visit to the business as part of the review process.

The decision to approve or deny the application is made in various ways. In some programs, such as Winston-Salem's, the decision rests with the program administrator. In others, the administrator recommends approval or denial to a review committee, which then makes the final decision. The programs in New Hanover County and the city of Asheville work this way.

The applicant is sent a letter with notification of the certification determination. In most instances, applicants denied certification may appeal through a formal appeal process.

Recertification

All certifying agencies require recertification, usually every two years. In general, recertification is less time consuming for both businesses and administrators, because the information requirements typically are minimal. Among the programs studied, only Winston-Salem requires applicants to resubmit the full application form.

Table 1
Characteristics of Certification Programs

Agency	Organizational Location	Certified Businesses[a]	Certification Staff[b]
Asheville	Community Development Div.	100	1
Charlotte	Purchasing Department	800–900	2
Durham	Affirmative Action Office	> 200	2
Fayetteville	Purchasing Department	N/A	1
Greensboro	City Manager's Office	500	1
New Hanover Cty.	County Manager's Office	195	1
Raleigh	Planning Department	350	1
Winston-Salem	Economic Development	500	1
N.C. DOA	Purchasing	1,200	4
N.C. DOT	Civil Rights/Business Development	130	6

a. The numbers are estimates provided by program administrators.

b. The number of certification staff includes the number of professional staff that are principally involved with the certification process. In all instances, these staff conduct certification in addition to many other job responsibilities.

Other certifying agencies use an abbreviated form or require only identification of changes that have occurred since submission of the original form.

Assistance Provided to MBEs and WBEs

Help in the application process. Many MBEs and WBEs need help right at the start, in compiling information and completing the application. Program administrators routinely assist applicants in organizing information such as business licenses, corporate documents, legal documents, tax records, and so on. Like all small business owners, MBE and WBE owners often work as manager, bookkeeper, salesperson, and production worker, so they do not have the time necessary to organize the paperwork that accompanies an active business.

Information services. Most certification programs regularly mail notices of upcoming bid opportunities to certified businesses. Many take additional steps. The city of Greensboro's program brochure, for example, cites the following services:

- referrals to both the public and private sector
- advance notice of contract opportunities with the city
- an annual contractors institute (a series of sessions designed to assist firms in the area of construction with skills vital to their businesses)
- an annual suppliers institute (a series of sessions designed to assist firms in the area of procurement with skills vital to their businesses)

- an annual contractors forum (to bring together prime contractors, subcontractors, and MBEs and WBEs to express concerns and to network)
- an M/WBE plan room (to provide an atmosphere conducive to working on bid estimates with the assistance of trained specialists)

Publication of directories. Most certifying agencies publish and distribute directories listing certified MBEs and WBEs, their services and products, and contact information. These directories are distributed widely among governmental agencies and private businesses seeking to contact minority- and women-owned businesses. Exposure through these directories may be the most important benefit many MBEs and WBEs receive from certification.

Facilitating contact. Certification programs encourage one-on-one personal contact between program administrators and business owners. The administrators believe that these meetings help them to learn about an applicant's business, to judge a firm's qualifications, and determine the types of governmental contracting opportunities that would be best suited to the business. These insights help administrators in introducing MBEs and WBEs to purchasing agents and in facilitating contact between owners and governmental agencies.

Post-award assistance. After a contract has been awarded and the MBE or WBE—along with subcontractors, perhaps—is engaged in performing the work, it is common for certification program administrators to monitor the progress of the contractor. This monitoring provides information that the contractor may find helpful and ensures that the MBE or WBE actually is participating in the contract and, in practical terms, is operating under minority ownership and control. This monitoring helps protect the integrity of the system and the integrity of legitimate MBEs and WBEs.

Evaluating Certification Programs

The Link between Intensity and Accuracy

Certifying agencies that use a more intensive certification process—one that requires more information in the application form and routinely involves a site visit to the applicant's place of business—are more likely to be reliable and accurate in the certification of MBEs and WBEs. One administrator discovered that a recently certified firm had been denied certification under a more intensive program in another municipality. "Had I known what [the other program] knew," the administrator said, "I wouldn't have certified the firm either." Several of the program administrators in the study commented on the necessity of asking for more information in the application process to protect the agency from legal challenges to its review and decision-making process. Some programs—including New Hanover, Fayetteville, and Asheville—require lawyers within the governmental unit to review the recommendations of the certifying agency before a final decision is made.

Yet requiring such detailed information and rigorous review may discourage some businesses from participating in certification programs. As mentioned earlier, businesses generally are reluctant to report financial information, and the application process often requires a substantial amount of financial data. More than 60 percent of the forms used by the agencies studied (and 44 percent of the out-of-state agencies contacted) require financial disclosure.

Administrators in the study generally did not consider the financial disclosure problem insurmountable. They pointed out that most of the information required is readily accessible to businesses (licenses, copies of tax returns, articles of incorporation, and the like). They also maintained that businesses that choose not to participate are not likely

1. to be in the business of supplying the types of goods and services purchased by government,
2. to pass the eligibility determination, or
3. to have the proper business licenses or qualifications to be considered for providing a service to government.

Furthermore, administrators said, "good" businesses will make the extra effort required by an expanded application process, because they recognize the marketing benefits associated with certification. And, finally, the administrators noted that they regularly assist businesses that ask for help in completing the application form.

At a minimum, certifying agencies should evaluate whether the financial information they require is critical in determining ownership and control. If it is not, the requirement should be deleted, as it may discourage MBEs and WBEs from applying and weaken the effectiveness of certification as a means of identifying minority businesses.

Modest Program Resources

Most certification programs operate with a very small staff, often just one person, working on certification applications in addition to other duties. Program administrators estimated the average total time spent on an

individual application to be anywhere from two to eight hours, depending on whether the administrator was familiar with the business, whether the applicant was local or from outside the jurisdiction, whether the application was submitted in complete form, and whether a site visit was conducted. Estimates for average review time were extremely variable and should not be used as a basis for measuring efficiency across programs.

Limited Measurement Ability

Certification does not provide a fully accurate measure of minority participation in government contracting. Because certification programs are voluntary, minority businesses have the option of *not* seeking certification. Governments that rely solely on the number of certified firms as a way to measure minority business participation in contracting will understate the extent of participation as long as legitimate, noncertified businesses receive contracts. Program administrators in the study said they do not consider undercounting a serious problem currently, because it appears that most MBEs and WBEs do apply for certification.

Lack of Reciprocity

There is no requirement that certification granted by one certifying agency be recognized by another certifying agency, and in practice, such reciprocity usually does not occur. (See Table 2.)

Reciprocity certainly would be helpful to MBEs and WBEs, promoting easier and wider market exposure for certified businesses. Without it, MBEs and WBEs must seek certification in each jurisdiction that operates a program, making the cumulative certification effort time consuming.

The most commonly cited reason for the lack of reciprocity is a concern about the reliability of certification programs in other agencies. As mentioned, there are marked differences in the review process, most notably in the intensity of the review. Some administrators review information in detail and conduct site visits frequently, while others are satisfied with a relatively less extensive review of an applicant's credentials.

Yet a strong case can be made for extending reciprocity. The study showed that application forms used by certifying agencies are very similar in style and content, requiring essentially the same information, usually with identically worded questions.[9] This similarity suggests that reciprocity could be facilitated by the use of a standard application form across the state. Such standardization would encourage greater minority-business participation in more contracting markets by reducing the cumulative time required for businesses to apply for certification with different certifying agencies.

Table 2
Reciprocity among Certification Programs in North Carolina

Program	Status*
Asheville	No
Charlotte	No
Durham	No
Fayetteville	Selective
Greensboro	No
New Hanover County	Selective
Raleigh	Selective
Winston-Salem	No
N.C. DOA	No
N.C. DOT	No

* Status indicates whether a program accepts certification from other agencies or only from select programs.

This type of standard form currently is used in other jurisdictions. The states of New York and New Jersey together use a single, comprehensive form that includes relevant information for many certification agencies in both states. Applicants fill out the form once and circulate it to a diverse group of agencies—including the state of New York, the Port Authority of New York and New Jersey, and the New York City School Construction Authority—for their *individual* certification decisions. The state of Ohio also uses a standard form, entitled "One-Stop Application for Certification," which is accepted by all state government agencies, state universities, and most counties in the state.

Surprisingly, the two agencies of North Carolina state government that conduct certification—the Department of Administration and the Department of Transportation—do not accept each other's certification. The DOT is apparently constrained by federal certification guidelines[10] and has little flexibility to change its process. The DOA, whose certification program appears to be less intensive, should provide reciprocity for DOT's certifications. DOA has considered reciprocity but has yet to adopt the practice.

If certification agencies in North Carolina decide to implement a standard application form, businesses should not view the convenience of reduced paperwork as a substitute for a personal meeting with certification staff. Businesses that want to expand their operating radius should indeed consider such a meeting and should regard the certification staff as potential customers—

these individuals offer an excellent point of contact for minority businesses.

The Need for Public Education

All administrators in the study noted that, ultimately, contracting decisions still are based on the lowest responsible bid. Certification does not provide an MBE or WBE with any type of special preference in the contracting process. Unfortunately, many businesses mistakenly believe that certification somehow ensures that government contracts will be awarded to certified firms. Business owners generally do not understand that the primary purpose of certification is to *identify* minority- and women-owned businesses, not to provide them with preferential treatment. This common misunderstanding was reported by many administrators, both in-state and out-of-state.

The misunderstanding suggests that administrators have a duty to take extra steps to ensure that business owners clearly understand the purpose of the certification program. This is particularly important for two reasons. First, certified businesses that expect to receive government contracts simply as a result of being certified may be lulled away from making an aggressive effort to compete for government contracts. These businesses must understand that, even with the extra help that certification programs can provide, all businesses must compete for the contracts on an equal footing. And second, the misperception that certification programs amount to "set-asides" hurts efforts to expand participation of minority businesses into the mainstream of vendors and suppliers. Several of the administrators and other professionals contacted in the study indicated that the labels MBE, WBE, and DBE often create a negative perception that the business somehow is different from or inferior to other businesses. Such connotations can hamper the ability of certified businesses to receive equal consideration in contracting.

Several administrators also cited the division of minority businesses into multiple classifications—MBE, WBE, and DBE—as potentially counterproductive. The more classifications and purchasing goals for each classification, it was argued, the more distraction there is from the primary purpose of identifying and encouraging minority participation in government contracting. Several administrators were concerned that having too many subgroups, each with its own purchasing goals, puts purchasing departments and certification programs in the difficult position of defending goals that are different for different minority groups.

Conclusion

Certification programs perform a valuable function in encouraging minority participation in government contracting. Policies designed to assure equal opportunity for minority businesses are difficult to implement without a reliable means of identifying the target groups, and the frequent cases of false representation by applicants reinforce the need for greater scrutiny of businesses that assert minority status, scrutiny that is most manageable through a certification process.

More intensive certification processes produce the most accurate and reliable identification of eligible businesses. Governments without certification programs—or those that rely on self-reporting by businesses—will not likely be in a position to evaluate minority business participation in purchasing and contracting. In these instances, minority participation almost always will be overstated. And governments that do not administer certification programs but recognize certification from other governments' programs are limited by the reliability and accuracy of those programs.

Minority businesses would benefit substantially from the establishment of some degree of reciprocity among certification agencies. Reciprocity would make it easier for legitimate minority businesses to expand their service areas and take advantage of marketing assistance provided through certification programs without having to spend time filling out multiple, redundant forms.

At a minimum, certification agencies in North Carolina should move immediately to develop and implement a standard form. This action can be accomplished with little or no cost and without compromising any agency's right to approve or deny certification.

Certification administrators should continue to actively promote their programs and recruit applicants in order to improve certification as a measurement tool and to improve the business community's understanding of the purpose and function of certification. The business assistance and outreach activities of many certification programs appear to be vital to the success of certification both as a measurement tool and as a means of promoting minority-business participation.

Will the need for certification programs eventually disappear? Many administrators expressed a long-term view that it would. As disparities in contracting disappear and more minority businesses participate, it stands to reason that the need to certify firms will recede. Until that point is reached, however, and while governments continue to adopt policies to promote minority involvement, certification programs will provide the best means

for identifying and measuring the participation of legitimate minority-owned businesses. ❖

Notes

1. The North Carolina Institute of Minority Economic Development is a private, nonprofit corporation that conducts research and provides information on the economic status of North Carolina's minority population.

2. A copy of the complete study is available from the Institute of Minority Economic Development, P.O. Box 1307, Durham, NC 27702.

3. Personal meetings and telephone interviews were conducted during November and December 1993 and January 1994 with certification administrators, business owners, and other professionals knowledgeable about certification programs and processes.

4. The study focused on certification programs in the public sector but included examinations of the private certification program administered by the Carolinas Minority Suppliers Development Council and a program administered by the Triangle Transit Authority.

5. N.C. Gen. Stat. § 143-128. See "Local Government Minority- and Women-Owned Business Programs: Questions and Answers," in this issue, page 19.

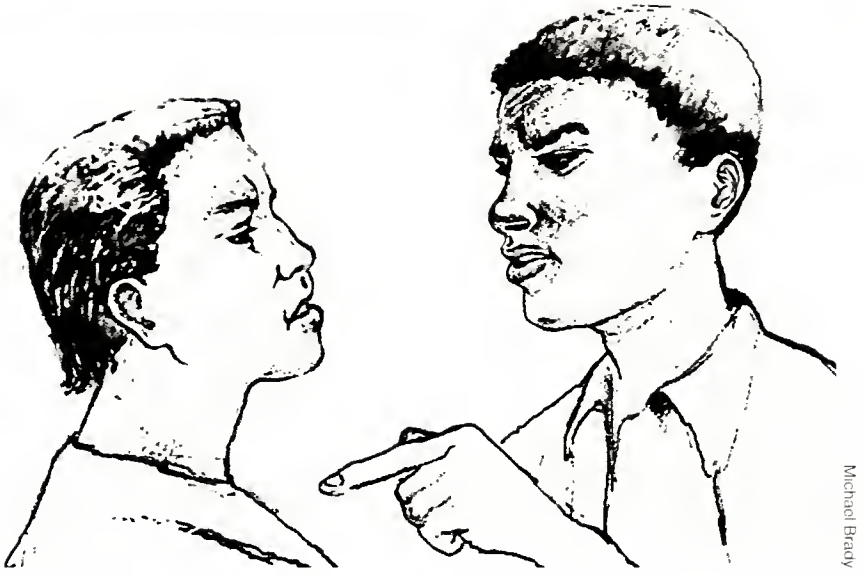
6. Congressional Research Services, *Federal Programs for Minority- and Women-Owned* Businesses (Washington, D.C.: CRS, Library of Congress, June 22, 1990), CRS-2 (hereinafter cited as *Federal Programs*).

7. *Federal Programs*, CRS-2.

8. Personal contact with staff from the Office of Minority Business Development of the Commonwealth of Pennsylvania, Nov. 24, 1993.

9. An exception is the application form used by Durham, which, though very similar to other forms, asks applicants to complete an additional component—a personal eligibility statement—not found in other forms. The forms used by programs in North Carolina are very similar to forms used by the out-of-state agencies studied.

10. Found in the Code of Federal Regulations, at 49 C.F.R. Part 23 (1993).



Michael Brady

A Calm Approach to Violence in the Schools

Scott Bradley and Frances Henderson

Two 13-year-old boys begin "talking trash" in the school hallway, and one insults the other. Students gather around, encouraging retaliation, and the boys become flushed with anger.

As the two boys face off chest to chest, a teacher separates them and suggests they meet with a trained mediator—who is a classmate. Grudgingly, the boys agree and set a time. In the mediation, they reach agreement that the situation had gotten out of hand, that neither of them had known how to stop it, and that onlookers had egged them on. Both boys apologize, and they agree to avoid such heated conversations in the hallway—they agree instead to talk over any future problems between them with the help of a mediator.

That story never made it to the local paper. Editors seem to prefer headlines like "5th Grader Brings Knife to School, Weapon Found in Backpack, Principal Suspends Student."[1] This article is about stories like the one described above, and hundreds of others, in schools across North Carolina. It is about conflict resolution training and peer mediation: students helping students avoid violence.

Scott Bradley is executive director of the Mediation Network of North Carolina and interim co-chair of the newly formed National Association for Community Mediation. Frances Henderson is the executive director of the Orange County Dispute Settlement Center. Karen Wallace Futreal, schools coordinator for the center, contributed significantly to this article.

The School Violence Problem

Public Perception

The public sees schools as increasingly violent places, and that perception is supported by increasingly frightening data. In a 1992 survey completed by the North Carolina Department of Public Instruction, 59 percent of school systems reported an increase in violent behavior during the preceding five years.[2] Last year the Governor's Task Force on School Violence reported a 100 percent increase in arrests of people under fifteen between 1987 and 1992,[3] and 18 percent of people arrested in North Carolina for index crimes in 1992 were under age eighteen.[4]

Throughout the spring of 1993, more than 1,300 North Carolinians attended six regional public hearings before the Governor's Task Force on School Violence, led by Attorney General Mike Easley, State Superintendent of Public Instruction Bobby Etheridge, and Crime Control and Public Safety Secretary Thurman Hampton. Parents, students, and other citizens expressed fear of increasing school violence and shared their ideas for responding to the situation.

Responses

In its report to the governor, the task force proposed a variety of violence-prevention approaches: [5]

- tougher penalties for bringing a weapon to campus or knowingly allowing a minor to bring one
- more services for violent students
- better coordination among schools, the juvenile justice system, and law enforcement
- alternative schools for violent students
- use of uniformed police officers assigned to a school campus
- new, prompt methods for punishment of disciplinary infractions, such as increased appropriations for in-school suspension programs
- a violence-prevention curriculum for faculty, staff, and students

This last suggestion goes to the heart of conflict resolution and peer mediation in the public schools.

In July 1993 the North Carolina General Assembly responded with the following new statutory provisions:

1. requiring school principals to report to law enforcement officials certain serious violent acts at school[6]
2. increasing the criminal penalties for possession of weapons at school[7]
3. making it a crime for a person who resides with a minor to leave a firearm in such a condition that it can be discharged and in a manner that permits the minor to get possession of it and take it to school[8]

And the General Assembly appropriated $5 million "to provide grants for local school administrative units for locally designed innovative programs to make schools safe."[9]

The Department of Public Instruction, implementing the provision for $5 million for safe-school programs, suggested to school systems a number of approaches to violence prevention, beginning the list with "conflict resolution techniques that emphasize the development of empathy, impulse control, problem solving skills, and skills in anger management."[10] Nearly a hundred school systems submitted requests for funding, and in December 1993 thirty-five school systems were awarded grants, most of them between $50,000 and $200,000. Of these at least twenty-five included peer mediation and conflict resolution among the approaches.

In that same month, however, when nearly $1 million in federal funds was awarded to thirteen school systems by the North Carolina Center for the Prevention of School Violence, an agency of the Governor's Crime Commission, only four of these grants included mediation or conflict resolution components. By contrast, all but two included uniformed police officers at school, an indication of the commission's strong preference for that particular approach to preventing school violence.

What Is Peer Mediation?

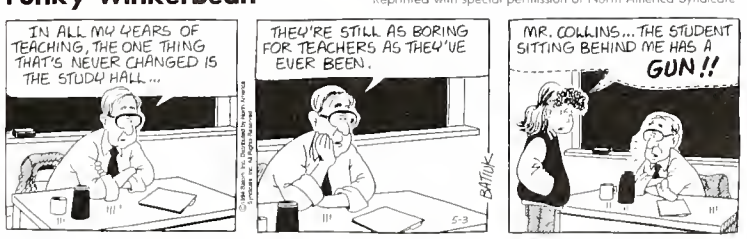
Mediation is a process of conflict resolution. An impartial third party—the mediator—intervenes in a conflict with the consent of the disputants, but the authority to make a decision remains with the parties themselves. In schools, that mediator is a student—that is, a peer—who has been well trained for the role. Peer mediation reduces the time that teachers and administrators have to spend on discipline, while teaching critical skills that benefit the mediators as well as the disputants.

North Carolina is in the forefront of the "alternative dispute resolution" movement in the United States, with twenty community mediation centers statewide, working with courts, schools, and other community agencies and coordinating their efforts through the Mediation Network of North Carolina. These centers first implemented peer mediation and conflict resolution programs in North Carolina schools in 1984. Since then, with the assistance of the centers and the leadership of principals, teachers, and guidance counselors, programs have developed in more than 100 North Carolina schools, without any central planning and with scant funding.

Implementing a Conflict Resolution Program

The Two-Prong Program

Fully developed conflict resolution programs in schools consist of two major components. First, all students and staff are taught basic procedures in both negotiation and mediation. Second, selected students serve as mediators of disputes that students are unable to resolve themselves. The most effective programs go beyond training a cadre of students to be peer mediators. After the initial training, all students get experience in negotiating resolutions to their own disputes as well as in mediating the conflicts of their classmates, serving as mediators on a rotating basis.



There are many different ways to develop a conflict resolution program, but all begin with the involvement and support of faculty, staff, and administrators. Each school selects an on-site coordinator to oversee the program, as well as an advisory committee that is representative of the student body, faculty, administration, parents, and community. At most schools, faculty and staff participate in a six-hour orientation workshop on conflict resolution and mediation so they can learn firsthand how mediation works. Teachers and administrators, serving as effective role models, reinforce the curriculum by using mediation and conflict resolution skills regularly.

A curriculum for all students. When fully implemented, the conflict resolution curriculum is taught to the entire student body periodically throughout the school year—the more often students are exposed to communication and problem-solving skills, the better they will learn them. The curriculum includes units on listening, dealing with anger and prejudice, interpersonal negotiation skills, and an introduction to the mediation process. Each school can determine how to fit these units into health, social studies, or other curricula at age-appropriate levels. Classroom activities are designed for exploration of the commonalities and differences among class members, for developing anger-reduction techniques, and for learning to express emotions in a positive way.

Special training for selected peer mediators. Typically, peer mediator training programs start by asking students to nominate individuals with leadership skills—classmates or themselves—to become mediators. If all students are prepared properly for the nomination process, the mediator pool will closely reflect the school's demographics. Teachers and school officials—perhaps the principal and on-site coordinator together—then select the mediators, relying largely on their appraisals of the students' leadership potential, both positive and negative. Students identified as "at risk" should be among those selected—they often profit the most from their training and practice in communication and problem-solving skills.[11] With their enhanced self-esteem, many of these students later assume positive roles in the school community.

The students who are selected as peer mediators undertake twelve to eighteen hours of intensive training to learn the mediation process step by step. After the training, they continue to meet regularly to improve their skills.

Putting the Mediators to Work

Each school sets its own guidelines for the types of conflict mediated. Typically, elementary school mediation cases involve bullying, refusing to share, and name calling; middle and high school mediations consist mainly of "he said/she said" rumors, dating or friend relationships, and name calling; and, in high school, issues of respect.

Peer mediation operates in various settings. At the elementary school level, "conflict managers" or "fuss busters" are on duty at certain times and places (for example, in the classroom, at lunch, or while students are waiting for the bus) in order to mediate disputes immediately as they arise. At the secondary level, mediations may be done by appointment. Students request referral from an administrator or faculty member; the on-site coordinator, often a guidance counselor, screens the request and then assigns two student mediators.

Mediation can work well in conjunction with existing school disciplinary procedures. For example, if two students get into a fight and break school rules, the principal may decide to offer them the option of receiving disciplinary consequences or resolving their differences in mediation. Or, recognizing that merely suspending a student fails to resolve the underlying causes of conflict, the principal may, where appropriate, permit a student to shorten his or her suspension by agreeing to participate in mediation upon returning from suspension.

Student mediators, like adult mediators in other settings, are obligated to maintain the confidentiality of the mediation sessions, with a few exceptions: Mediators must pass on to the appropriate adult any information they may receive about child and sexual abuse, threats of suicide, or illegal activities. Also, mediators *may, with the permission of that peer,* pass on other information about a peer's well-being to the appropriate adult. The mediators are required to explain these conditions to the disputants in advance.

How the Mediators Do Their Jobs

The mediator helps the disputants to

- make the issues and everyone's interests and concerns clear,
- reduce obstacles to communication,
- gather information and explore possible solutions, and
- reach an agreement.

Mediation might be put to students this way: "You'll have a chance to talk face to face, uninterrupted, so everyone is heard. With the help of a mediator, you'll define the problem and look for a solution. When you reach an agreement, if you do, you'll write it down and sign it."

A key principle of mediation is that it is a *voluntary* process. The parties are free to choose to participate as well as free to design the settlement. Mediation leads to agreements that parties are likely to honor, because they created them.

Getting to the root of the problem. Mediation seeks to uncover and resolve the underlying causes of a conflict, often with an eye toward improving relationships for future interaction. Two ninth-grade girls in Transylvania County resolved a dispute that had started between them in the sixth grade. During those three years they—and their supporters—had had numerous altercations and tense situations in classrooms and hallways. In mediation, where they were able to communicate directly in a confidential environment, the girls discovered that neither of them had any interest in continuing the feud, which had festered from gossip, nurtured by their peers.

This is a fairly common type of school dispute that often begins when a new person comes into the circle of friends, and one of the longtime members feels alienated or jealous. Gossip and rumors circulate, the kids take sides, and cliques form. The same process often unfolds over dating, as when a boy starts dating his (recent) girlfriend's best friend. Occasionally, these conflicts spill over into the community, involving parents; the kids mediate their differences, then the parents reconcile theirs—or also mediate (if there is a local mediation center).

The two Transylvania County girls were able to take responsibility for their conflict and their future behavior toward each other. Repeated mandates imposed by a teacher or principal to "stay away from each other" generally rang hollow, while *their* mutual agreement to talk to each other and verify rumors that jointly related to them rang true—and worked.

Benefits of Mediation

Peer mediation is more effective than suspension or detention in teaching responsible behavior, and it improves the school atmosphere for teachers and students alike by reducing violence, vandalism, truancy, and absenteeism. By supplying a structure for students to use in making decisions about conflicts, the mediation process teaches skills that are critical to all learning—and essential in a democracy. Because the final settlement must be acceptable to all disputants, young people take responsibility for their conflicts, practice communication and problem-solving skills, and develop concepts of fairness.

The experience of productive decision making contributes to the development of students as self-governing

RESOURCES

Mediation Network of North Carolina
P.O. Box 241
Chapel Hill, NC 27514-0241
(919) 929-6333

Many of the twenty nonprofit community-based mediation centers affiliated with Mediation Network help schools to develop conflict resolution curricula and peer mediation programs. In June and July 1994, the Network is holding three week-long "Train the Trainer" Summer Educator Institutes to help schools to develop programs. (Institutes will also be held in summer 1995.) In addition, the Network's Fifth Southeastern Mediation Conference, "The Art of Conflict Resolution," October 14–15, 1994, in Black Mountain, N.C., will offer a variety of relevant seminars and workshops. The Network is developing curriculum and program management material to be available in June 1994.

National Association for Mediation in Education (NAME)
205 Hamshire House, Box 33635, UMass.
Amherst, MA 01003-3635
(413) 545-2462

NAME is a national clearinghouse offering an excellent list of books, manuals, videos, and packets of articles from a variety of sources. It also publishes a bimonthly newsletter, *The Fourth R*, and offers regional training and an annual conference.

Material developed by The Community Board Program (San Francisco) and Peace Works (Miami)—available also through NAME—has been used very effectively. Most educators teaching conflict resolution curricula and managing peer mediation programs draw from a variety of sources, which they adapt for their site-specific needs.

Note: There is an increasing number of for-profit organizations and consultants selling curricula, training, and "expertise." Consumers are encouraged to investigate before purchasing—developing an effective response to school violence is a long-term commitment.

and self-regulating members of a school system, a family and of society. One authority noted,

> By sharing decision-making power, the responsibility for enforcement shifts from the parents, teachers, and administrators to the entire family or school body, including the students themselves. Participation in decision making directly nurtures self-respect, emotional stability, self-confidence, social responsibility, nonaggressive leadership, meaningful involvement with life, and the unfolding of potential. As society becomes more aware and concerned about interpersonal violence, child abuse, child sexual abuse, drugs, alcohol, teenage sexual behavior, pregnancy, and sexually communicable diseases, it becomes increasingly apparent that children must learn to regulate their own behavior and make decisions regarding their own lives.[12]

Evidence that Peer Mediation Works

While anecdotal reports about the effect of school mediation programs have been consistently enthusiastic, until recently few programs had been evaluated systematically. With the benefit of systematic studies, some programs have been able to cite impressive statistics to buttress the anecdotes. Project SMART (School Mediators' Alternative Resolution Team), which works in seven of New York's toughest schools, reported decreases of 46 to 70 percent in suspension rates for fighting since its inception in 1983. A school on Maui, part of the Hawaii School Mediation Alliance, reported that the number of school fights had dropped from eighty-three to nineteen during the first two years of the program.[13]

The Ohio experience. The Ohio Commission on Dispute Resolution and Conflict Management is measuring the impact of conflict management programs on disciplinary actions and student attitudes in twenty schools from fall 1990 to spring 1993. Their report for the second year indicates that conflict management programs can change student attitudes.[14] Analysis of more than 10,000 student surveys has yielded preliminary findings:

- Students in K through 3 indicated higher acceptance of kids seen as "different," better confidence in their communication skills, and an improved likelihood of acting independently of peers, compared to other students in the same school who had not participated in the conflict management program.
- Students in grades 4 through 6 indicated greater willingness to stop a fight, improved knowledge of nonviolent options to resolve a conflict, and increased confidence in their communication skills.
- Middle school students indicated increased willingness to talk rather than fight about a problem and greater willingness to stop a fight.
- High school students' responses suggested increased awareness of mediation, greater willingness to stop a fight, and improved knowledge of nonviolent options to resolve conflict.

Disciplinary data from the first two years of the project showed marked improvement at the four middle and five high schools in the study. Three schools had significant reductions in detention and in-school suspensions. Two schools had modest reductions in out-of-school suspensions. One high school reported fewer expulsions and dropouts. The Ohio commission reportedly is optimistic about the preliminary results, and it expects greater results as the programs' full impact on student attitudes and school climate is achieved over the next three to five years.

The Minnesota experience. University of Minnesota researchers studied the children participating in a peer mediation training program in three elementary school classrooms at a nearby elementary school on the effects of a peer mediation training program.[15] They found that before the training program began, the children experienced frequent conflicts involving (1) insults and teasing, (2) playground conflicts, (3) access or possession conflicts, (4) physical aggression and fights, (5) academic work conflicts, and (6) turn taking. "Students seemed conditioned to look to the teacher for a solution to their conflicts because they did not have the procedures and interpersonal skills necessary to manage conflicts constructively," the researchers found. The strategies they used tended to escalate the conflict rather than resolve it.

After the training, the researchers report, conflicts among students were less severe and destructive. Teachers reported that the conflicts referred to them to resolve were reduced by 80 percent. The number of conflicts referred to the principal was reduced to zero. Students showed spontaneous use of negotiation and mediation skills in settings outside the classroom, including at home with their siblings and friends.

In one aspect of the study, students were given two conflict situations and were asked how they would resolve them. A control group of students that had not been trained were twice as likely as trained students to go to the teacher for help. Untrained students were more likely to use repetitive verbal requests or force, strategies likely to escalate conflict and increase the chance that the teacher would have to intervene. Trained students, by contrast, were much more likely to discuss the conflict and negotiate solutions; no untrained students would even attempt to negotiate.

Arguments Against Adopting a Program

Schools offer several reasons for not adopting conflict resolution curricula and peer mediation programs.

Some officials are concerned that conflict management is a passing fad and that the responsibility for handling conflicts rests with teachers, principals, and parents, not students. But experience shows that by learning practical knowledge and skills for communicating, listening, and problem solving, students can take responsibility for their problems, allowing teachers to get on with their task of teaching.

Some fear that such programs will mean more responsibilities for already overburdened teachers and hesitate to add subject matter to an already crowded curriculum. Yet many teachers have incorporated mediation easily into their classroom management and the curriculum into their lesson plans, fostering an environment more conducive to learning. Additionally, schools are recognizing that providing students with the skills to resolve conflicts in nonviolent ways is a top priority.

Still other schools fear that they will lose control of the disciplinary process, or that it will be difficult for school officials to exercise their authority to quell conflicts if they operate indirectly through student mediators. This problem is not a great one for two very basic reasons. First, peer mediation works—the evidence increasingly shows that it reduces the need for school-administered discipline. And second, throughout the process, school officials of course retain the full authority to intervene to handle serious disciplinary problems.

And some fear the costs of a conflict resolution and peer mediation program. Start-up expenses can vary from $3,000 to $5,000 per school, or more. When compared to the expense of installing and maintaining a metal detector ($2,000), keeping one student in an in-school suspension program ($3,000 per year), or maintaining one inmate in a boot camp or juvenile detention center ($35,000 to $42,000 per year), the costs represent a bargain.

A Vision for North Carolina

Two basic approaches to the problem. Beginning now, North Carolina can *legislate* to deal with the consequences of behavior, and we can *educate* to work changes in behavior. Recent laws that make parents and children accountable for bringing weapons onto school property or provide for stiffer penalties for juvenile crimes deal with immediate consequences of behavior. But school mediation and conflict resolution programs take the longer, calmer, educational approach. By teaching young people conflict management skills, we point them toward responsibility for their behavior and appreciation of the positive nature of conflict, perhaps for the rest of their lives.

Studies have shown that children who demonstrate early aggressiveness during their school years have a reasonable chance of displaying severe antisocial aggressiveness as adults. A twenty-two-year study published in 1984 found that

> the child who is at the top of the (aggressiveness) distribution for 8-year-olds is likely to be near the top of the distribution for 30-year-olds two decades later. It is apparent that many individuals are characterized by a propensity to respond in an aggressive manner to a variety of interpersonal situations. This propensity or disposition becomes apparent early on in their development and continues to characterize their behavior as they grow into adulthood.[16]

Teaching (and modeling) skills that foster nonviolent behavior in a child's early years is a critical preventative. The opportunity now exists to incorporate the teaching and promotion of the use of nonviolent conflict resolution in a variety of settings, including Smart Start, Head Start, day care, before-school and after-school care, teen parenting programs, and home visitation programs.

It seems certain that school-based curricula and programs will continue to expand rapidly; some will be funded through the $5 million pool the 1993 General Assembly created for school violence programs, others will operate with local funding. Legislation proposed in 1993 would have required that all schools (K through 12) teach a minimum ten-hour conflict resolution curriculum, coupled with the voluntary implementation of peer mediation programs. Requiring such a curriculum did not make its way into law, but the momentum is likely to carry forward into future legislative sessions. Perhaps the next legislature will move to require and expand the curriculum in all grades.

The 1993 General Assembly did pass an act providing that "[b]eginning with the 1994–95 school year, a school is encouraged to review its need for a comprehensive conflict resolution program."[17]

The seven-week "special session on crime" in February and March 1994 called by Governor Hunt focused on punishing rather than preventing crime. Tens of millions of dollars were appropriated to build and lease prison spaces—costs that will continue year after year. Some funding, however, was allocated for after school, alternative school, and locally designed intervention and prevention programs.[18]

The success of conflict management and mediation programs at the Stonewall Jackson School in Concord—a youthful offenders "training school"—has encouraged the state's Division of Youth Services to expand programs to other schools for juvenile offenders. Similar strategies are used in other states among jail and prison populations.

In our state the potential for educating for behavioral change is limited only by our creativity and our commitment. Community mediation programs and other citizen groups will continue to join with parents, educators, and students who recognize the importance of empowering young people with the skills they need to resolve their conflicts without violence. North Carolina can become nationally recognized as a role model for these efforts. ❖

Notes

1. *Chapel Hill Herald*, November 12, 1993, 1.
2. *Executive Summary*, Governor's Task Force on School Violence (hereinafter *Executive Summary*), April 1993, 7.
3. *Executive Summary*, 5.
4. Index crimes include murder and non-negligent manslaughter, rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft. North Carolina Department of Justice, *Crime in North Carolina: 1992 Uniform Crime Report* (Raleigh, N.C.: N.C. Department of Justice, 1993), 146.
5. *Executive Summary*, 11–19.
6. New G.S. 115C-288.
7. G.S. 14-269 and -269.2.
8. G.S. 14-315.1.
9. 1993 Sess. Laws ch. 321, § 139.
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11. Michael Van Slyck and Marilyn Stern, "Conflict Resolution in Educational Settings: Assessing the Impact of Peer Mediation Programs," in *Community Mediation: A Handbook for Practitioners and Researchers* (New York: Guilford Press, 1991).
12. Jennifer P. Maxwell, "Mediation in the Schools: Self-Regulation, Self-Esteem, and Self-Discipline," *Mediation Quarterly* 7 (Winter 1989): 152.
13. "Talking It Out: Students Mediate Disputes," *Harvard Education Newsletter* 5 (Jan./Feb. 1989): 4.
14. Ohio Commission on Dispute Resolution and Conflict Management, "Dealing with Conflict in Ohio's Schools: Teaching Students New Skills to Resolve Conflicts Without Violence," *Report of the Second Year of the School Conflict Management Demonstration Project 1990–3* (Columbus: Ohio Commission, 1993).
15. David W. Johnson, Roger T. Johnson, and Bruce Dudley, "Effects of Peer Mediation Training on Elementary School Students," *Mediation Quarterly* 10 (Fall 1992): 89–99.
16. L. Rowell Husemann et al., "Stability of Aggression over Time and Generations," *Developmental Psychology* 20, no. 6 (1984): 1131.
17. 1993 Sess. Laws ch. 509, § 3.
18. Joseph Neff, "Lawmakers Find No Magic Bullet in Fight against Crime," *News & Observer* (Raleigh), March 27, 1994, 1A.

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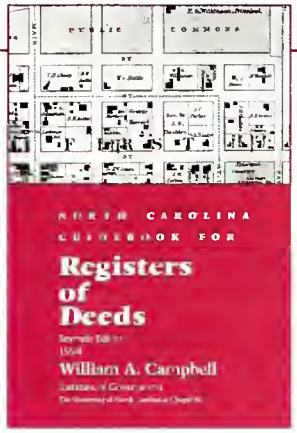
Off the Press



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