POPULAR GOVERNMENT

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Teen Curfews to Combat Crime

- Public Health System
- Mediated Settlement
- Interplay of Laws on Worker Injuries
- Using the Internet

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POPULAR GOVERNMENT

Fall 1995 Volume 61, Number 2

INSTITUTE of GOVERNMENT The University of North Carolina at Chapel Hill

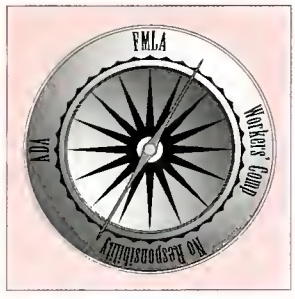
Feature Articles

Bob Donnan

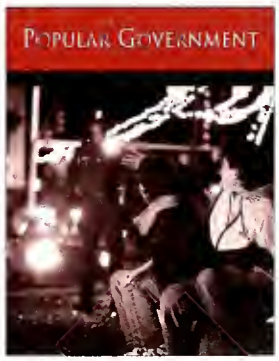
Page 2

Home Health Agency of Chapel Hill

Page 14



Page 20



On the cover Many municipalities have adopted curfews for minors as a way to stem crime. Our article examines the legal and constitutional issues involved in the use of such ordinances. Photo by Bob Donnan.

Curfews for Minors and Other Special Responses to Crime

Thomas H. Thornburg

Nighttime crime in your community is up. Shopping centers and the downtown area draw large numbers of young people during the evening. The local news features street assaults, robberies, fighting, gunfire, vandalism, and drunk and disorderly conduct. The police report that both adults and minors are contributing to the growing problems. Whether you are a law enforcement officer, a town manager, a member of a town council, a county commissioner—or an ordinary citizen—this problem affects you.

You may wonder if ordinary law enforcement and existing laws are adequate to deal with the problem. And you may ask: Can't we pass a special ordinance to help us get a handle on crime?

Depending on the precise nature of your community's concern, you might consider any of the following crime-response ordinances: (1) curfews for *everyone* in the community, (2) curfews for *adults* only, (3) curfews for *minors* only, (4) "no cruising" ordinances, and (5) laws prohibiting loitering in specific situations.

This article will discuss legal and practical issues surrounding each of these special responses to crime, covering local government authority to create such ordinances, the constitutional issues at stake, possible specific ordinance provisions, and enforcement considerations.

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He would like to thank Lori Bernstein and Ingrid Johansen for their contributions to this article. Bernstein received her J.D. from UNC–CH Law School. Johansen received her J.D. from the University of Michigan Law School.

Local Authority to Create Crime-Response Ordinances

The first question a local government must address in considering one of these ordinances is whether it has the authority to create such a law.

The authority of North Carolina local governments is limited in two principal ways. First, they have only the authority that the North Carolina General Assembly delegates to them. Without such a delegation, authority to act in a particular area lies in the state government. And second, the General Assembly has put some areas of law exclusively into the hands of state government, explicitly providing that local governments may not act in these areas; this occupation of particular areas of regulation is generally referred to as *preemption*. For example, a local government may not make illegal by local ordinance an activity already prohibited by state law. Burglary is prohibited by statute, so a local government may not also punish that conduct.

The North Carolina General Assembly has delegated to local governments some general police powers that may provide the authority necessary for adoption of special responses to crime. North Carolina General Statute (G.S.) 160A-174 empowers *cities* to prohibit and regulate "acts, omissions, or conditions, detrimental to the . . . safety, or welfare of its citizens and the peace and dignity of the city." G.S. 153A-121 provides almost identical authority for *counties* to enact such ordinances in their jurisdictions. This language appears broad enough to permit a wide assortment of local government ordinances, including curfews and laws regulating cruising or loitering, as long as they are otherwise legally valid.

G.S. 14-288.12 and G.S. 14-288.13 empower municipalities and counties, respectively, to enact ordinances to protect their communities in "times of riot or other grave civil disturbance or emergency." G.S. 14-288.12(c) explicitly states that the statute's provisions "supplement" general ordinance-making powers.

With these statutes as a backdrop, a local govern-

ment must decide whether it has the authority to create special responses such as a curfew for minors. North Carolina has no case law or statute that definitively says whether local governments have the authority. There are two viable opposing points of view. One says that the general legislative grants of authority to local governments to protect safety, welfare, and peace are broad enough to empower governments to enact curfews or other ordinances that achieve those goals. A 1994 North Carolina Supreme Court decision casts favor on this point of view. In *Homebuilders Association of Charlotte v. City of Charlotte*,[1] the court said that legislative grants of power to municipalities should be construed broadly to include "any additional or supplementary powers reasonably necessary or expedient" to carry a particular legislative mandate into execution.[2] The opposing point of view maintains that without specific legislative authorization to enact these kinds of ordinances, local governments may not create them. Supporters of this point of view might argue that general legislative grants of authority to safeguard safety, welfare, and peace, coupled with specific grants of authority to deal with emergencies allow local governments to enact curfews and other restrictive ordinances only during emergencies. In this interpretation, the General Assembly provided emergency power statutes because it viewed local government authority as limited under G.S. 160A-174 and G.S. 153A-121.

It is not clear which of these views would prevail in the courts if a special-response ordinance were to be challenged on the grounds that the local government created the ordinance without legislative authority. The arguments favoring authorization of such local government actions seem strong, but a government should still weigh for itself the risks and potential costs of judicial challenge to its authority before proceeding with a curfew for minors or other special response to crime. (See "Judicial Rulings Concerning Curfews for Minors," page 6.)

Note that the General Assembly, if it chose, could pass a law specifically authorizing local governments to create ordinances such as a curfew for minors. New Jersey adopted such a law in 1992.[3]

General Constitutional Considerations

These special crime-response ordinances inevitably affect constitutional rights and are subject to the scrutiny of state and federal courts to assure that such rights are not overburdened or violated.

One set of rights affected by these ordinances involves travel. The U.S. Supreme Court has recognized a right to travel between states—interstate travel—that is protected by the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.[4] The North Carolina Supreme Court has recognized a right to travel within the state—intrastate travel—on the public streets of a city, as a part of every individual's liberty. It is protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and by Article 1, Section 19, of the Constitution of North Carolina (the Law of the Land Clause). The freedom to travel may be subject to reasonable time and manner restrictions.[5]

A second set of constitutional rights affected involves freedom of speech, assembly, and association. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . ." Many courts have derived a freedom of association from the explicit rights of speech and assembly. These rights are not limitless, of course. They may be subject to reasonable time, place, and manner restrictions. And they are subject to limitations imposed by the courts. The U.S. Supreme Court appears to have limited the scope of the right of free association, for example, in a case from Texas.[6] There a majority of the Court said that purely social gatherings do not involve the assertion of any protected First Amendment associational rights. The primary ruling was that a city ordinance limiting the use of certain areas in dance halls to persons between fourteen and eighteen was constitutional.

Third is the constitutional right of "family autonomy," a right found by many courts in the Due Process Clause of the Fourteenth Amendment, protecting parental decisions concerning how to supervise and raise their families.[7] This right is not as firmly recognized by courts as are the two discussed above.

Other constitutional concerns stemming primarily from the Due Process Clause of the Fourteenth Amendment are also at stake in the creation of a crime-response ordinance. An ordinance must be clear enough, for example, for reasonable individuals of ordinary intelligence to understand which activities are illegal. Clarity limits the possibility of an ordinance being arbitrarily or discriminatorily enforced.[8] And an ordinance must be drawn narrowly enough to avoid placing too much burden on law-abiding behavior. A stated purpose in an ordinance that specifies the problems and activities it addresses may be crucial to whether the ordinance survives judicial scrutiny in the face of a challenge that it was unduly burdensome to law-abiding behavior.

After confronting the issues of local authority and constitutional rights, a local governmental unit must weigh the relative merits of each crime-response option.

Curfews for Everyone in the Community

Communities throughout the country have tried different approaches to curfews with varying success in the courts. While it seems clear that under North Carolina law a curfew on everyone in the community could be imposed in a time of actual emergency, it is by no means clear that such a curfew could be imposed at other times.

In Times of Emergency

As already mentioned, North Carolina statutes permit local governments to impose prohibitions and restrictions "in times of riot or other grave civil disturbance or emergency."[9] The statutes permit governments to restrict the movement of people in public places during an emergency. Governments may impose a curfew during such a state of civil disorder.

In 1971 the North Carolina Supreme Court upheld the city of Asheville's use of these statutes in proclaiming a state of emergency and imposing a curfew and other restrictive measures for three days after a violent confrontation between high school students and police.[10] In a federal case arising out of the Asheville situation, the United States Fourth Circuit Court of Appeals ruled that North Carolina's statutory scheme authorizing local governments to declare states of emergency and impose restrictions is not unconstitutionally vague or overbroad.[11] The court ruled that there must be a factual basis for a government's decision to proclaim that an emergency exists and the government must act in good faith.

In Times Other Than Emergency

Justice Thurgood Marshall once said that "absent a genuine emergency a curfew aimed at all citizens could not survive constitutional scrutiny."[12] It is a nearly universal view among commentators that Justice Marshall's statement is correct, that a general curfew against all citizens is unconstitutional.

Curfew for Adults Only

Since the mid-1970s most legal commentators have accepted Justice Marshall's view that a curfew may not be invoked against "all citizens," except in a state of emergency. Commentators expand that view to say that a curfew aimed exclusively at adults also is not constitutional.

Curfew for Minors Only

At the turn of the century, about 3,000 U.S. municipalities had implemented curfews for minors. Throughout the twentieth century, communities have continued to employ them to promote community order. In 1957 more than 50 percent of cities with populations greater than 100,000 had such laws.[13] Today 146 of the United State's 200 major cities have teen curfews.[14] Among these cities are Atlanta, Buffalo, Dallas, Detroit, Milwaukee, Phoenix, Roanoke, Sacramento, San Antonio, and Washington, D.C. Countless other communities across the country have considered such curfews in the 1990s. Despite this popularity, significant and difficult legal issues may arise with passage of a curfew. Consequently, some curfews have been—or currently are being—legally challenged.

Atlanta's curfew has generated community criticism and occasional lawsuits yet remains in effect. Dallas's was upheld by a federal court of appeals in November 1993. Washington, D.C.'s passage of a curfew effective in June 1995 came after a previous curfew in that city was invalidated by a federal district court in 1989. Florida's local government curfews for minors have faced considerable legal challenges. In November 1995 Dade County's ordinance was upheld by a state appellate court, after first being struck down by a state trial court as violating the Florida constitution.[15] Earlier in the year, a request for a preliminary injunction barring Orlando from enforcing its curfew for minors was denied.[16]

North Carolina has seen similar attention to curfews among its local governments. In February 1995 Charlotte became one of the most recent North Carolina local governments to pass a curfew for minors.

Authority to Adopt a Curfew for Minors

There are some specific ordinance-making authority issues that any government considering a curfew for minors must contemplate.

In 1960 the North Carolina attorney general wrote an opinion that ". . . a municipality in this State does not have authority under the general law to adopt curfew ordinances regulating the hours when young people must be off the street."[17] The opinion provides no rationale for its position, so it does not provide much guidance, especially in light of changes in constitutional law made by the U.S. Supreme Court since 1960 and in light of today's climate of heightened public concern about crime. This opinion was issued before the statutes authorizing local governments to create laws to maintain public peace and safety were passed by the General Assembly, and it makes no reference to statutes providing local governments with police authority that were in place in 1960. Ultimately, a local government that is contemplating creating a curfew for minors will have to decide whether it considers this opinion to still accurately state the applicable law. It is not clear that it does.

Whether local governments have authority to promulgate curfews for minors has not been tested in North Carolina's appellate courts, so it is impossible to predict precisely how the state supreme court or the court of appeals would respond to such a curfew if it was asked to review it for validity.

Judicial Rulings Concerning Curfews for Minors

State and federal courts have been all over the board on the issue of curfews for minors. There is no clear majority position on their constitutional validity.

Courts That Have Approved Curfews

When courts have approved curfews for minors, they have relied on two major justifications. Sometimes they have found that the ordinance was narrowly drawn, providing for specific exceptions that inform parties about what conduct is impermissible; and sometimes they have held that limitation on minors' right to be on the street does not infringe on basic constitutional rights. These same courts might invalidate curfews they view as overly restrictive. Consider the following:

Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993).

The Dallas, Texas, curfew for minors was upheld as narrowly tailored to further compelling government interest of reducing crime and victimization by minors. The court held that the resulting regulation of the right of travel was for permissible purposes—the ordinance included exemptions for minors accompanied by adults; returning home from work and school, civic, or religious functions; running parental errands; and exercising First Amendment rights—and that parents' right to raise children was only minimally burdened. Note, this same court disapproved of a curfew in *Johnson v. City of Opelousas*, discussed in the next section.

Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *cert. denied,* 429 U.S. 964, 97 S. Ct. 394, 50 L. Ed. 2d 333 (1976).

A curfew for minors with numerous exceptions was held valid. It allowed minors to exercise free speech and association rights and to travel with minimal regulation, and, the court ruled, parents' rights to raise children were only modestly burdened.

Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989).

A curfew for minors with exceptions for travel to and from work, church, community, or a school function was upheld. The court ruled that the municipality's interest in protecting minors against nighttime hazards of the city justified restriction of minors' right to travel. Note that this same court invalidated a curfew for minors in *City of Maquoketa v. Russell and Campbell,* discussed in the next section.

People in the Interest of J.M., 768 P.2d 219 (Colo. 1989).

A curfew prohibiting people under eighteen from loitering between certain hours on any street, sidewalk, gutter, curb, parking lot, alley, vacant lot, park, playground, etc., without the owner's permission was upheld. The court noted that the ordinance contained exceptions for travel to and from employment, religious activities, or school events; and the court ruled that it was reasonable for the city to reinforce parental authority in regulating minors, who are more susceptible to peer pressure and immature judgment than are adults.

City of Milwaukee v. K.F., 426 N.W.2d 329 (Wi. 1989).

A curfew prohibiting any person under seventeen from loitering between certain hours unless accompanied by a parent, guardian, or other adult responsible for the minor's care, control, or custody was upheld. The ordinance was a reasonable attempt to control juvenile behavior, the court ruled, with no undue restraint on minors' First Amendment rights or interference with constitutional rights of "family autonomy."

City of Eastlake v. Ruggiero, 220 N.E.2d 126 (Ohio 1966).

An ordinance making it unlawful for persons under sixteen to be on the streets or sidewalks during certain hours unless accompanied by a parent, guardian, or "some responsible" adult, or unless the minor has a "legitimate excuse," was upheld. The court described the curfew as necessary to control juvenile crime and as valid because it was not an absolute restriction on minors' right to be in public.

Courts That Have Invalidated Curfews

When courts have invalidated curfews for minors, they have relied on a variety of grounds. Historically, more courts disapproved curfews than approved them, but some courts that have disapproved curfews may well find other curfews permissible if they are narrowly drawn and take careful steps to safeguard constitutional rights. Consider the following cases.

Constitutional Issues in Curfews for Minors

Even though there is no North Carolina case law about curfews for minors, cases from other states and federal courts provide some guidance on the relevant constitutional concerns. This case law may also give a sense of what issues would be important to North Carolina's trial and appellate courts. (See "Judicial Rulings Concerning Curfews for Minors," above.)

The general constitutional considerations described earlier in this article apply in this context. How a court views the constitutional rights of minors will have a significant impact on whether the court finds curfews for this group constitutional. Some courts rule that minors have the same constitutional rights as adults and that those rights may not be infringed. Such courts rule unconstitutional virtually any curfew for minors.[15]

Other courts rule that minors have constitutional

Waters v. Barry, 711 F. Supp. 1125 (D.C. Dist. Col. 1989).

The court held that a curfew for minors unconstitutionally infringed minors' rights of free speech, assembly, association, and travel, by invalidly requiring that activities be registered and that work permits be issued and by invalidly prohibiting minors from being out with adults. The worthwhile objectives of protecting minors from exposure to drugs and violence and protecting the community from criminal activities did not justify the restrictions.

McCollester v. City of Keene, 514 F. Supp. 1046 (D.N.H. 1981), *reversed on other grounds,* 668 F.2d 617 (1st Cir. 1982).

A curfew prohibiting minors from being on a public street or in any public place between certain hours was struck down, with the court noting that the only exception was for a minor accompanied by a parent or guardian, that the ordinance unduly restricted minors' right to travel, and that the ordinance was invalid also because it penalized parental action that would normally be reasonable—that is, it hindered rather than promoted the parenting role. The court held that the exceptions were insufficient, and prevailing public need was insufficient, to justify a curfew.

Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981).

A curfew prohibiting any person under seventeen from being on the streets without supervision during certain hours was struck down because it did not allow minors to participate in employment, religious activities, or educational events. It hindered rather than promoted parenting.

Naprstek v. City of Norwich, 545 F.2d 815 (2d Cir. 1976).

A curfew for minors was invalidated because it did not state an ending time for the curfew—in other words, a reasonable person could not know when his or her actions were illegal.

City of Maquoketa v. Russell and Campbell, 484 N.W.2d 179 (Iowa 1992).

A curfew prohibiting minors from being in public during certain hours, with exceptions, was held to be unconstitutionally overbroad because it did not provide exceptions for emancipated minors or for First Amendment activities by minors. Additionally, the exception for minors who were involved in "parentally approved supervised activity" was so vague as to allow too much opportunity for selective enforcement of the curfew.

K.L.J. v. State of Florida, 581 So. 2d 920 (Fla. App. 1991).

A curfew for minors under sixteen during certain hours was struck down because it did not provide exceptions for otherwise constitutionally protected behavior. An exception for conducting "legitimate business" was too vague to be understood, the court held.

Brown v. Ashton, 611 A.2d 559 (Md. Ct. of Spec. App. 1992).

A curfew prohibiting minors from remaining in any public place between certain hours was held to be an invalid burden on fundamental rights. The court concluded that the ordinance was not justified by the *Belotti* factors (see below for a discussion of these factors). The ordinance included numerous exceptions for travel by minors, including one for children "attending a cultural, scholastic, athletic or recreational activity supervised by a bona fide organization." The court ruled that the term "bona fide organization" was unconstitutionally vague.

Allen v. City of Bordentown, 524 A.2d 478 (N.J. Super. Ct. 1987).

A curfew prohibiting any person under nineteen from being in public during restricted hours and charging parents with responsibility for the minor's behavior was struck down on two grounds. First, the ordinance failed to adequately define exceptions for "emergency business" and "on legitimate business." And second, it improperly interfered with parental authority by restricting parents' right to guide their children in understanding and using rights of free speech, assembly, religion, and travel.

Wadsworth v. Owens, 536 N.E.2d 67 (Ohio 1987).

An ordinance prohibiting any person under the age of eighteen from being on the streets during certain hours unless accompanied by a person over eighteen was struck down as being overbroad in prohibiting legitimate activities such as returning from employment, attending religious services, or attending social activities, which are a part of "the growing-up process."

rights just as adults do but say that minors' rights may be regulated to a greater extent than the rights of adults.[19] Many of these courts rely on the U.S. Supreme Court's ruling in *Belotti v. Baird*[20] for treating the groups differently. In *Belotti*, in the context of an abortion rights issue, the Court said the government may more strictly regulate minors' rights because of "the peculiar vulnerability of children," minors' "inability to make critical decisions in an informed, mature manner," and "the importance of the parental role in child rearing."

A court adopting this view of minors' constitutional rights of movement, speech, and association is likely to evaluate a curfew for minors less rigorously than it would a curfew for adults. However, before applying the *Belotti* standard, a court is likely to require that there be evidence of the need for the curfew based on the three *Belotti* reasons for regulating minors. No

North Carolina appellate opinion clearly states our appellate courts' position concerning the constitutional rights of minors, so it is not possible to say whether they would adopt the *Belotti* position, or whether they would be inclined to view the constitutional rights of minors and adults as being the same.

Possible Provisions in Curfew for Minors

A local government may decide that it has the authority to create a curfew for minors and that its crime problems justify running the risk of judicial review. At this stage, the government must consider what the language of a curfew should be. What follows are suggestions for provisions in a curfew for minors. The suggestions are designed in part to address potential constitutional concerns and to limit to the greatest extent possible the burden that the curfew places on legitimate activity.

1. A section stating why a curfew is necessary. This section is important for demonstrating that the local government has authority to create the curfew. It should clearly state how the curfew protects community safety, welfare, and peace. The section is important also for demonstrating that there is sufficient reason for regulating minors' rights of movement, speech, and association. A government may wish to frame its reasons for implementing a curfew in terms of the factors listed in *Belotti*. For example, you may say that minors are particularly vulnerable to nighttime crime and drug abuse, that minors do not always make good decisions concerning whether they should take part in crime or drug use, and that the curfew will be used in a way that reinforces the parental role in raising and guiding children. This may also be an appropriate place to describe a community's crime problem with statistical or anecdotal information.[21]

2. A section defining terms, such as "public place," "guardian," and "minor." In defining "minor," consider that eighteen is the age of majority in North Carolina. Minors sixteen or older but not yet eighteen may be penalized as adults, but they must be afforded special treatment in arrest and interrogation procedures. Trial of a minor under sixteen must begin in juvenile court and is subject to the provisions of the North Carolina Juvenile Code.

3. A section stating what is illegal and to whom the ordinance applies. For example: "It is unlawful for any minor to be in or remain in any public place as defined in this ordinance in [name of local government unit] between midnight and five o'clock a.m. of the following morning." The illegal acts may also include aiding and abetting, being a negligent parent, or knowingly allowing minors on business premises during curfew hours.

4. A section stating possible exceptions to the curfew. Exceptions are important indicators of a local government's interest in restricting minors' rights no more than necessary. A strong exceptions section is likely to be crucial for successfully defending a constitutional challenge in the courts. Consider the following examples:

a. Exempting travel between place of residence and work. The exemption may be limited, for example, to no longer than one hour before the minor's work period begins and no longer than one hour after the minor's work period ends.
b. Exempting travel in emergencies. Define emergency.
c. Exempting travel with parents, guardians, or other adults authorized to have control over the minor.
d. Exempting travel done with written parental permission.
e. Exempting bona fide interstate movement by motor vehicle through the county, or beginning or ending in the county. (Such a provision is included in the Charlotte curfew.)
f. Exempting situations in which a minor is outdoors but attending activities involving the First Amendment free exercise of religion, freedom of speech, or the right of assembly.
g. Exempting travel in instances of reasonable necessity, if the minor possesses a written statement signed by the parent, which describes the minor, states the facts establishing such reasonable necessity, specifies the streets, the time, and the origin and destination of travel. (Proposed 1991 Cumberland County ordinance.)
h. Exempting situations in which a minor is on the sidewalk of the place where the minor resides, or on the sidewalk of a next-door neighbor not communicating an objection to a law enforcement officer, or is congregating outdoors on another person's private property with the express permission of the owner or other person in lawful control of the property. (Proposed 1991 Cumberland County ordinance.)
i. Exempting travel, by a direct route, between a minor's place of residence and a school, religious, recreational, entertainment, or any other organized community activity, including activities

involving the free exercise of religion, speech, or assembly. (Proposed 1991 Cumberland County ordinance.) Again the time for this exemption may be limited to a time period around an activity's beginning and end.

5. A section providing punishments. Minors who are at least sixteen but not yet eighteen may be punished as adults. Therefore they may be punished for a curfew violation by fine or imprisonment, as otherwise permitted by law. The North Carolina Juvenile Code does not permit local governments to punish minors under sixteen by fine or imprisonment. However, they may be adjudicated delinquent juveniles.[22] A curfew may direct law enforcement officers to take temporary custody of minors under sixteen.[23]

Given the limitations that state law imposes on the treatment of minors, a local government may wish to punish parents or guardians for curfew violations by minors in their custody. For example, a curfew ordinance might punish parents of repeat offenders by fine or imprisonment.[24] It is unclear whether to be lawful this punishment must be only for "knowingly permitting" a violation or whether the punishment may result from the simple fact that a minor over which the parent has custody violates the curfew as some courts have held.[25] Other courts have invalidated punishing parents in this manner, saying either that it violated the parents' due process rights or that such punishments interfere with the constitutional right to family autonomy.[26] North Carolina's appellate courts have not ruled on this issue.

Some curfews contain punishments for persons who aid and abet violations of curfew, and others contain punishments for businesses that knowingly allow minors to be on their premises during curfew hours.

6. A section providing law enforcement procedures. An ordinance may specify steps that officers are to take to determine ages of suspected offenders, and it may spell out rules concerning what to do with minors in custody.

7. A severability provision. Such a provision may allow remaining portions of the ordinance to be valid if a court holds any other section of the ordinance invalid or unconstitutional.

Practical Issues in Enforcing and Applying a Curfew for Minors

There are also significant practical problems in enforcing such a curfew. Does local law enforcement have the time and resources to effectively enforce a curfew for minors? Remember, with minors, officers cannot always simply issue citations or make arrests, as they do with much of the crime they encounter. Meaningful enforcement of a curfew requires great resources. If resources for combating crime are limited, would you be better served by dedicating more resources to traditional law enforcement, rather than to enforcing a curfew? Law enforcement resources were significant political issues in consideration of curfews in both Buffalo and Phoenix. Phoenix has dedicated more than one-half million dollars annually to enforce its curfew.[27]

Do you need to worry about selective enforcement or pretextual stops by law enforcement—or allegations of such actions—in your community? If a government creates a curfew for minors, the curfew should be applied in all neighborhoods. If it is applied in only some, it raises potential constitutional equal protection claims for persons who have the curfew used against them. A pretextual stop is one in which a law enforcement officer uses a curfew as an excuse to stop people, hoping to find evidence of other criminal wrongdoing. Such stops can invalidate prosecutions for the discovered crimes.

Local governments should ask several other practical questions before enacting a curfew for minors. Are they satisfied that a curfew will deter crime? Will a curfew clear the street of a troublemaking element or only serve to chill the activities of normally law-abiding youths and their parents? Do the community and police force support a curfew for minors? If not, it may be difficult to enforce the ordinance, and the local government may face swift legal challenges to the curfew.

Ordinance Prohibiting "Cruising"

Perhaps a community has a less general crime problem. Instead, it has a particular problem with people hanging out in the streets or parking lots, or driving vehicles slowly in groups through the streets, snarling traffic. The local government might want to consider an ordinance that prohibits "cruising."

It will face the same issues of authority and constitutionality that apply to the other crime-response ordinances discussed in this article. Some courts have upheld "no cruising" ordinances,[28] and others have invalidated them.[29]

If after considering issues of authority and constitutionality, a local government decides to promulgate an

ordinance prohibiting cruising, it should consider provisions like the following ones, derived from Modesto, California, and York, Pennsylvania, ordinances.

1. A section stating why such an ordinance is necessary. See the discussion of this same provision under the section of this article about curfews for minors.

2. A definitions section.

a. Defining "cruising." For example, it may mean "the repetitive driving of any motor vehicle past a traffic control point in traffic which is congested at or near the traffic control point."
b. Defining "repetitive driving." For example, it may mean "operating a motor vehicle past a traffic control point more than twice within an hour."
c. Defining "congested traffic" precisely. For example, a definition may include "when motor vehicles cannot move through a 100-yard approach corridor to an intersection controlled by a traffic light within two complete green light cycles where the delay in forward movement is due to the position of other motor vehicles."
d. Defining other terms such as "green light cycle" and "traffic control point" precisely. For example, "traffic control point" may be "a location along a public street, alley, or highway used by a police officer on duty in the affected area as an observation point in order to monitor traffic conditions for potential 'cruising' violations."

3. A section defining what is illegal. "No person shall engage in the activity known as 'cruising' as defined in this ordinance, on the public streets, alleys, or highways of this city in any area which has been posted as a no-cruising zone," for example.

4. A section outlining punishments, including the possibility of issuing warning tickets.

5. A severability provision.

A "no cruising" ordinance may be more easily enforced and the public will receive greater warning about what activity is prohibited if signs labeling particular areas as "no-cruising zones" are posted.

Ordinance Prohibiting "Loitering"

In the 1960s and 1970s, courts invalidated many general loitering and vagrancy laws on the grounds that they were vague, infringed on law-abiding activity, and permitted arbitrary and discriminatory enforcement. In an Oregon case, for instance, the court ruled that a law making it unlawful to roam or be on the streets between certain nighttime hours without a lawful purpose was unconstitutionally vague and violated constitutional due process; the court said that government cannot make the mere presence of people criminal.[30]

Courts have split on the validity of modern-day loitering statutes and ordinances, which tend to be more specific than their predecessors.[31] Modern antiloitering laws are often patterned after Model Penal Code section 250.6. They punish individuals who "loiter or prowl in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity." The laws list specific circumstances that may warrant alarm. These include taking flight on the arrival of an officer and attempting to conceal oneself or an object. Before arrest, officers must give a suspect an opportunity to dispel any alarm by identifying himself or herself and explaining his or her presence or conduct.

North Carolina's appellate courts have not addressed the issue of general loitering ordinances directly. However, in 1985, the North Carolina Court of Appeals indicated its sense that courts in the United States have "overwhelmingly upheld" loitering crimes that "include an element of criminal intent."[32] This may mean that an offender must have a specific criminal intent (such as engaging in prostitution or drug-related activity). As a result, North Carolina governments may be on firmer legal grounds in considering a specific-intent loitering ordinance (discussed below), rather than a general-intent loitering ordinance.

Ordinance Prohibiting Loitering for Drug-Related Activity

Several North Carolina cities, including Charlotte, Durham, Fayetteville,Wilson, and Winston-Salem have adopted ordinances prohibiting "loitering for the purpose of engaging in drug-related activity" to combat the increasing incidence of open one-on-one drug sales in public places. Such ordinances are based in part on the approach used in G.S. 14-204.1, which prohibits loitering for the purpose of engaging in prostitution. That statute was upheld in 1985.[33] A similar law was approved in Washington,[34] but several Florida courts have ruled that such ordinances violate both the Florida state constitution and the First Amendment.[35]

The general ordinance-making authority issues discussed under curfews for minors also apply to consideration of this type of ordinance. Again a government must address and be comfortable with how the constitutional issues described under curfews for minors are addressed in the writing and enforcement of this type of ordinance.

If a government is satisfied about the authority and constitutionality issues, it may decide to create a loitering ordinance prohibiting particular kinds of specific-intent criminal activity. It may consider the following as possible provisions in a loitering-for-the-purposes-of-engaging-in-drug-related-activity ordinance (derived from ordinances in Durham and Fayetteville).[36]

1. A section stating why such an ordinance is necessary. See the earlier discussion of the need for a similar provision in a curfew for minors.

2. A section defining where the ordinance applies. For example, "public place" may mean "any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility, or the doorways and entranceways to any building that fronts on any of these places, or a motor vehicle in or on any of these places or any property owned by [name unit of local government]."

3. A section stating the prohibited act. For example, it is "unlawful for a person to remain in or wander about a public place in a manner and under circumstances manifesting the purpose to engage in a violation of any subdivision of the North Carolina Controlled Substances Act, North Carolina General Statutes, Chapter 90, Article 5."

4. A section outlining circumstances that may manifest that a person has a purpose to commit a drug offense. Potential circumstances include

a. repeatedly beckoning to, stopping, or attempting to stop passers-by, or repeatedly attempting to engage passers-by in conversation; or
b. repeatedly stopping or attempting to stop motor vehicles; or
c. repeatedly interfering with the free passage of other persons; or
d. repeatedly passing to or receiving from passers-by, whether on foot or in vehicle, money or objects; or
e. taking flight on the approach or appearance of a police officer.

5. A section outlining how law enforcement officers are to use the factors laid out above. For example, if an ordinance includes provisions concerning prior drug crime involvement, officers might be instructed to make an arrest only if several of the listed factors are present.

6. A punishment section outlining potential fine or imprisonment.

7. A severability provision.

Validity Issues to Consider

There may be special validity issues a local government should consider before creating this kind of ordinance. In May 1990 North Carolina Superior Court Judge E. Lynn Johnson invalidated several provisions of Fayetteville's drug-loitering ordinance.[37] Judge Johnson ruled that the provisions violate the evidentiary rule that evidence of other crimes is generally inadmissible on the issue of guilt if its only relevance is to show a defendant's bad character or disposition to commit an offense similar to the one charged.[38] Such provisions may also be viewed as invalid because they allow officers to arrest, and courts to convict, persons for violating this ordinance based only on loitering and past involvement in drug-related activity. Judge Johnson invalidated another provision because it was too vague to allow reasonable persons to understand the prohibited behavior. There was no appellate court decision concerning Judge Johnson's ruling. As a result, the case produced no law of precedential value applicable to other communities or in other courts. However, it raised legitimate legal concerns.

The ruling invalidated the following sections:

1. In the definitions section:

   a. Defining a "known, unlawful drug user, possessor, or seller" who may violate the ordinance. The definition used was "a person who has, within the knowledge of the arresting officer, been convicted in any court within this State of any violation involving the use, possession, or sale of any substance" covered by the North Carolina Controlled Substances Act.

2. In the circumstances section:

   a. the person "is a known unlawful drug user, possessor, seller or member of a 'gang' or other association which has as its purpose illegal drug activity"; or
   b. the person is in a place frequented by persons who use, possess, or sell drugs and that place is by public repute known to be an area of unlawful drug use, sale, purchase or delivery; or

Other Legal Resources

Any local government considering one of the special ordinances discussed here should also consult other resources on this issue. The following list may prove helpful.

On Curfews for Minors

"Curfew," *Ordinance Law Annotations*, Volume 2A, Shepard's/McGraw-Hill (1990), and supplements in succeeding years, provides brief summaries of curfew cases from around the nation.

"Validity, Construction, and Effect of Juvenile Curfew Regulations," 83 A.L.R. 4th 1056 (1990), and succeeding supplements, provides an exhaustive discussion of cases concerning curfews for minors from around the nation.

"Model Juvenile Curfew Ordinance," National Institute of Municipal Law Officer (NIMLO) Model Ordinance Service (1995), at pp. 13-1.1 through 13-1.22, provides ordinance text and discussion of some of the legal issues. Of course, a community should flesh out such language to fit its own needs and concerns.

Matthews Municipal Ordinances, §§ 53.06, 53.07, and 53.08 (2d ed., 1994), Thomas A. Matthews and Byron S. Matthews, also provides sample ordinances that may be adapted to a community's needs.

"Criminal Responsibility of Parents for Act of Child," 12 A.L.R. 4th 673 (1982), and succeeding supplements.

On Anticruising Ordinances

"Validity, Construction, and Effect of Statutes or Ordinances Forbidding Automotive 'Cruising' Practice of Driving Repeatedly through Loop of Public Roads through City," 87 A.L.R. 4th 1110 (1991), and succeeding supplements.

On General and Specific-Purpose Loitering Laws

"Validity of Loitering Statutes and Ordinances," 25 A.L.R. 3d 836 (1969), and succeeding supplements.

"Validity, Construction and Application of Statutes Prohibiting Loitering for the Purpose of Using or Possessing Dangerous Drugs," 48 A.L.R. 3d 1271 (1973), and succeeding supplements.

c. any vehicle involved is registered to a known unlawful drug user, possessor, or seller, or is known to be or have been involved in drug-related activity; or

d. the "person behaves in such a manner as to raise a reasonable suspicion that he or she is about to engage in or is engaged in an unlawful drug-related activity."

A local government should use a drug-loitering ordinance cautiously. Law enforcement officer training about this kind of law is important for permitting successful prosecution of ordinance violations, reducing arbitrary enforcement, and defending legal challenges to the law. Useful approaches include training officers about the kinds of surveillance required to establish probable cause for an ordinance violation, and implementing rules for how arrests can be made. For example, a law enforcement agency could adopt a policy recommending that officers make an arrest for violation of a drug-loitering ordinance only if several (or, a particular number) of the circumstances indicating possible drug offenses are present, and only if the officer can describe specific behavior or specific indications of criminal conduct.[39]

Summary

This article discussed several types of ordinances a local government might adopt in addressing crime problems: (1) curfews for *everyone* in a community, (2) curfews for *adults* only, (3) curfews for *minors* only, (4) "no cruising" ordinances, and (5) laws prohibiting loitering in specific situations. Curfews for adults only is the single proposal that is clearly not constitutionally viable. Of the remaining four kinds of law, a curfew for everyone in a community is almost certainly permissible only during a state of civil emergency (such as during and in the aftermath of a hurricane). Curfews for minors have received great national attention in the last three to five years; several North Carolina local governments have implemented them. The legal viability of such curfews in North Carolina is still uncertain. Nationally, there is no consensus among courts about their legality, though the recent trend has been toward finding such curfews valid. North Carolina's local governments should create such measures warily, after considering all options for responding to crime. Loitering ordinances and "no cruising" measures also present legal peril, and their positive and negative characteristics should be explored thoroughly before any implementation.

Notes

1. Homebuilders Ass'n of Charlotte v. City of Charlotte, 336 N.C. 37 (1994).

2. The court was applying G.S. 160A-4, which covers municipalities. G.S. 153A-4 is the companion legislation applicable to counties.

3. 1992 N.J. Pub. Law Ch. 132.

4. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), *overruled on other grounds*, Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) (*Shapiro* ruled unconstitutional statutes that denied welfare assistance to residents who had not lived in the jurisdiction for at least one year immediately before application for assistance).

5. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971) (ruling valid a city's emergency curfew).

6. City of Dallas v. Stanglin, 490 U.S. 19, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989).

7. *See, e.g.*, Moore v. City of Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (holding unconstitutional a city ordinance that limited occupancy of any dwelling to members of the same "family" and defined who could be a part of such a "family").

8. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 110 (1972).

9. G.S. 14-288.12 and G.S. 14-288.13.

10. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

11. U.S. v. Chalk, 441 F.2d 1277 (4th Cir.), *cert. denied*, 404 U.S. 943, 92 S. Ct. 292, 30 L. Ed. 2d 257 (1971). *See Chalk* for an example of an emergency ordinance.

12. Justice Thurgood Marshall wrote that in an opinion dissenting from the denial of *certiorari* to Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *cert. denied*, 429 U.S. 964, 97 S. Ct. 394, 50 L. Ed. 2d 333 (1976).

13. Note, "Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution," *Harvard Law Review* 97 (March 1984): 1164.

14. Mark Potok, "Teen Curfews 'the Norm' in More Cities," *USA Today*, June 26, 1995, 1A.

15. Metropolitan Dade County v. Pred, Fla. 3d Dist. Ct. App., No. 94-2595, 1995 Fla. App. LEXIS 11440 (Nov. 1, 1995).

16. Sansbury v. City of Orlando, 654 So. 2d 965 (Fla. 5th Dist. Ct. App. 1995).

17. 36 Op. N.C. Att'y Gen. 122 (1960).

18. *See, e.g.*, Waters v. Barry, 711 F. Supp. 1125 (D.C. 1989).

19. *See, e.g.*, Stanglin v. City of Dallas, 490 U.S. 19 (1989), and Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *cert. denied*, 429 U.S. 964, 97 S. Ct. 394, 50 L. Ed. 2d 333 (1976).

20. 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979).

21. *See, for example*, the preamble of City of Charlotte Ordinance No. 15-145.

22. *See* G.S. 7A-517(12).

23. G.S. 7A-571 and G.S. 7A-572.

24. *See, e.g.*, Jacksonville, N.C. Code § 15-35, Curfew for Minors (1991).

25. *See* City of Eastlake v. Ruggiero, 220 N.E.2d 126 (Ohio 1966) and City of Milwaukee v. K.F., 426 N.W.2d 329 (Wi. 1989).

26. *See, e.g.*, McCollester v. City of Keene, 514 F. Supp. 1046 (D.N.H. 1981), *reversed on other grounds*, 668 F.2d 617 (1st Cir. 1982), and Allen v. City of Bordentown, 524 A.2d 478 (N.J. Super. Ct. 1987).

27. Abraham Kwok, "Phoenix Tightening Budget Belt," *Arizona Republic*, May 16, 1993, A4.

28. In Lutz v. City of York, 899 F.2d 255 (3d Cir. 1990), a York, Pennsylvania, ordinance prohibiting cruising was held valid. The court ruled that the ordinance was a valid time, place, and manner restriction on the right of localized intrastate travel.

29. A court invalidated a similar Modesto, California, measure in Aguilar v. Municipal Court, 130 Cal. App. 3d 34, 181 Cal. Rptr. 516 (Ca. 1st Dist. 1982), on the grounds that the local government improperly promulgated a law in a field of legal regulation occupied exclusively by the state government.

30. City of Portland v. James, 444 P.2d 554 (Or. 1968).

31. Cases in which such loitering ordinances have been declared invalid include Fields v. City of Omaha, 810 F.2d 830 (8th Cir. 1987); City of Bellevue v. Miller, 536 P.2d 603 (Wash. 1975); and City of Portland v. White, 495 P.2d 778 (Or. App. 1972). Cases in which they have been upheld as valid include State v. Nelson, 439 N.W.2d 562 (Wis. 1989), *cert. denied*, 493 U.S. 858 (1989); Watts v. State, 463 So. 2d 205 (Fla. 1985); State v. Ecker, 311 So. 2d 104 (Fla. 1975), *cert. denied*, 423 U.S. 1019, 96 S. Ct. 455, 46 L. Ed. 2d 391 (1975); and Bell v. State, 313 S.E.2d 678 (Ga. 1984).

32. State v. Evans, 73 N.C. App. 214, 218, 326 S.E.2d 303 (1985).

33. State v. Evans, 73 N.C. App. 214, 326 S.E.2d 303 (1985).

34. City of Tacoma v. Luvene, 827 P.2d 1374 (Wash. 1992).

35. Wyche v. State, 619 So. 2d 231 (Fla. 1993); Holliday v. City of Tampa, 619 So. 2d 244 (Fla. 1993); and E.L. and R.W. v. State, 619 So. 2d 252 (Fla. 1993).

36. Durham City Code § 12.62 (1991); Fayetteville City Code § 21-55 (1989).

37. As an unpublished order, Judge Johnson's ruling is not generally available for consideration. However, a summary of the ruling is available from the author.

38. State v. Weldon, 314 N.C. 401, 333 S.E.2d 701 (1985).

39. The Winston-Salem Police Department trains its officers in a manner similar to that described in the text, and it has policy recommendations about what evidence should be gathered for an arrest to be made under the city's drug-loitering ordinance Telephone interview with Claire McNaught, public safety attorney, Winston-Salem Police Department (Nov. 21, 1995).

Prospects for the Future of North Carolina's Public Health System

Jeffrey S. Koeze

In my eight years at the Institute of Government, North Carolina's eighty-six local health departments have been my primary clients. In five more years, they all may be gone.

Why? We may be on the brink of fundamental changes in the role of county government in North Carolina, and changes in the way health care is provided and paid for threaten the role of local public health departments in providing clinical care. The combination of these factors is a volatile mix.

Government is always adapting to changes in public notions of its proper role and to shifts in the economic and social organization of the population. This article takes a look at the sweeping adaptations now looming—or under way—in the public health system.

Rebellion in the Counties

Every two years the Institute of Government holds a school for new county commissioners. These folks have just been elected to what they believe is a local office. They are looking forward to serving and making policy for their communities. What they learn from the Institute catches many by surprise: being a local official is only a part of their job. The other part is serving as a kind of state official, particularly with regard to public health, social services, and mental health services. They must tax their constituents through local property taxes—that is one of the local duties—to pay for programs that are mandated by the state and controlled by the state and by local boards over which the commissioners have limited influence.

In North Carolina, counties have a dual role. They are local governments that exist to serve the particular needs of the people within their borders, but they also are a part of state government that exists to finance and administer statewide programs. County commissioners do not like the second role, and they draw no comfort from learning that it is the older of the two.

I sense that county commissioners are rebelling against being servants of the state. This rebellion has not issued its Declaration of Independence, but signs of rebellion are common. One is the growing resistance to so-called "unfunded mandates." Implicit in this resistance is the notion that counties should not be mere creatures of state government, as they now are, but should be separate and exist to meet local needs. Otherwise, commissioners' complaints about unfunded state mandates would make no more sense than if the secretary of the Department of Correction were to complain about unfunded state mandates.

Consistent with complaints about unfunded mandates is the single most common refrain heard during the 1995 session of the General Assembly: the desire to increase local control over programs and expenditures. There was talk of a proposal—never drawn into the form of a bill—to amend the state constitution to give counties and cities powers that the General Assembly could not take away. The record of the 1995

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General Assembly was decidedly mixed on matters of local power, but there continues to be interest in examining counties' power to set policy locally.

One bill introduced in the General Assembly in 1995 carried a variation on that refrain. If it had passed, the bill would have allowed the board of county commissioners in each county to vote to confer upon itself the powers and duties of the county boards of health, social services, and mental health. The increase that would bring in commissioner control over those programs is obvious. Mecklenburg County has had this authority since 1973, and its commissioners function as the county's board of health, board of social services, and mental health authority board. Wake County recently gained this authority. The Wake County commissioners have not assumed the duties of those boards, although they have made administrative changes that increase the county manager's, and by extension the commissioner's, influence over policy and administration of those services.

Before the General Assembly convenes in 1996, people interested in a different role for counties will have several opportunities to express their views. The General Assembly created the State and Local Government Fiscal Relations and Trends Study Commission, which is authorized "to review the current responsibilities of State agencies and units of local government for administering, financing, and making decisions about public services." The commission is to give special attention to the statewide services that are administered by counties on behalf of the state, including public health. The commission may make an interim report to the General Assembly in 1996 and a final report in 1997.

The North Carolina Local Government Partnership Council, which advises the governor on issues affecting local governments, has established a Human Services Task Force co-chaired by Betty Lou Ward, president of the North Carolina Association of County Commissioners and C. Robin Britt, Sr., secretary of the Department of Human Resources. This group primarily is interested in how the state should respond to proposed cuts in federal block grant funding for human services, but some of those participating in task force meetings would like to consider the role of counties in providing health care and other human services.

Two other groups have a narrower mandate to examine counties' role in the provision of health services generally and public health in particular. Both the Health Care Reform Commission (successor to the Health Planning Commission) and the Public Health Study Commission have the power to look into counties' public health work and could recommend changing the counties' place in the existing public health system.

Revolution in the Health Care Delivery System

Two changes in the health care system may soon force many local health departments to stop providing health care to patients. First, home health care has become profitable, introducing competition into an arena that public departments filled when no one else would. Second, the state is beginning to place Medicaid recipients into capitated managed care systems.

Competition in Home Health Care

The General Assembly and the Commission for Health Services required counties to provide home health because the private-sector services were inadequate. Now home health is a profitable business. That has meant steadily increasing competition for health department home health agencies. To respond to this competition, counties have had two options: either structure the financing and administration of their agencies in a way that makes them competitive

Courtesy Home Health Agency of Chapel Hill

with private providers *or* get out of the business. The latter option has been by far the more popular one. Unless the growth in competition stops or more counties choose to fight to keep home health, public health department provision of home health services will continue to fade away.

Medicaid Patients in Managed Care

As a second major change, North Carolina's Medicaid program will increase the number of beneficiaries in capitated managed care systems. Today Medicaid pays health departments on a fee-for-service basis for treating Medicaid patients. That is, the fees are set to cover the cost of services provided. Under a capitated system, by contrast, the payor—which in the case of Medicaid is the state—pays a managed care organization a set amount of money per month per person covered. That money pays for all the covered services that all beneficiaries require. The services are provided by employees of the managed care organization itself or by other health care providers who enter into contracts with the managed care organization to provide services to the beneficiaries. If the managed care organization spends less than the set monthly fee to provide its services, it makes money. If it spends more, it suffers a loss.

North Carolina has moved slowly in placing its Medicaid patients into capitated managed care, but the pace is sure to pick up. The state has permission from the federal government to test a capitated system in Mecklenburg County. (Some states have created statewide capitated systems without testing them.) The financial, legal, policy, and political issues associated with managed care in Medicaid are myriad, but I believe that most Medicaid beneficiaries, or at least most beneficiaries who seek care from health departments—poor women and children—eventually will be enrolled in capitated managed care systems.

Will North Carolina's public health departments be willing and able to provide care when the state moves to a capitated system? In some states, the Medicaid agency has required managed care organizations to contract with health departments—that is, the health care organizations must utilize the health department as a provider of some of the organization's services to Medicaid patients. If North Carolina does not do that (and it has not in the Mecklenburg pilot project), some health departments will be able to continue providing care to Medicaid patients and some will not. In some parts of the state, counties may not be offered the opportunity to provide care to Medicaid patients, because the managed care organization will provide the services itself, uninterested in contracting with the health department or anyone else. In other places, counties that wish to continue to provide such services will find themselves in competition with hospitals and physician practices to enter a contract with the managed care organization. In those counties, questions will arise about the appropriateness of competition with the private sector, about the counties' ability to accurately project their costs of providing care and hence make an effective bid, about the counties' willingness to accept the risks associated with such contracts, and finally about a number of unfamiliar and difficult legal questions associated with managed care contracting. These have all been issues in states that have already moved health department clients into managed care.

In many communities in North Carolina, health departments are the primary providers of care for women and children. In such cases, managed care organizations may be almost forced to contract with the health department for the provision of care, because there would be no other providers to give the care. Those communities would have the luxury of deciding whether to participate, along with some bargaining power to give them influence over how services were provided.

The state could also choose to keep local health departments in the business of providing direct patient services by making health departments the managed care organization for Medicaid recipients. The health department would receive a fixed amount per eligible person per month, and it would then be responsible for arranging for any care those people might need. The state has taken this approach in mental health by making area mental health authorities the managed care organization for Medicaid mental health services.

Issues in Health Care Services to Patients

No one can predict either the speed or scope of change in the health care system and in the role of counties, let alone how they might interact. However, if these changes take place, they will have some predictable consequences and will raise a number of important policy issues.

If changes in the health care system and in the role

of counties take away local health departments' job of providing clinical care to patients, the state's public health system will need to consider several key questions.

One concerns the effect on the cost and quality of care and access to it. Taking local health departments out of the business of serving home health and Medicaid patients may lessen the quality of care for that population, or it may improve the quality. Costs might go up or they might fall. Access could improve or get worse. Much depends on how the shift from local public health to other providers is handled.

Who will be responsible for seeing that the changes do not reduce quality, raise costs, or decrease access to care? Under the current structure of public health, the state health director and his staff deal with these issues on the state level, under the regulatory guidance of the Commission for Health Services. At the local level the programs are administered by a health director who is hired by and reports to the local board of health. But if public health departments leave the business of home health and patient clinical services, the locus of regulatory and administrative control shifts. Administrative, day-to-day attention to these matters would become the job of the managed care organization or home health agency. That organization might be public (such as the Charlotte-Mecklenburg Hospital Authority), it might be private and for-profit, or it might be private and not-for-profit.

Today, outside of public health the primary regulatory control of home health agencies lies with the federal Medicare program (which pays most of the bills) and with the Division of Facility Services in the Department of Human Resources, which licenses home health agencies and grants them certificates of need. Regulatory control of managed care organizations participating in Medicaid rests with the Division of Medical Assistance in the Department of Human Resources. (All other managed care organizations are regulated by the Department of Insurance.) The open question is the extent to which these regulators will pay attention to the public health implications of their work.

Another question that arises if health departments stop providing clinical services is the effect on the financing for the rest of the public health system. Revenues from clinical services have become an increasingly important source of support for local health departments—even though the reimbursement for those services is based on costs the health department incurs in providing them. Because of the way in which health department revenues are handled in most

Courtesy Home Health Agency of Chapel Hill

Home health agencies often train patients' spouses to perform essential tasks. Here a specially certified nurse instructs a client on setting up an IV for her husband, a patient with endocarditis.

counties, the expansion in reimbursement for clinical services has made money available for facilities, equipment, and programs in other parts of the health department. (This subject is treated in detail in the article "Paying for Public Health Services in North Carolina," in the Fall 1994 issue of *Popular Government*.)

On top of changes in the health care system, shifting effective policy control from the state to the counties raises questions about clinical services. An increase in the commissioners' policy role is neither inherently good nor bad for clinical services, unless one believes that their knowledge and abilities (most members of boards of health are health professionals; most county commissioners are not), their direct accountability to voters (county commissioners are elected; board of health members are not), or some other characteristic of commissioners makes them systematically less likely to make good policy choices than boards of health and the Commission for Health Services.

It is safe to say, however, that an increase in the commissioners' power will lead to more variation in services among counties. The idea that the mix and level of health services available might vary from one county to another is not controversial, because unmet health needs vary fairly dramatically from county to county. On the other hand, increased county control might sacrifice an important goal of current public health policy: making a basic level of health services available across the state. That sacrifice is made somewhat easier by the fact that the goal has not yet been reached.

Of course, once the role of counties is on the table, anything is possible. The General Assembly could decide to get county health departments entirely out of the business of providing health care to individual patients. That job could be assigned to local human services agencies, to the private sector, or to the state.

Issues in Environmental Health

A change in the role of counties might have a dramatic effect on environmental health programs of public health departments. That change—reducing the extent to which counties function as a part of state government—could increase commissioners' control over the programs currently assigned to them. Under the current system the state has substantial authority over environmental health programs. When local environmental health specialists go about their jobs inspecting restaurants and granting permits for septic systems, they are exercising the authority of the state, delegated to them by the secretary of the Department of Environment, Health and Natural Resources.

Shifting control over such programs directly to county commissioners may not be acceptable to either the regulators in state government or to the people regulated. It is hard to argue from a policy standpoint that restaurant sanitation, for example, should vary from county to county; and it is easy to see why restaurant operators would object to different rules in different counties. If counties were to obtain increased control over local public health departments, I would expect strong pressure to transfer restaurant inspections—and septic system permitting and other environmental health programs—to the state level. (In fact, county-to-county consistency in enforcement is so difficult to achieve under the current system that there already is substantial support for such a move.)

Such a transfer is not, however, a foregone conclusion. Some counties might fight to retain those programs. In addition, a transfer would create a budget problem for the state, because most of the money used to pay the staff working in those programs is today provided by counties.

Effects on Population-Based Services

Changes in the health care system and in the role of counties stand to work profound changes in the broadest arm of work of North Carolina's local health departments: population-based services. The aim of such services is to improve health by using tools that improve the health of groups or communities of people all at once rather than individual by individual. For example, foodborne illness can be treated by physicians as each patient gets sick, or it can be prevented with a program of restaurant inspections.

Environmental health programs such as restaurant inspection make up one element of population-based services. The myriad others include educational programs to encourage healthy eating habits, early prenatal care, or quitting smoking; and communicable disease-control programs such as immunization services. Providing the basis for these activities is the collection of data about health and the things that make it better or worse, and public health departments play a role in the collection and analysis of this information.

In some ways these are the forgotten activities of public health. When Tennessee implemented its statewide Medicaid managed care system, many of these activities had their budgets eliminated. (The state continued to use some Medicaid money for these activities, but there was no budget for them.) What will happen to population-based services in North Carolina if health department clinical patient services are eliminated and if environmental health programs are transferred to the state? Maybe they would remain the sole function of local health departments. Or maybe they could be transferred to the state or handled by new regional entities.

Perhaps these services are not required at all. Managed care providers have made the argument that the need for public health is reduced in a health care system in which most people are enrolled in capitated plans. The argument goes something like this: Under the traditional fee-for-service health care system, providers get paid when a patient gets sick. Thus providers have no economic incentive to spend money on preventing ill health. In a capitated system, however, the providers get paid the same amount whether or not people get sick. If they get sick less, the provider has to spend less on care, and the provider makes more money. Thus in this system the providers do have an economic incentive to invest in preventative care, on health education, and on carefully tracking the health of the plans' enrollees.

This argument would have more force if everybody participated in managed care. Today, however, most people receive care under the fee-for-service system, and many receive no regular care at all. In addition, there are incentives for managed care systems to skimp

on these services when competing with fee-for-service plans (and other managed care providers) because of the long time period required for the benefits of prevention to pay off. Consider programs that reduce smoking among the members of a managed care plan, for example. Dollars spent on such programs today cost the managed care plan money in this fiscal year. The benefit to the plan in reduced expenditures on heart disease, lung cancer, and other health problems related to smoking will not come for years, and probably not for decades. The extent of that benefit is highly uncertain, there is no guarantee that the people in the Stop Smoking program will be enrolled in the plan when the benefits accrue, and there is no guarantee that the managed care plan will hold the contract for that plan member, or even be in business then.

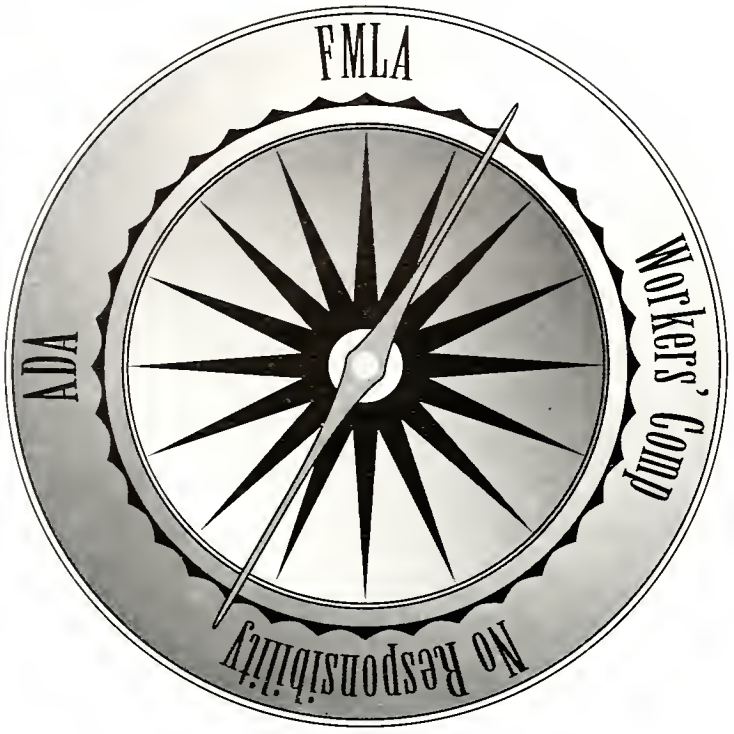
Effects on the Structure of the Public Health System

With all these changes in prospect, fundamental elements of the structure of public health in North Carolina are open to question.

For example, the pressures of the health care marketplace and ideas about changing the role of counties threaten to divide environmental health from the rest of public health. In 1989 the General Assembly sought to consolidate all state environmental programs in a single state agency. This proposal had the potential to split environmental health programs from the rest of public health, which was then located in the Department of Human Resources. This split was vigorously opposed by public health officials at the local and state levels. They argued that effective policy-making and administration required these programs to be in the same agency under the authority of the state health director. The result was that public health was kept together and moved more or less intact to the new Department of Environment, Health and Natural Resources. But a separation of environmental health functions from other public health programs at the local level in response to these pressures could yet occur, and it might lead to a reorganization at the state level. One possible outcome is precisely what was resisted so vigorously in 1989: environmental health staying in the Department of Environment, Health and Natural Resources and other public health programs returning to the Department of Human Resources.

The other structural issue concerns the trade-offs involved in dividing policy-making authority, administrative control, and financial responsibility between state and local government. The current allocation of work in public health has developed over the course of more than 100 years. The pressures on the current system provide the opportunity to examine both the strengths and weaknesses of the structure in individual programs and overall. The kinds of questions that can be asked include, for example, How important is it to a program that administration be uniform across the state? How important is it that local political interests be taken into account in making policy? Does the public's identification of public health programs as part of local rather than state government have positive or negative effects on public health? How effective are local boards of health in performing their job? How important are they to building community support for public health work? Does effective administration require expertise, data systems, or other resources that are beyond the financial reach of local governments?

Answers to these sorts of questions are necessary before we can conclude that the demise of local health departments is likely to be a disaster or, on balance, a good thing. ⊠



Navigating through ADA, FMLA, and Workers' Comp

Cary M. Grant

Joe, a maintenance worker for the city, falls while trying to repair a leaking gutter, seriously injuring his back. He and his employer immediately face complex questions: they must sort out his rights under both state and federal laws. How much time off is he due? What pay and benefits is he to receive during that time? What kinds of medical certification may the employer require? Who gets to pick the doctor? What rights does the worker have when he is well enough to go back to work?

Together the employee and the employer must navigate a legal Bermuda Triangle bounded by the North Carolina Workers' Compensation Act (called "workers' comp" in this article),[1] the federal Americans with Disabilities Act (ADA),[2] and the federal Family and Medical Leave Act (FMLA).[3] Each of these laws is complex in its own right. When they all apply to one particular case, however, they pose significant challenges to navigation.[4]

The three statutes have distinct purposes. Workers' comp was created to provide prompt, sure, and reasonable income and benefits on a no-fault basis to people injured on the job. The ADA was designed to prevent employment discrimination against qualified individuals with disabilities. And the FMLA was passed to protect the employment of workers who must take time off to care for their own medical needs or the needs of family members.

Despite their distinct purposes, all three laws can apply simultaneously. It happens when an employee suffers an on-the-job injury covered by workers' comp and because of that injury qualifies as both a disabled individual protected by the ADA and an individual with a serious health condition as defined in the FMLA. Employers risk running afoul of one or more of these laws unless they carefully evaluate each when dealing with an employee who has been injured on the job.[5] This article focuses on the interplay of the employment obligations under the ADA, the FMLA, and workers' comp.

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Overview of the Triangle

ADA

Congress passed the ADA in 1990 to prohibit discrimination against physically and mentally disabled individuals. Its employment provisions apply to job application procedures, hiring, advancement, discharge, compensation, training, and all other terms, conditions, and privileges of employment.[6] The ADA goes farther than other federal employment discrimination laws—those prohibiting discrimination on account of race, sex, and age—by requiring that employers take affirmative measures in favor of persons with disabilities beyond those required for people in other protected classifications. Under the ADA, an employer must provide reasonable accommodations necessary to enable a qualified applicant or employee with a disability to perform the essential functions of the job.[7]

The ADA is having a tremendous impact on the workplace. The Equal Employment Opportunity Commission (EEOC) reports receiving nearly 30,000 ADA charges between July 26, 1992, and June 30, 1994.[8] More than half of these charges were filed by employees (as

opposed to applicants). Back impairments were the most frequently cited disability, followed by neurological impairments, and emotional or psychiatric impairments. Discriminatory discharge was the most cited basis for discrimination, accounting for about half of the ADA charges. Failure to provide reasonable accommodation was noted in 25 percent of the charges, hiring violations were alleged in 11 percent of the charges, and harassment claims were cited in 10 percent of the charges.

FMLA

Congress passed the FMLA in 1993 to establish minimum labor standards to address employee family and medical leave needs. The FMLA requires covered employers to provide eligible employees with up to twelve weeks of unpaid leave per year for any of the following reasons:

- the birth of a son or daughter (applies to father and mother) and the care of such son or daughter;
- the placement of a child with the employee for adoption or foster care;
- the care of a spouse, or a son, daughter, or parent, if such spouse, son, daughter, or parent has a serious health condition;
- a serious health condition that makes the employee unable to do his or her job.[9]

An employee on FMLA leave cannot lose any benefit that accrued before the start of the leave, and the employer must maintain the employee's group health coverage, just as though the employee had continued to work.[10] At the end of an FMLA leave period, the employee must be returned to his or her original position or to an equivalent position with equivalent pay, benefits, and other terms and conditions.[11]

Workers' Comp

Workers' compensation laws were among the earliest employee rights and protection laws enacted in the twentieth century. New York enacted the first statute in 1910, more than fifty years before Congress adopted the ADA and the FMLA. The North Carolina General Assembly adopted this state's first workers' comp statute in 1929, modeling its version on New York's law. The law does not seek to cover all employee health problems but instead limits benefits to personal injuries or diseases "arising by accident out of and in the course of employment."[12] That is, an injury must be accidental and it must be work-related to be compensable.

The Three Laws Usually Will Not Apply Simultaneously

It is by no means a given that an employee's medical problem will be covered by all three statutes. It is only in a limited set of circumstances that all three laws apply at the same time. In one case, one statute may apply to the employer in question and the other two may not. In another, two of the statutes may apply to the particular medical situation of an employee and the third may not. The three do not apply to all employers equally, do not cover the same set of employees, and do not cover the same range of medical conditions.

Differences in Employers Covered

The ADA is applicable to public- and private-sector employers with *fifteen* or more employees, including part-time employees, who work for twenty or more calendar weeks in the current or preceding calendar year.[13] The FMLA's coverage of private employers is more limited than the ADA's: it applies only to such employers with *fifty or more* employees who work for at least twenty weeks a year.[14] The FMLA's regulations state that the act applies to all "public agencies" (defined as including all state, county, or local governments). However, a public employee must meet all the eligibility requirements to be accorded FMLA rights, including the requirement that he or she work for an employer who employs fifty or more workers within seventy-five miles of the worksite.[15] Thus small towns in North Carolina that do not employ fifty or more workers at any facility within the town's corporate limits are not subject to the FMLA's requirements. The workers' comp law applies to *all* state and local government employers in North Carolina and to private employers with *three or more* employees.

Differences in Individuals Covered

The ADA applies to every employee (full- or part-time) of a covered employer and also to applicants who meet the definition of a "qualified individual with a disability."[16] The FMLA does not apply to applicants and covers only those employees, including part-timers, who have worked for the employer for *one year*, who have worked at least *1,250 hours* during that year, and who work for an employer who employs *fifty or*

more workers within seventy-five miles of the worksite.[17] Like the FMLA, workers' comp covers only full- or part-time employees (not applicants), but without regard to their length of service.[18]

Differences in Medical Situations Covered

The ADA and workers' comp apply to an individual with a "disability." The FMLA applies to an individual with a "serious health condition." The workers' comp law defines "disability" differently from how the ADA does, and both these laws' definitions differ from the FMLA's definition of "serious health condition." These differences require a closer look.

Workers' comp disability. The workers' comp law requires that an employee have a work-related injury or occupational disease that results in disability.[19] It defines disability as "incapacity because of injury [on-the-job] to earn the same wages that the employee was receiving at the time of the injury in the same or any other employment."[20] This concept of disability is tied more to an employee's post-injury earning capacity than to his or her actual physical disablement. Generally, if an employee is unable to earn his or her normal wages because of a work-related accidental injury or an occupational disease, that employee is eligible for workers' comp benefits.[21]

Under the workers' comp disability criteria, an employee's disability can be total (that is, the employee is unable to earn any wages) or partial (that is, he or she is able to perform some duties—light or part-time work, for example—at a reduced wage). Similarly, the disability can be temporary or permanent. Workers' comp takes into account both the extent and duration of the disability. There are four types of conditions for which an employee might receive compensation: "temporary total disability," "temporary partial disability," "permanent total disability," and "permanent partial disability."[22]

ADA disability. The ADA defines "disability" to cover three situations. An individual is disabled if he or she

- has a physical or mental impairment that substantially limits one or more life activities; or
- has a record of such an impairment; or
- is regarded as having such an impairment.[23]

The EEOC has defined "physical or mental impairment" to include any physiological disorder, condition, cosmetic disfigurement, or anatomical loss affecting one or more of a number of body systems, or a mental or psychological disorder.[24] Specifically excluded are environmental, cultural, and economic disadvantages, as well as pregnancy, physical characteristics, common personality traits, and normal deviations in height, weight, or strength.[25] To be covered, the physical or mental impairment must "substantially limit one or more major life activities." A person is substantially limited if a physical or mental impairment prevents him or her from performing a major life activity that the average person in the general population can perform with little or no difficulty (such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and *working*).[26] Factors to consider in determining whether one is substantially limited in a major life activity are the nature and severity of the impairment; its actual or expected duration; and its permanent or long-term impact (or expected impact).[27]

The EEOC has stated that for a condition to be a disability that substantially limits one's ability to work, it must restrict the employee from either a class of jobs or a broad range of jobs in various classes open to the average person with comparable training, skills, and abilities.[28] The inability to perform one particular job does not, according to the EEOC, constitute a substantial limitation. Factors that may be considered in determining whether a person's work life is substantially limited are the geographical area to which he or she has access; the job from which he or she has been disqualified because of an impairment; and the number and types of jobs using similar skills and training within that geographical area (or class of jobs), from which he or she also is disqualified because of the impairment.[29]

An employee is covered by the ADA only if he or she is a "qualified individual with a disability." That determination is made in two steps. First, the individual must satisfy the prerequisites for the position such as the necessary educational background, experience, and licenses. Presumably this already will be established in the case of an employee. Second, the individual must be able to perform the "essential functions" of the job in question, with or without reasonable accommodation. As interpreted by the EEOC, essential functions mean fundamental job duties. A function may be considered essential if the position exists to perform the function, the incumbent is hired specifically for his or her expertise in the function, or performance of the function cannot readily be distributed to other employees. If the employee has a disability that prevents him or her from performing the essential functions of the job, the employee is not a qualified individual with a disability protected by the ADA.[30]

FMLA serious health condition. In contrast to the ADA and the workers' comp law, the FMLA uses the term

"serious health condition." A serious health condition includes any physical or mental condition requiring inpatient care in a hospital, hospice, or residential medical care facility, or any incapacity of more than three calendar days that also involves either two visits to a health care provider or one visit followed by a regimen of supervised and continuing medical treatment.[31] A serious health condition also may include a chronic condition that requires periodic treatment, continues for an extended time, causes episodic incapacity (that is, incapacity lasting for periods of less than three days), and may not require a visit to the doctor during the period of incapacity.

How the Statutes May Apply Simultaneously

For any two of the three statutes to apply to a single situation, both must cover the employer, the individual, and the medical problem. For all three to apply to a single situation, they all must cover the employer, the individual, and the medical problem. Thus, in any particular case, the question is how many of the statutes apply to the employer, to this particular kind of injured individual, and to this particular kind of medical problem.

Is This Employer Covered?

To fall under the workers' comp law, an employer must have at least three employees;[32] for the ADA, that number is fifteen;[33] and for the FMLA, it is fifty. An employer with only ten employees, for example, cannot be subject to the ADA or the FMLA, while an employer with fifty or more employees will be subject to all three.

Is This Individual Covered?

The FMLA and workers' comp apply only to employees, not applicants. Further, the FMLA applies only to employees who have worked for at least a year, have accumulated at least 1,250 hours in the preceding year, and who work for an employer who employs fifty or more workers within seventy-five miles of the worksite. The ADA applies only to "qualified individuals." So, for all three statutes to apply to a particular individual, he or she must be a qualified employee who has met those minimum time and size requirements.

Is This Medical Problem Covered?

Frequently, the ADA and workers' comp both will apply when the employee sustains a work-related injury serious enough to prevent the employee from performing his or her job.

In some situations, however, workers' comp will apply but the ADA will not, such as when the employee's condition is temporary (that is, it is expected to heal in a few weeks or months) and does not have chronic long-term impact. In that case, the employee would not be considered disabled under the ADA, even if he or she receives disability benefits under workers' comp.[34] Examples of short-term conditions that normally have little or no long-term impact include broken limbs, sprains, concussions, and mild hernias. Unfortunately for both employers and employees attempting to assess each other's legal obligations and rights, it might not be possible initially to determine whether an injury will be temporary or permanent. For instance, if a broken leg takes significantly more time to heal than normal and the employee is substantially limited in a major life activity during that period, he or she could be covered by the ADA. Among the more serious and chronic physical or mental conditions that can trigger simultaneous coverage under the ADA and workers' comp are a heart condition, a serious back condition, carpal tunnel syndrome, and emotional or mental illness.

In other instances, the ADA may apply when workers' comp coverage does not. If, for instance, an employee previously experienced an on-the-job injury that also implicated the ADA because of the injury's severity and long-term impact, he or she may, even after fully recovering from the injury and being released from workers' comp, still qualify for ADA coverage under the act's provision covering an individual with a "record of such an impairment." Under this provision, an employer who, fearing that the injury will recur, refuses to reinstate an employee who has been on workers' comp, or who avoids hiring individuals who were on workers' comp previously with another employer, can be held in violation of the ADA.[35]

Also, an employee who sustains a temporary work-related injury of even relatively short duration may still be protected under the ADA if he or she is "regarded as having a disability impairment." Under this ADA disability criterion, an employer who thinks that all employees who file workers' comp claims are poor employees, or that these employees will likely have more injuries, or that injured employees should not be permitted back to work until they are "one-hundred percent" recovered, risks violating the act.[36]

Under the FMLA's broad criteria for a serious health condition, a variety of situations could arise—serious back traumas, heart conditions, emotional or

mental disorders—that will involve overlapping coverage under all three statutes. In some cases, only two statutes may overlap. For example, an employee who undergoes an operation requiring inpatient care for a relatively minor work-related injury that did not substantially limit a major life activity would not be covered under the ADA. But he or she might be eligible for workers' comp benefits and would be entitled to twelve weeks of unpaid leave under the FMLA. Similarly, an employee with a prior workers' comp injury who was "regarded as having a disability" would be covered under the ADA but not under the FMLA.

Simultaneous Coverage and Medical Certification

Under all three laws, an employer may require medical certification of an injured employee's condition to verify coverage. Conflicts between the laws arise, however, over questions of who may choose the physician, whether the employer may directly contact the employee's physician, and what types of medical information an employer may require of an employee.

Certification under Workers' Comp

Under the workers' comp law, an employer "has the right, in the first instance" to select a physician to diagnose the employee's condition and provide medical treatment (defined as "medical, surgical, hospital, nursing, and rehabilitative services, and other medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief").[37] The employee may select his or her own attending physician only with the prior approval of the North Carolina Industrial Commission.[38] In each instance the employer is entitled to a full report on the employee's condition and to periodically reported medical information, as needed to process and manage the workers' compensation claim.

Certification under FMLA

The FMLA has detailed rules concerning employer requests for medical certification of an employee's condition. The act permits the employer to require a medical certificate from the *employee*'s health care provider to support a leave request for a serious health condition.[39] The employer may request that information be provided on the certificate that specifies a diagnosis, the date on which the serious health condition began, the expected duration of the condition, whether hospitalization is required, and whether the employee is able to perform the functions of his or her position.[40] If the employer questions the adequacy of the medical certification, a health care provider representing the employer may contact the employee's health care provider with the employee's permission—but only to clarify the information in the certificate or confirm its authenticity.[41] The inquiry may not seek additional information about the employee's condition. If the employee refuses to give the employer permission to contact his or her health care provider, or if the employer has good reason to doubt the employee's certificate, the FMLA permits the employer to obtain a second opinion, provided the employer pays for it.[42] The employer may not regularly contract with or otherwise regularly employ the physician furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (such as a rural area where no more than one or two doctors practice in the relevant specialty).[43] If the second provider disagrees with the first, the employer may require a third opinion, again at the employer's expense, from a doctor the employer and employee both approve. The third opinion is final and binding.[44]

Certification under the ADA

Under the ADA an employer can obtain information about an injured employee's condition by requiring the employee to submit to medical inquiries or examination (performed by the employer's physician) but only if the inquiries or exams are "job-related" and "consistent with business necessity."[45] If both these conditions are satisfied, the employer may proceed, but the employer must keep all the medical information obtained confidential, maintain it in a separate file, and disclose the information only to those who need to know—such as the immediate supervisor or health and safety personnel.

Resolving Certification Conflicts

The laws appear to conflict on the selection of the health care provider. In cases of simultaneous coverage, the FMLA's "greater rights" proviso, allowing the employee to obtain medical certification from a physician of his or her choice, may govern. As indicated above, the FMLA does permit the employer to get second and third opinions. The rules adopted under the FMLA also appear to resolve a conflict with the

workers' comp over what contact the employer may have with the physician treating the employee. The FMLA rules provide that in a case of concurrent coverage the employer may follow the provisions of a state workers' compensation statute that permits the employer or the employer's representative to have direct and unrestricted contact with the employee's workers' comp health care provider.[46] Regardless of whose medical provider is involved, all parties should work together to get the employee through the injury and back to work as soon as possible.

The EEOC has provided some guidance on the interaction of workers' comp and ADA rules related to medical examinations and information. The commission has said that when a worker has an on-the-job injury that appears to affect his or her ability to do essential job functions, a medical examination or inquiry in this situation is "job-related" and "consistent with business necessity."[47] The ADA also allows an examination or inquiry in this situation if necessary to determine what constitutes a "reasonable accommodation" for the employee.

The outcome of the interplay between the FMLA and ADA rules on medical inquiries is not entirely clear. An employer might argue that requiring medical certification under the FMLA is also proper under the ADA because it is job-related and consistent with a business necessity: the employee requesting FMLA leave is claiming that he or she cannot *work*.[48] Whether an employer obtains medical information on an injured worker under workers' comp or FMLA, the employer should take the precautions specified by the ADA to protect the employee's right to privacy and ensure that the information is kept confidential, maintained in separate medical files, and used appropriately.

Simultaneous Coverage and the Duty of Accommodation

When studying the interplay among the laws, it's worth looking also at the ways the ADA's reasonable accommodation rule interacts with the FMLA's leave requirements for serious health conditions and the workers' comp leave rules for work-related injuries.

Reasonable Accommodation under the ADA

The ADA requires that an employer provide reasonable accommodation for the known physical and mental limitations of a qualified applicant or employee with a disability, unless the employer can demonstrate that the accommodation would create an undue hardship on the employer's business operation. Although both are important requirements, the ADA does not precisely define either "reasonable accommodation" or "undue hardship." The act does list a number of possible accommodations an employer might have to provide when they present no undue hardship, including facilities accessible to individuals with disabilities, job restructuring, new or modified equipment, part-time or modified work schedules (for example, flexible leave policies, accrued paid leave or additional unpaid leave for medical treatment related to a disability, and flexible work hours), and reassignment to a vacant position.[49]

According to EEOC interpretations, determinations concerning "undue hardship" and "reasonable accommodation" must be made on a case-by-case

The Basic Rule When the Three Laws Apply Simultaneously

The laws do not state precisely how one act's provisions relate to another's. But the FMLA—the newest of the three—does state that it should not be construed to modify or affect any federal or state law prohibiting discrimination based on disability and that it does not supersede any provision of any state or local law that provides greater family or medical leave rights.[1] The ADA similarly states that its requirements are not to be construed to invalidate or limit any other federal, state, or local law that provides greater or equal protection for the rights of individuals with disabilities.[2] This language has been interpreted to mean that in cases of simultaneous coverage "an employer must comply with whichever [law's] statutory provisions provide the greater rights to employees."[3]

1. 29 U.S.C.A. § 2651(a) and (b).
2. 42 U.S.C.A. § 12201(b).
3. *See* Nancy R. Daspit, "The Family and Medical Leave Act of 1993: A Great Idea But a 'Rube Goldberg' Solution?" *Emory Law Journal* 43 (Fall 1994): 1352, 1412. The author in footnote 322 reproduces excerpts from letters written by Senators Dodd and Harkin, principal authors of the FMLA and ADA, respectively, to EEOC Chairman Tony Gallegos, which state, "We believe that both Acts are to be applied simultaneously and that an employer must comply with whichever statutory provision provides the greater rights to employees." The U.S. Department of Labor adopted this position in the Final Rules. *See* 29 C.F.R. § 825.702.

basis, taking into account the needs of the particular employee and the resources of the particular employer.[5] Further, the concept of undue hardship covers any action that is "unduly costly, extensive, substantial, disruptive, or that would fundamentally alter the nature or operation of the business."[51] Thus a small employer with one employee who performs a particular function may suffer undue hardship from any restructuring or scheduling changes and may have no vacant positions available for reassignment. On the other hand, an employer with several employees performing a particular function may be able to accommodate an injured worker by redistributing tasks or offering the worker extensive temporary leave to recover his or her health.

FMLA Leave Requirements

The FMLA requires only that an employer provide an employee up to twelve weeks per year of unpaid leave for a qualifying circumstance (which, for our purposes here, is the employee's serious health condition). An employee may elect to use, or the employer may require the employee to use, any accrued paid vacation, personal, or sick leave the employee may possess under an employer-provided leave of absence policy, and the employer may count this leave period against the FMLA twelve weeks.[52] If the employee has a serious health condition, he or she is eligible for FMLA leave if the condition prevents him or her from performing any one (or more) of the "essential functions" of the job within the meaning of the ADA.[53]

Under the FMLA, an employee is entitled under certain circumstances to take leave "intermittently" or on a "reduced-time schedule."[54] Intermittent leave is leave taken in separate blocks of time because of a single illness or injury. Examples include periodic leave, taken a few hours at a time for visits to a doctor, and more extended leave taken several days at a time over a period of months to recover from a condition. A reduced-time or reduced-leave schedule is a reduction of the employee's regular work schedule. This usually means the employee goes from full-time to part-time.

Applying the FMLA's intermittent leave and reduced-time schedule provisions is not easy. Employers should study the act and its regulations carefully. It is important to know how to calculate the amount of leave used in intermittent leaves or reduced-time schedules[55] and to be familiar with the restrictions the act imposes on the employee's right to such leaves. The employee, for example, must have a valid medical reason for an intermittent leave or reduced-time schedule. The employer may require that the employee provide certification from a health care provider verifying the medical necessity for the leave, including the dates expected for any planned medical treatment and the expected duration of the leave.[56] Further, the employer may require that employees give a thirty-day notice (or such notice as is practicable under the circumstances) if the leave is foreseeable based on planned medical treatment.[57] The FMLA also requires that the employee make a "reasonable effort to schedule treatment so as not to disrupt unduly the employer's operations."[58] The act does not define what this statement means. The U.S. Department of Labor has indicated it must be applied on a case-by-case basis.[59] The language apparently does not mean the employer has an "undue hardship" defense as under the ADA that would permit denying intermittent leaves or reduced-time schedules to qualifying employees in certain cases. According to the Labor Department, the final resolution in such cases "always remains subject to the approval of the health care provider and the schedule established for the planned medical treatments."[60] Finally, the employer is permitted to temporarily transfer an employee who qualifies for an intermittent leave or reduced-time schedule to an "available alternative position" that is better suited to accommodate these types of leaves.[61]

Workers' Comp Leave Requirements

Under the workers' comp statute, employers are required to grant a leave of absence to a qualifying employee until a physician allows the employee to return to work. The employee is also entitled to compensation (two-thirds of his or her average weekly wage) while he or she is unable to work because of an injury as well as coverage for medical and rehabilitation expenses. An employer may provide additional benefits beyond these (such as benefits under an employer disability plan), but the employer cannot provide substitute benefits in place of paying workers' comp benefits.[62]

An employer may, but is not required to, offer the employee a "light-duty" job that makes allowances for the employee's medical limitations. If an employee refuses to accept a suitable job (made available on a nine-month trial basis), that employee's workers' comp benefits generally will be suspended until he or she agrees to take the job.[63]

Resolving Leave Conflicts

Leave entitlements vary widely under the three acts, and their interaction can result in employee absences stretching from a minimum of twelve weeks under the FMLA to potentially indeterminate periods under the workers' comp and the ADA. The prospect of having their employees away from work for such a long time, with the resulting disruptions and costs, does not sit well with many employers. In fact, many employers fear that there are loopholes in these laws, which are increased in cases of simultaneous coverage that allow employees to abuse the process by taking more time off than deserved. Fortunately for employers, most employees will use the three laws in the spirit in which they were intended.[64] However, there also are several steps an employer can take to minimize extensive absences and deter possible employee abuse.

One is promoting safe work practices and monitoring the work environment to eliminate hazardous conditions that can cause employee injuries. If an injury still occurs, however, the injured employee is entitled to benefits and leave to recover his or her health and should also be treated by the employer as a valued individual whom the employer cares about and is committed to seeing to full recovery. An employee who feels he or she is being treated fairly is less likely to try to take advantage of the employer. Demonstrating commitment in this situation requires that the employer manage the employee's condition proactively, which includes communicating regularly with the employee and his or her physician to understand the scope of the injury and the prognosis. The physician should be apprised of the employee's job duties so he or she can make an accurate and fully informed assessment of the employee's ability to return to those duties.

It is likely that the longer an employee remains off work after an on-the-job injury, the more difficult it will be to return the employee to his or her job. The employer can get employees back to work sooner by establishing light or modified work programs. As mentioned earlier, the workers' comp act permits such programs and requires employees to accept light duty that is within their medical restrictions and offered on a nine-month trial basis. The ADA likewise permits light-duty jobs that can serve to satisfy an employer's reasonable accommodation obligation.[65] While the FMLA does not permit an employer to use light-duty options to suspend an employee's right to a full twelve weeks of unpaid leave, the FMLA Final Rules state that if the employee in a simultaneous case does refuse to return to suitable work, the employer may stop payment of his or her workers' comp benefits, in compliance with the applicable workers' comp law.[66]

To limit incentives for abuse in cases involving simultaneous application of workers' comp and the FMLA, an employer may count an employee's workers' comp leave concurrently with the employee's twelve-week FMLA leave.[67] Unless the employer ensures that the two leaves are counted together, an individual looking to manipulate the process may take workers' comp leave, return to work, and then decide to take another twelve weeks of FMLA leave. Counting the two leave entitlements concurrently requires the employer to notify the employee that his or her workers' comp leave is also being designated as FMLA leave "up front," before the leave begins or within two business days after the employer learns that the employee's condition qualifies under the FMLA.[68] While on concurrently running workers' comp and FMLA leaves, the employee is precluded from receiving double compensation—workers' comp benefits plus accrued pay if this is available—since he or she, for the duration of the jointly running FMLA and workers' comp leaves, is not considered to be without pay and thus may not substitute any accrued paid leave for the unpaid FMLA portion of the leave of absence.[69]

Finally, in situations involving the ADA and the FMLA, the ADA may provide the employer with an undue hardship defense against employee demands for extended leaves that the employer simply cannot accommodate. For many employers, having to cope with an employee's absence for even twelve weeks may be too costly. In such a case, the employer may succeed in arguing that it should be permitted to consider prior periods of FMLA leave and deny an employee's request for additional leave over twelve weeks because of undue hardship.[70]

Simultaneous Coverage and Continuation of Benefits

The right to continued benefits during a leave period under the ADA and the FMLA illustrates the basic rule mentioned earlier: that employers in simultaneous coverage situations must apply whichever law's provisions provide the greater rights to employees. The ADA does not require that employers maintain employment benefits while an injured employee is on leave or on some other form of accommodation. In contrast, the FMLA requires that an employer

maintain group health benefits during a leave period. According the employee the greater rights could lead to the following scenario: The employer attempts ADA reasonable accommodation by offering a disabled employee a part-time work schedule or leave of absence with no benefits; if the employee is also covered by the FMLA, he or she could use the provisions of the FMLA and have the modified work arrangement treated as FMLA "intermittent leave," or a "reduced-leave schedule," with employment benefits maintained for up to twelve weeks.

Simultaneous Coverage and Reinstatement Rights

In cases of simultaneous coverage, several tensions arise over the issue of reinstatement rights. For example, the workers' comp statute does not specify precisely whether an employer must reinstate an injured employee after a leave of absence, while both the ADA and FMLA do impose such an obligation. And, the ADA and FMLA themselves differ in their reinstatement requirements.

Workers' Comp Non-Retaliation Requirements

Under workers' comp, an injured employee cannot be discharged for having in good faith filed a workers' comp claim. This anti-retaliatory discharge provision (formerly found at G.S. 97-6.1) was added to the workers' comp law in 1984. G.S. 97-6.1 also provided several defenses to employers accused of retaliatory discharge, including a provision making it permissible for the employer to discontinue the employment of an injured employee "if the employee has received compensation for permanent total disability or for permanent partial disability that interferes with the employee's ability to adequately perform available work."[1] Under G.S. 97-6.1, as interpreted by the North Carolina courts, employers were essentially released of any further employment obligation to the injured employee by accepting and paying out the employee's workers' comp claim on the basis of a "permanent total" or "permanent partial disability," as provided under the act.

In 1992 the General Assembly repealed G.S. 97-6.1 and enacted a new anti-retaliation law applicable to workers' compensation: the North Carolina Retaliatory Discrimination Act (REDA).[2] REDA contains language similar to the earlier law that makes it illegal to take any retaliatory action against an employee who files a workers' comp claim. But unlike the old law, REDA does not say an employer is no longer obligated to continue the employment of an injured employee who receives compensation for a permanent total or permanent partial disability. Instead, the new law provides that "it shall not be a violation for [the employer] to discharge or take any other unfavorable action with respect to an employee who has engaged in protected activity as set forth under [REDA] if the [employer] proves by the greater weight of the evidence that it would have taken the same unfavorable action in the absence of the protected activity of the employee."[3] Whether this language will be applied in the same way as that of former G.S. 97-6.1 is unclear. The courts have not yet decided a case on this issue.

ADA and FMLA Reinstatement Requirements

While an injured employee may not enjoy reinstatement rights under workers' comp, he or she does have them in a simultaneous coverage situation under the ADA and FMLA—although the two laws impose different reinstatement obligations on employers. The ADA accords the greater right by requiring that a disabled employee be reinstated to the same position he or she held before a leave of absence, unless the employee is no longer qualified (meaning the employee cannot do the essential functions of the job even with a reasonable accommodation) or the employer can show that holding the position open would be an undue hardship.[4] If the job is no longer available because it would have been an undue hardship to hold it open, or if the employee cannot perform that job even with accommodation, the employer must consider reassigning the employee to a vacant position for which the employee is qualified if one exists.[5]

In contrast to the requirements under the ADA, the employer does not have to reinstate an employee returning from FMLA leave to the same position; the employer may return the employee to either the same position he or she held before the leave or to an equivalent position with the same pay, benefits, and other terms and conditions of employment.[6] Also, the employer does not have to show undue hardship to transfer the employee to an equivalent position instead of restoring the employee to the same position he or she previously held. Once the employer offers

to reinstate the employee to the same or an equivalent position and the employee has exhausted the twelve weeks of leave provided under the act, the employer has satisfied its FMLA reinstatement obligations.[77]

Resolving the Reinstatement Rights Conflict

Again, the rule seems to be that the employer must follow "whichever statutory provision provides the greater rights to employees." Thus, even after an employee has successfully claimed a "permanent total disability" under workers' comp, an employer still may have to evaluate the injured employee's reemployment status to determine if he or she is entitled to return to work under the ADA or FMLA.[78] Under the FMLA, the employee is entitled to return to the same or an equivalent job; however, if an employee's continuing condition makes it impossible for him or her to perform an essential function of the position after exhausting twelve weeks of FMLA leave, the employer has no further obligation under the FMLA to accommodate the employee.[79] The employee also may have a right under the ADA to return to work with a reasonable accommodation—unless the employer can show undue hardship.[80]

Conclusion

It's clear from this discussion that employers who view the ADA, the FMLA, and workers' comp as separate and distinct responsibilities do so at their own peril. To successfully navigate this legal Bermuda Triangle it is essential to have a working knowledge of each law's requirements. It might be a good idea for employers to consult the agencies that administer these laws for interpretive guidance,[81] as well as an attorney who practices employment law. An employer also must adopt an integrated approach to managing its compliance obligations under the three laws. By doing so, employers will avoid violating the laws; they also will be better prepared to minimize unnecessary employee leaves. An employer might consider administering its leave policies in an integrated fashion. Bringing workers' comp, FMLA, ADA, and other employer-provided leave policies together under one roof, rather than administering them separately, can eliminate confusion among both the employer and employees over what leave employees may be eligible to take. Employers also should use the ADA's reasonable accommodation rule as the impetus to begin a proactive and comprehensive light-duty job program, which might help revamp failing workers' compensation programs stymied by widespread fraud and mismanagement. The interaction of the ADA, FMLA, and workers' comp poses a significant compliance challenge for employers, but it might present an opportunity to cure some ills, too.

So what about poor Joe, who fell and injured his back while trying to repair the gutter?

How much time off is he due? What pay and benefits is he to receive during that time off? The minimum time off he is due is twelve weeks of unpaid leave under the FMLA (with continuation of group health plan benefits). If he has suffered a permanent total disability, the maximum time off he is due might stretch out indefinitely. That would be the case under the workers' comp law. Under workers' comp, Joe also is entitled to two-thirds of his average week's wage, plus medical and rehabilitation expenses. Although the employer might lawfully terminate Joe's employment under the FMLA if he cannot perform an essential function of the job after twelve weeks of leave and under the workers' comp act if it pays out his claim on the basis of a permanent total disability, the employer must first evaluate whether Joe has a disability covered by the ADA and whether it might be possible to keep him employed with a reasonable accommodation.

What kinds of medical certification may the employer require? Who gets to pick the doctor? Looking at all three statutes together, it is clear that the employer may require sufficient certification to understand the scope of the injury and the prognosis, and to provide an objective basis on which to assess whether the employee should continue in his previous job. Initially, it might be unclear who gets to pick the doctor, but all three acts allow the employer to secure second (and in one case, third) opinions.

What rights does Joe have when he is ready to go back to work? He may have no reinstatement rights; in that case, he may never get back to work for this employer. But if his recovery period is short and he remains able to do the job, then he will likely be entitled to reinstatement.

Notes

1. N.C. Gen. Stat. §§ 97-1, -101. Hereinafter the General Statutes will be cited as G.S.
2. 42 U.S.C.A. §§ 12101–12213.
3. 29 U.S.C.A. §§ 2601–2654.
4. The U.S. Department of Labor, the agency respon-

sible for enforcing the FMLA, provided recent guidance on many of the unanswered questions regarding the interplay of the ADA, FMLA, and workers' comp laws in its FMLA Final Rules adopted to implement the act and made effective April 6, 1995. *See* FMLA Final Rules published in the Federal Register, 60 Fed. Reg. 2180–2279 (January 6, 1995) (to be codified and replace the FMLA Interim Rules at 29 C.F.R. pt. 825). (Hereinafter the Code of Federal Regulations citation will be used to cite the Final Rules.)

5. In cases involving employee work-related injuries and non-work-related medical conditions, North Carolina public employers also must consider and evaluate possible legal obligations under four other sources of state law—the workplace safety and health program requirements under the North Carolina Occupational Safety and Health Act, established at G.S. 95-148 (additional requirements are found at G.S. 95, Art. 22); the disability leave entitlements available under both the Local Government Employees' Retirement System (LGERS), established at G.S. 128, Art. 3 (applicable to covered municipal and county employees); and the Teacher and State Employees' Retirement System (TSERS), established at G.S. 135, Art. 1 (applicable to covered community college and state employees); and lastly, their own personnel leave policies.

6. 42 U.S.C.A. § 12112; the ADA's employment provisions contained in Title I of the act became effective for all public- and private-sector employers with fifteen or more employees as of July 26, 1994. 29 C.F.R. § 1630.2(e).

7. This statement refers to several legal concepts (e.g., "reasonable accommodations," "qualified individual with a disability," and "essential functions") that are key components of the ADA's employment provisions. These concepts are examined in more detail later in comparison with the requirements of the FMLA and the workers' comp statute. The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing the ADA, has issued implementing regulations, "EEOC Regs" (29 C.F.R. pt. 1630), together with an extensive "Interpretive Guidance" (published as an Appendix to the regulations—29 C.F.R. pt. 1630 app.) defining these terms. The commission has also issued a *Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* that provides additional guidance on the legal requirements set forth in the ADA and its regulations. [Hereinafter the *Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* will be referred to as *EEOC Tech. Assist. Manual*. This document is published by the Bureau of National Affairs, Inc. (BNA). BNA is a private concern that publishes comprehensive legal guides to state and federal fair employment practice laws, including a full text of statutes and administrative regulations. BNA's telephone number is 800-372-1033.]

8. *See* "EEOC Charges on ADA Violations Mounting Rapidly, Official Says," *Daily Labor Report* (BNA) 1993 *DLR* 220 d13 (Nov. 17, 1993); "Disabilities Act: Greater Activism, Awareness Mark ADA as Law Extends to Small Employers," *Daily Labor Report* (BNA) 1994 *DLR* 141 d24 (July 26, 1994).

9. 26 U.S.C.A. § 2612(a)(1)(A)–(D).

10. 26 U.S.C.A. § 2614(a)(2) and (c)(1).

11. 26 U.S.C.A. § 2614(a)(1)(A) and (B).

12. G.S. 97-2(6); Hicks v. Guilford County, 267 N.C. 364, 366, 148 S.E.2d 240, 242 (1966); Rorie v. Holly Farms Poultry Co., 306 N.C. 706, 709, 295 S.E.2d 458, 461 (1982).

13. *EEOC Tech. Asst. Manual*, p. S-3. This minimum size requisite applies only to Title I's provisions. State and local governments, regardless of size, have been covered by the employment nondiscrimination requirements under Title II of the ADA since 1992. 42 U.S.C.A. §12132; *EEOC Tech. Asst. Manual*, p. S-3, pt. I. Title II is enforced by the U.S. Department of Justice. The requirements of Title II are beyond the scope of this article.

14. 29 U.S.C.A. § 2611(4).

15. 29 C.F.R. § 825.108(d).

16. *EEOC Tech. Asst. Manual*, p. S-3, pt. I-2.

17. 29 U.S.C.A. § 2611(2); 29 C.F.R. § 825.110(a).

18. G.S. 97-2(2).

19. G.S. 97-2(6).

20. G.S. 97-2(9).

21. Hilliard v. Apex Cabinet Co., 305 N.C. 593, 290 S.E.2d 682 (1982). North Carolina courts apply the presumption that an injured employee's disability and eligibility for benefits end when he or she returns to work. *See* Ashely v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967). This presumption will not apply, however, to cases where an employee is properly determined to have a "permanent total disability" (as defined under the workers' comp statute). In such cases, evidence that the employee has resumed (or has refused an opportunity to so resume) earning his or her pre-injury wages is not conclusive on the issue of disability and the employer cannot avoid a finding of continuing disability or diminished capacity to earn by placing the employee in a special (i.e., "make-work") position not available generally in the market, though paying the same wages the employee was receiving prior to the injury. *See, e.g.*, People v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986).

22. G.S 97-29, -30, -31, -31(17); Gamble v. Borden, Inc., 45 N.C. App. 506, 508, 263 S.E.2d 280, 281, *rev. denied*, 300 N.C. 372, 267 S.E.2d 675 (1980). The workers' comp statute also provides benefits for scarring and permanent impairment of specific parts of the body. G.S. 97-31. An employee is eligible for these benefits whether or not a disability exists and without regard to the aforementioned disability considerations.

23. 42 U.S.C.A. § 12102(2).

24. 29 C.F.R. § 1630.2(h) (EEOC Regs.).

25. 29 C.F.R. pt. 1630 app. § 1630.2(h) (Interpretive Guidance).

26. 29 C.F.R. § 1630.2(i).

27. 29 C.F.R. § 1630.2(j)(2).

28. 29 C.F.R. § 1630.2(j)(3)(i). *See also EEOC Compliance Manual Section 902: Definition of the Term Disability*, Fair Emp. Pract. Binder (BNA) No. 769, at 405:7251, 7266-7270 (March 14, 1995). In this recent ADA guidance material issued by EEOC, the commission reiterates this point and provides examples.

29. 29 C.F.R. § 1630.2(j)(3)(i). *See, e.g.*, Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994) (The court cited the EEOC's criteria and held that, although the plaintiff could not perform certain necessary duties of his position after his on-the-job injury, he failed to produce evidence [court

placed burden on him to do so] showing that he suffered an impairment that substantially restricted his overall employment opportunities. Accordingly, the court found he did not have a disability covered by the ADA.).

30. 29 C.F.R. § 1630.2(n)(2). To determine this, employers also must consider whether there is a reasonable accommodation that would allow the disabled employee to do the job. However, the act limits the employer's obligation to provide accommodations. The employer is not required to make fundamental or substantial modifications in its operations. *See, e.g.,* Reigel v. Kaiser Foundation Health Plan of North Carolina, 859 F. Supp. 963 (E.D.N.C. 1994) (The court ruled that a physician, disabled by a work-related shoulder injury, was not a "qualified individual with a disability" because she was unable to perform the essential duties of practicing medicine, including lifting and using her hands and arms during patient examinations. The employer was able to demonstrate the employee was not qualified by presenting evidence from a workers' compensation claim hearing in which the employee and her doctor testified that she was totally disabled and could no longer do the job. The court said the employer was not required to restructure its operations by assigning some of the employee's tasks to others in the department or by hiring someone as her assistant. According to the court, neither of these options was a reasonable accommodation.). Tyndall v. National Educ. Centers, Inc., 31 F.2d 209 (4th Cir. 1994) (Court ruled that a teacher with a lupus condition who, despite employer's efforts to accommodate her with leave for treatment, consistently missed classes due to her illness for extended periods, was not a "qualified individual with a disability" entitled to ADA protection. According to the court a regular and reliable level of attendance is a necessary element of most jobs, particularly in the case of a teacher expected to teach classes.).

31. 29 U.S.C.A. § 2611(11); 29 C.F.R. § 825.114 (Final Rules).

32. In fact, there is no minimum size for *state and local government* employers. G.S. 97-2(1).

33. For public employers there is no minimum size because of Title II. *See* note 16.

34. *EEOC Tech. Assist. Man.*, p. S-5, pt. II-4 and p. S-36, pt. VIII-8.

35. *EEOC Tech. Assist. Man.*, p. S-36, pt. VIII-8.

36. *EEOC Tech. Assist. Man.*, p. S-36, pt. VIII-8.

37. G.S. 97-19(2), -25; Schofoeld v. Great Atl. & Pac. Tea Co., 299 N.C. 582, 590-91, 264 S.E.2d 56, 62 (1980).

38. *See* Baldwin v. Duke Power Company, I.C. No. 133392 (Order, May 15, 1991) (The commission observed that "[w]here treatment has clearly failed and alternatives are promising, a party who can show a greater probability of success through a different physician or treatment is entitled to a change.").

39. 29 U.S.C. § 2613. The definition of "health care provider" under the FMLA includes social workers practicing under state law and any provider recognized by the employer or the employer's group health plan. 29 C.F.R. § 825.114(a), (b), (c).

40. 29 C. F. R. § 825.306.

41. 29 C.F.R. § 825.307(a). (This is a change DOL made in the FMLA Final Rules. Previously, under the Interim Rules, the employer was prohibited from having any contact with the employee's health care provider.)

42. 29 C.F.R. § 825.307(2).

43. 29 C.F.R. § 825.307(2).

44. 29 U.S.C.A. § 2616(c) and (d).

45. 29 C.F.R. §§ 1630.13 and 1630.14

46. 29 C.F.R. § 825.307(1).

47. *EEOC Tech. Assist. Man.*, p. S-37, pt. IX-3.

48. *See* Peggy R. Mastroianni and David K. Fram, "The Family and Medical Leave Act and the Americans with Disabilities Act: Areas of Contrast and Overlap," *The Labor Lawyer* 9 (Spring 1993): 553.

49. 42 U.S.C.A. § 12111(9).

50. 29 C.F.R. app. § 1630.9.

51. *EEOC Tech. Asst. Man.*, p. S-12, pt. III-11; 29 C.F.R. § 1630.2(p).

52. 29 C.F.R. § 825.207.

53. 29 C.F.R. § 825.215(d)(4).

54. 29 U.S.C. § 2612(b); 29 C.F.R. § 825.203(a).

55. Under an intermittent leave or reduced-time schedule, only the leave actually taken is deducted from the employee's twelve-week leave entitlement. For example, if an employee takes off two days of a normal five-day work week, the employee has used only two-fifths of a week of FMLA leave. If an employee who normally works thirty hours per week works only twenty hours a week under a reduced-time schedule, the employee's ten hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced-time schedule. 29 C.F.R. 825.205(a) and (b).

56. 29 C.F.R. § 2613(b)(5).

57. 29 U.S.C.A. § 2612(e)(2)(B). Several additional points on employee notice requirements are important to note. First, the regulations state that the employee requesting a foreseeable leave need not expressly assert his or her rights under the FMLA and need not make reference to the act. It is up to the employer to inquire further and gather enough information to determine whether the employee qualifies for FMLA leave and to work out the details of the leave. 29 C.F.R. § 825.302 (c). Secondly, when the leave is unforeseeable, the employee must give notice "as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303. The regulations state further that an employee who is unable to foresee his or her leave will be expected "to give notice to the employer no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible." When the leave is unforeseen, the employee is similarly not required to mention the FMLA specifically when he or she gives notice. 29 C.F.R. § 825.303. The Fifth Circuit Court of Appeals recently rejected an employer's arguments that permitting employees to avail themselves of the FMLA's protections without expressly invoking the act is contrary to the FMLA and exposes employers to abuse of the act's generous provisions. The court found the act does provide adequate safeguards against delinquent employees by permitting the employer to require medical certifications, to obtain second and third medical opinions, and to request periodic recertifications of the continuing need for intermittent leave. *See* Manuel v. Westlake Polymers Corp., No. 95-

30050, slip op. (5th Cir. Oct. 3, 1995). The court's conclusion assumes that employers will always get enough information early on about the employee's condition, from either the employee or someone calling to report the absence, to determine if the absence should be designated as FMLA leave. To ensure this, employers should ask an employee, "Do you have a serious health condition? Are you requesting time off under the FMLA?"

58. 29 U.S.C.A. § 2612(e)(2)(A).

59. 60 Fed. Reg. 2180, 2198 (1995).

60. 60 Fed. Reg. 2180, 2198 (1995).

61. 29 U.S.C.A. § 2612(b)(2). According to the act's regulations, the alternate position must offer pay and benefits equivalent to the employee's previous job; however, the new job need not have equivalent duties. Also, the employer may transfer the employee to a part-time job paying the same hourly rate and benefits. In such a case, the employer may not eliminate benefits otherwise not given to part-time employees. But employers may proportionately reduce earned benefits, such as vacation leave, where they normally do so for their part-timers. 29 C.F.R. § 825.204(c).

62. Estes v. North Carolina State University, 89 N.C. App. 55, 365 S.E.2d 160 (1988).

63. G.S. 97-32, -32.1.

64. The FMLA and workers' comp provide a few statutory safeguards for employers dealing with employee fraud and misrepresentation. Under the FMLA, the employer has the right to deny FMLA benefits and take other action (such as discipline) against an employee who has fraudulently obtained FMLA leave. The workers' comp makes it a criminal offense (Class 1 misdemeanor) for an employee to willfully make false statements to obtain benefits. And, under workers' comp, health care providers are subject to civil penalties and fines for fraudulent medical bills and providing unnecessary treatment or services.

65. Although light or modified work options may be viewed as reasonable accommodations under the ADA, the act does not mandate that employers establish such positions to accommodate disabled employees. Employers who have created light-duty jobs as a means of gradually returning injured employees to their full capacity, should make sure the jobs are temporary and that this limitation is clearly specified prior to a job assignment. Otherwise, the employee may claim a permanent entitlement to the modified duty position. *See, e.g.*, Howell v. Michelin Tire Corp. 860 F. Supp. 1488 (M.D. Ala. 1994).

66. 29 C.F.R. § 825.207(d)(2).

67. 29 C.F.R. § 825.207(d)(2).

68. 29 C.F.R. § 825.208(b)(1). In some cases, the employee may be out briefly and return to work before the employer can determine if his or her condition was also covered by the FMLA. The Interim Rules prohibited employers from retroactively designating leave as FMLA covered for any reason once the employee returned to work. The DOL revised the Final Rules to permit an employer to designate leave as FMLA after the fact if the employer has *provisionally* designated leave (at the time it begins) as FMLA leave and is awaiting medical certification; or the employer is unaware that some or all of an absence was taken for an FMLA reason and learned of the event after the employee returns to work, provided the employer designates the leave within two business days after the employee's return. 29 C.F.R. § 825.208(2)(e)(1) and (2). An employee may request that prior absences be designated retroactively as FMLA leave, provided he or she notifies the employer within two business days of returning to work that an absence was for an FMLA reason. 29 C.F.R. § 825.208(2)(e)(1) and (2).

69. 29 C.F.R. § 825.207(d)(2).

70. *See* Mastroianni and Fram, "The Family and Medical Leave Act and the Americans with Disabilities Act," 553.

71. *See applied in* Johnson v. Builder's Transport, Inc. 79 N.C. App. 721, 340 S.E.2d 515 (1986); Conklin v. Carolina Narrow Fabrics Company, 113 N.C. App. 542, 439 S.E.2d 239 (1994).

72. G.S. 95-240 through -245.

73. G.S. 95-241(b).

74. *EEOC Tech. Assist. Man.*, p. S-37, pt. IX-3 (There is a very limited exception allowing exclusion of employees who would pose a significant risk of substantial harm to themselves or others. This determination must be made on an individualized assessment of the employee's present ability to safely perform essential functions. Even where such a risk exists, the employer may have to make a reasonable accommodation if that would eliminate the risk or reduce it to an acceptable level.).

75. 42 U.S.C.A. § 12,111(9); 29 C.F.R. pt. 1630 app. § 1630.2(o).

76. 29 U.S.C.A. § 2614.

77. 29 C.F.R. § 825.216.

78. It might seem contradictory that an employee could be permanently and totally disabled for workers' comp purposes and simultaneously claim under the ADA that he or she is able to do the job with reasonable accommodations. One court reached this conclusion. Finding that the plaintiff's representations about her medical condition in a prior workers' compensation proceeding did conflict with her subsequent ADA claim that she could perform the essential functions of her position, the U.S. District Court for the Eastern District of North Carolina granted summary judgment in favor of the employer. *See* Reigel v. Kaiser Foundation Health Plan of North Carolina, 859 F. Supp. 963 (E.D.N.C. 1994).

79. 29 C.F.R. § 825.214(b).

80. Suppose the employer cannot reinstate the employee as he or she continues to be unable to perform the job, and the employer cannot continue to hold the position open. What then is the employee's status? Unfortunately, the employee faces the loss of a job. If the condition is covered by workers' comp, the employee may be eligible for lifetime benefits for a permanent total disability. If the condition is not work-related, many North Carolina public employees will be able to offset some of their financial loss by obtaining long-term disability benefits under the North Carolina Teachers' and State Employees' Retirement System or the Local Government Employees' Retirement System.

81. For guidance on the ADA, contact the EEOC's regional offices at (919) 856-4022 (Raleigh) or (704) 567-7100 (Charlotte); for the FMLA, contact the U.S. Dept. of Labor's regional offices at (919) 790-2741 (Raleigh) or (704) 344-6299 (Charlotte); and for workers' comp, call the N.C. Industrial Commission at (919) 733-4820 (Raleigh). ▣

Evaluating Court-Ordered Mediation

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

In 1991 legislation was passed requiring North Carolina's Administrative Office of the Courts (AOC) to conduct a pilot program of court-ordered mediated settlement conferences (MSCs). The program encompassed superior court civil lawsuits in eight judicial districts comprising thirteen counties.[1] The legislation forbade any expenditure of state funds for either the program or its evaluation. Funding came from the State Justice Institute, a private nonprofit agency, as well as from private grants obtained by the North Carolina Bar Foundation.[2] The 1991 legislation required the AOC to investigate whether the program "[made] the operation of the superior courts more efficient, less costly, and more satisfying to the litigants." At the AOC's request, the Institute of Government conducted an evaluation of the MSC program using data from direct observations, local court records, questionnaires and interviews with litigants and attorneys, and the AOC's civil case database.

The following article outlines the authors' evaluation of this pilot program.[3] An earlier article in Popular Government *described the operation of the program.[4]*

The MSC Pilot Program

In the eight pilot districts, the North Carolina Supreme Court's rules authorized senior resident judges to order, in contested[5] cases, a mediated settlement conference that the parties, their attorneys, and representatives of their insurance companies were compelled to attend.[6] All civil cases were eligible for the program except those involving actions for extraordinary writs. A majority (55.6 percent) of cases subject to the program involved negligence suits (primarily motor vehicle negligence). Other cases involved contractual disputes; collection on accounts; real property disputes; issues regarding wills, trusts, and estates; and other civil matters.

Mediators were experienced attorneys certified by the AOC after completing forty hours of approved training; their fees were paid by the parties in each case. Parties could choose their own mediator, but if they failed to do so (as they did in most cases we studied), the senior resident judge made the selection from a list of certified mediators.

Results of the Study

Much of our analysis focused on three "intensive study" counties—Cumberland, Guilford, and Surry. In these counties, cases filed from March 1992 through January 1993 were randomly assigned to either a Mediation Group (eligible to be ordered to conduct MSCs) or a Control Group (excluded from MSCs).[7] For additional comparison, we used a Preprogram Group: a sample of civil cases filed in 1989 in the three intensive-study counties, three years before the MSC program began. The cases in the Preprogram

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Group would have been eligible for the MSC program if it had existed at the time.[8]

There were 741 cases in the intensive-study county sample, 722 of which had been closed (reached court disposition) before our analysis was performed, and 19 of which remained open at that time. These 741 cases were assigned to the three groups as follows (the number of *closed* cases is shown in parentheses): Preprogram Group—243 (242) cases; Control Group—244 (235) cases; and Mediation Group—254 (245) cases.[9]

In other analysis, we combined data on cases in the Mediation Group from the three intensive-study counties with data from a sample of cases filed in Forsyth County in 1992–93, a total of 104 of which had reached disposition before our analysis was performed. (In Forsyth County *all* contested cases were eligible for mediation; no control group was created there.) This four-county dataset is broadly representative of the MSC pilot program in the thirteen pilot counties. Cumberland, Forsyth, Guilford, and Surry counties normally handle about three-fourths of all superior court civil cases filed in those thirteen counties.

Statistical Significance

We performed generally recognized tests of statistical significance on many comparisons of proportions, means, and medians. When we say that a difference we observed was statistically significant, this means that the difference was very unlikely—with a probability of less than 5 percent—to be the result of random variation in sampling. That is, it is unlikely to have occurred unless there was a true difference among the compared samples in the underlying population of cases from which the samples were drawn. When we say that an observed difference is *not* statistically significant, this means that we cannot dismiss the possibility that the observed difference occurred simply by random variation in sampling. Observed differences that are not statistically significant are considered unreliable or inconclusive.[10]

Mediation Compared with Conventional Settlement

In cases in our study, MSCs lasted up to 10.3 hours, with a median[11] time of 2.5 hours; most required only a single session (14.4 percent went beyond one session). The attorneys did most of the negotiating, frequently caucusing (holding separate meetings) with the mediator and communicating with each other through the mediator. Although litigants did little direct negotiating, their attorneys submitted possible settlement offers or demands to them for approval. Mediators often explained the process to the litigants and gave them opportunities to express personal concerns that went beyond strictly legal issues. Litigants had the opportunity to communicate with the other side directly as well as through the mediator.

Superior court civil cases are commonly resolved through conventional (unmediated) settlement negotiation. Although we did not observe such negotiation, conversations with lawyers and other observers clearly suggest that conventional settlement negotiation differs from mediated settlement in several respects. First, conventional settlement is protracted, usually lasting months or even years; mediation is usually completed in one sitting. Second, in conventional settlement the parties and their attorneys usually do not meet and negotiate face to face in the same setting; instead, attorneys make offers and counteroffers over the telephone or by letter and relay them to their clients. Third, conventional settlement does not use a neutral facilitator as does a mediated settlement. Fourth, litigants in conventional settlement have few opportunities to communicate with the other side without an intermediary.

Participation in MSCs

Despite initial expectations of the program planners that most eligible contested cases would go to mediated conferences, only 49 percent actually did so (see Figure 1).[12] One-fourth did not receive MSC orders, usually because they reached conventional (unmediated) settlement relatively early. Another fourth were ordered to mediate but did not do so; most of these settled conventionally before the deadline to mediate (the rest went to trial or were disposed of in other ways before the deadline). When mediated conferences were held, 44 percent resulted in a settlement (almost always resolving all issues), while 56 percent ended when the mediator declared that an impasse had been reached. Although impasse cases were more likely to go to trial than the average contested case,[13] most of them eventually reached conventional settlement despite the impasse at mediation.

Conventional settlement negotiation persisted despite the MSC program. Excluding cases in the Control and Preprogram groups, 68 percent of settlements

in Cumberland, Forsyth, Guilford, and Surry counties were conventional, not mediated.

Percentages of eligible cases that actually participated in an MSC varied widely among the four counties, from 30.7 percent in Cumberland to 73.7 percent in Surry. Yet the "success rate"—the percentage of mediations that ended in settlement—was about the same (41.5 to 50.0 percent) across the four counties. This suggests that increasing the MSC program participation in counties where it is low would not affect the success rate.

Case Outcomes

Mediation did not affect case outcomes in terms of money or other relief received by the parties. The Control Group and Mediation Group did not differ significantly in case outcomes. Also, comparing mediated settlement with conventional settlement showed little difference in case outcomes. However, both conventional and mediated settlement had outcomes that were quite different from trial. Plaintiffs who settled, with or without mediation, were more likely to receive *some* money than plaintiffs who went to trial. The proportions of plaintiffs who received money were about the same for mediated settlement (88 percent) and conventional settlement (83 percent), but were much lower for trial (53 percent). Plaintiffs could get more money at trial if they were willing to take the risk of a zero recovery. Including zero amounts, the average amount received at trial ($58,451) was greater than the average received in either mediated settlement ($37,673) or conventional settlement ($34,364).

Disposition Time

Comparison of the Mediation Group with both the Control and Preprogram groups indicated that the MSC program reduced the median filing-to-disposition time in contested cases by about seven weeks—from 407 days in the combined Preprogram and Control groups to 360 days in the Mediation Group (Figure 2). The program apparently directly affected the disposition time of cases that mediated successfully and also indirectly affected the time by spurring earlier conventional settlement.

Where cases were not exposed to the MSC program, the normal median time to reach a conventional settlement was about 380 days from filing to disposition (378 days in the Preprogram Group and 381 days in the Control Group).[14] In the Mediation Group, including both mediated and conventional settlement, the median time was 329 days—about two months less than in the comparison groups. In the Mediation Group, for mediated settlement the median time was 315 days and for conventional settlement, the time was 363 days.[15] Thus both forms of settlement (mediation and conventional) tended to occur faster (with a shorter median time) when these cases were exposed to the MSC program.

Figure 1
MSC Program: Participation and Case Outcome
(Cumberland, Forsyth, Guilford, and Surry Counties)
N=349

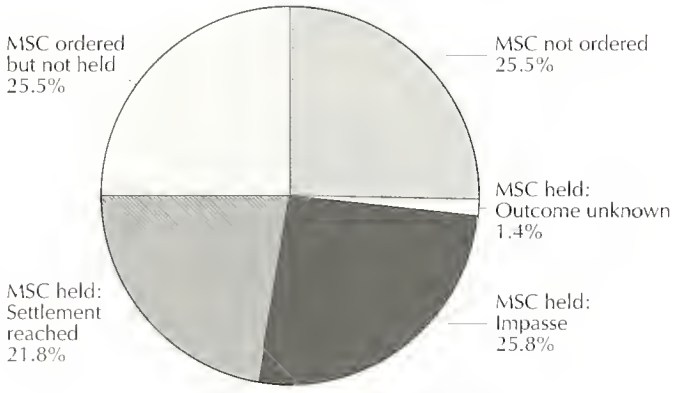
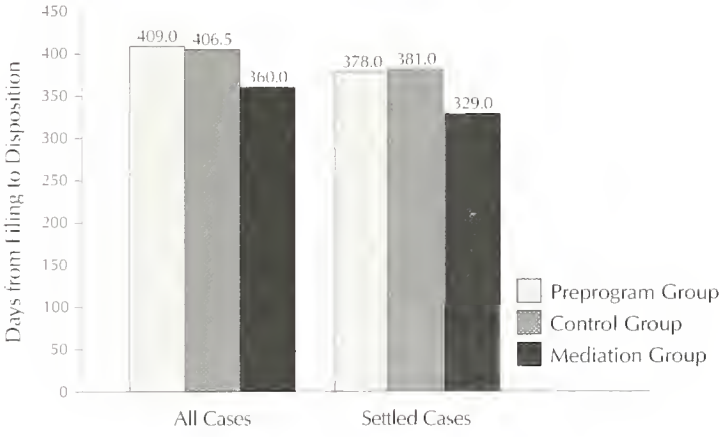


Figure 2
Median Time from Filing to Disposition (in Days)
for Preprogram, Control, and Mediation Groups
(Cumberland, Guilford, and Surry Counties)



Settlement versus Trial

The MSC program evidently did not affect the overall probability of settlement in contested cases. Figure 3 shows the percentages of cases in the Preprogram, Control, and Mediation groups that (1) settled at mediation, (2) settled conventionally, (3) went to trial, and (4) reached other dispositions.[16] The Preprogram and Control groups' cases (which were not exposed to court-ordered mediation) had a conventional settlement rate determined from court records that was about 65 percent. Eighteen (18.0) percent of the Mediation Group's cases (which were exposed to court-ordered mediation) settled in mediation and another 47.8 percent settled conventionally, producing a total settlement rate of 65.8 percent—the same as in the Preprogram and Control groups.[17]

Also, the program did not significantly reduce the trial rate, which was 12.0 percent in the Preprogram Group, 9.8 percent in the Control Group, and 9.4 percent in the Mediation Group. We therefore concluded that the cases that settled in mediation would have settled conventionally in the absence of the MSC program, and the program did not divert cases from trial.

Motions, Orders, and Judges' Time

Court record data did not indicate that the MSC program reduced court workload in terms of the numbers of motions processed by judges and orders issued by judges or clerks. However, several senior resident judges said that the program freed judges' time by encouraging earlier settlement, thus reducing the number of cases that were placed on trial calendars and that ended up settling at the last minute. While our study did not provide an independent confirmation of this assertion, it makes sense in light of our finding that the program hastened settlement.

Litigants' Satisfaction with Their Cases

Litigants who participated in mediated settlement conferences generally spoke favorably of the experience. Most said they thought highly of the mediators and felt the procedures were fair. Most participants indicated that they understood what was going on and had a chance to tell their side of the story. They also thought that the conferences were the best way to handle cases like theirs and would recommend the program to a friend.

However, this sense of satisfaction with MSCs did not affect litigants' *overall satisfaction with their cases.* In other words, although most litigants thought that mediation was worthwhile, they might have been less than satisfied with other aspects of the litigation process. To put it another way, although people like mediation, it may not make them feel any better about accidents, contract disputes, and lawsuits (we measured satisfaction by forming scores based on litigants' responses to a variety of specific questions). There was no significant difference in satisfaction scores between the Mediation Group and Control Group, with respect to either case outcomes and procedures or costs and time.

Plaintiffs who settled—with or without mediation—were more satisfied with their entire cases than were those who went to trial. For defendants, the reverse was true; those who settled were less satisfied than those who went to trial. (These findings might be because plaintiffs were more likely to receive money at settlement than at trial, and defendants were more likely to lose money.) But there were no significant differences in entire-case satisfaction between mediated and conventional settlement.

For plaintiffs, participating in MSCs carried a certain risk: Those who participated, reached impasse, and later reached a conventional settlement were even less satisfied with their entire cases than were those who went to trial. It may be that going through an unsuccessful mediation, even if one settles eventually, is more frustrating than going through a trial.

Litigants' Costs Compared

The MSC program may have produced savings for litigants, but our results on this issue must be considered inconclusive. For plaintiffs, average attorney fees and costs were $6,717 for mediated settlement, $9,667 for conventional settlment, and $30,146 for trial (see Figure 4).[18] For defendants, these averages were $4,507, $8,072, and $13,238, respectively. These observed differences were large, but were not statistically significant with regard to mediated settlement versus either conventional settlement or trial. Neither were the differences significant when comparing the entire Mediation and Control groups. Thus the observed differences could well have been due to random variation (see the explanation of statistical significance on

page 34). Also, they could have been due to the inherent characteristics of litigants or cases rather than to modes of disposition. For example, the cases that tended to reach mediated settlement may have been less complex than other cases, or their litigants may have been less stubborn, and therefore may have involved less work for attorneys.

Compliance with Settlements and Judgments

The program evidently had no effect on parties' compliance with what they agreed to pay or do in settlements or what was required of them by verdicts or other court-imposed awards. Although we did see that compliance was much higher with settlements than with trial verdicts, mediated and conventional settlement had the same level of compliance,[19] which was quite high; in most cases, the parties would not sign an agreement unless prompt compliance was assured. The compliance rate was the same in the Mediation and Control groups.

Lawyers' Attitudes toward Program

A survey of attorneys in the thirteen pilot counties, as well as of certified mediators statewide, found that almost all favored continuing the program, and three-fourths wanted it expanded beyond the pilot districts. Most had favorable views regarding the program—for example, most believed that mediators were fair and that the program reduced the likelihood of trial and hastened settlement. Attorneys who were certified mediators were somewhat more favorable than were nonmediator attorneys.

Conclusions and Suggestions

One reaction to our study's results—a reasonable one, in our view—may be that the MSC program is working well enough. Litigants who attend MSCs generally are satisfied with the experience, and attorneys overwhelmingly favor it. The program definitely shortens disposition time and may reduce attorney costs. Judges believe it saves their time. It costs the court system virtually nothing. Therefore, why not continue it as is?

On the other hand, our findings may show to some that the program needs improvement and further testing. More participation in MSCs, and at an earlier stage, might help the program further reduce disposition time, court workload, and litigants' costs. Also, more participation would bring more litigants into a process that has satisfied most participants. If the court system wishes to increase and hasten MSC participation, the study's results suggest that this could

Figure 3
Mode of Disposition Compared
for Preprogram, Control, and Mediation Groups
(Cumberland, Guilford, and Surry Counties)

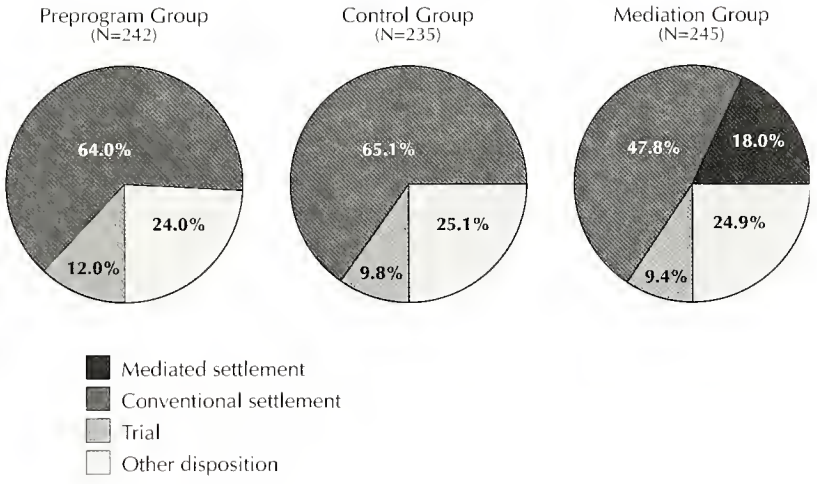
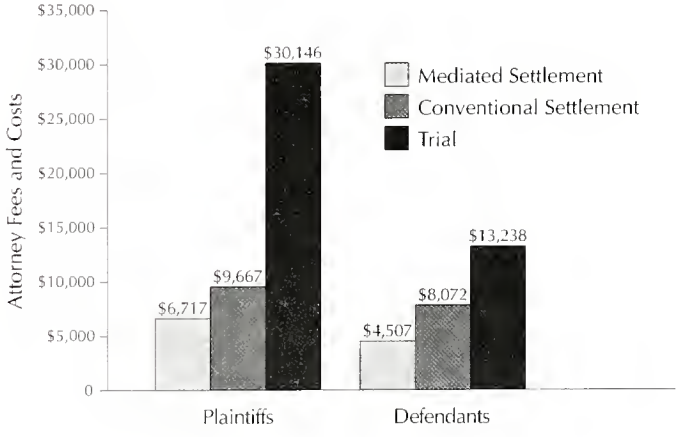


Figure 4
Mean Attorney Fees and Costs Compared
for Mediated Settlement, Conventional Settlement, and Trial
(Cumberland, Guilford, and Surry Counties)



be done by tightening the program's current rules and by strengthening the court's management of the program.

Shortening the time for the court to order an MSC would be one possible rule change. The current rules set no limit, allowing the senior resident judge to issue the order any time after the defendant's deadline to file an answer.[20] This change could replace conventional settlement with mediation in many cases that now settle before they are ordered to mediate or before the time to mediate expires[21]—a change that would be desirable if court administrators believe that mediation is an inherently better procedure for settlement. Also, reducing the order-to-conference time could replace trial with mediation in some cases that currently go to trial before the time to mediate expires, thus freeing the time that judges and other court officials would otherwise spend on those trials.[22] A shorter time limit could sharply reduce the number of cases that currently receive an unmediated disposition because a mediation order had not been issued.

Another possible rule change would be to shorten the maximum time from issuance of the order to holding the MSC. The current rule, effective October 1, 1995, provides that the conference must be held in *no less than* 120 days from the order and in no more than 180 days.[23] The original version of this rule required the conference to be held no later than 60 days after the court's order, but this limit was frequently exceeded; analysis revealed that the median time from order to conference was 77.0 days.[24]

A third possible rule change would be to require that no trial will take place unless the parties have first participated in a mediated settlement conference. Close to half of trials, according to our data from the four counties, currently take place without an MSC being held. Testing a no-trial-without-mediation rule would show whether it is possible to reduce the trial rate through the MSC program.

We also believe that if court administrators want to increase participation in MSCs, more active case management may be necessary. In counties that had relatively high rates of participation in MSCs, court administrators were more aggressive and persistent in following up to make sure that deadlines were met for appointing a mediator and for holding the mediated conference. This kind of intervention may be essential to increase MSC participation. In addition, senior judges need to make it clear that willful failure to mediate will result in the use of authorized sanctions.[25] In some cases at present, getting the parties to the table within the time the MSC order allows seems to be left up to the mediator, although arguably it is the court's responsibility.

In responding to our preliminary talks on the study, some judges and attorneys have been skeptical about the idea of increasing participation in MSCs through shorter deadlines and more intensive case management. In their view, cases settle depending primarily on factors outside the court's control. They are concerned that if cases are brought into mediation sooner, some will fail to reach settlement in mediation because they are not "ready to settle." As they see it, making MSCs happen faster and more often would lose more mediated settlements than it would gain.

But a different view underlies the MSC program: By changing court procedures, it is possible to encourage parties to settle earlier in a substantial number of cases. This view receives support in the findings of this study. First, the MSC program shortened settlement times in both mediated and conventional settlement, without reducing the overall settlement rate. Second, the "success rate" at mediation was the same in high-participation counties as in low-participation counties.

Regardless of which view is correct—both may be partially correct—it would be easy to see whether increased participation produces a net gain or net loss in mediated settlement. If the court system wants to increase participation and adopts changes such as those we have suggested, it would be necessary to keep data only on the number of eligible cases, the number of MSCs that occur, and the number of these conferences that settle.

Although our study suggests that the MSC program has not been as successful as its advocates may have expected, its results should not be greeted with discouragement. The MSC program is the first instance in which the state has experimented on a broad scale with alternative dispute resolution in large civil cases. The state's earlier experiment with court-ordered arbitration was more successful, but that program concerned much smaller civil cases with claims limited to $15,000 (two-thirds were under $3,000), involving mostly contractual or bill-collection matters.[26] The MSC program handles cases that are much more difficult with respect to legal issues, complexity of evidence, and size and type of claims. We hope that the results of this study will encourage further careful planning and testing to improve the civil justice system in North Carolina.

Notes

1. The legislation was codified as N.C. Gen. Stat. § 7A-38(a). The eight original pilot districts (chosen by the AOC) were 6A (Halifax County); 12 (Cumberland County); 13 (Bladen, Brunswick, and Columbus counties); 15B (Orange and Chatham counties); 18 (Guilford County); 21 (Forsyth County); 17B (Surry and Stokes counties); and 30B (Haywood and Jackson counties). Later, in 1994, the program was expanded to include four additional districts and counties: 26 (Mecklenburg County), 28 (Buncombe County), 8B (Wayne County), and 10 (Wake County). Most recently, in 1995 N.C. Sess. Laws ch. 500, the General Assembly authorized expansion of the program statewide "as soon as practicable." Our study dealt only with the original eight pilot districts (thirteen counties).

2. We are grateful for the support of the grantors, which include the State Justice Institute (a private nonprofit agency); the IOLTA Board of Trustees; the North Carolina Bar Foundation Endowment; the Broyhill Family Foundation; and the Hanes Family Foundation. *Neither the North Carolina Bar Association nor any of the grantors is responsible for any of the statements or data in this report.*

3. For more information, see the authors' final report on the study: *Court-Ordered Civil Case Mediation in North Carolina: An Evaluation of Its Effects* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, forthcoming).

4. Elizabeth D. Ellen, Kelly McCormick, and Stevens H. Clarke, "A Pilot Program in Court-Ordered Mediation," *Popular Government* 60 (Winter 1995): 2–11. North Carolina also is testing court-ordered mediation of child-custody disputes [see Leslie C. Ratliff, "A Case Study in Child-Custody Mediation," *Popular Government* 60 (Winter 1995): 2, 12–23].

5. A contested case is one in which the defendant files an "answer" disputing liability. If the defendant does not contest liability, there is no need to order the case to mediation.

6. North Carolina Supreme Court, *Rules Implementing Court Ordered Mediated Settlement Conferences* (1991) (hereinafter *MSC Rules*).

7. In the Control Group, a small amount of departure from the study design occurred. MSCs took place in 5.5 percent of Control Group cases. Most of these cases (ten of thirteen) were ordered to MSCs by senior judges, presumably because the parties requested the orders; all reached settlement at MSCs, suggesting that these cases would have settled anyway. For reasons explained in the final report (see note 3), we believe that this departure had virtually no effect on the Control Group as a whole and thus did not compromise the study's findings.

8. In the Preprogram Group (cases filed in 1989), although the MSC program did not exist for several years after the cases were filed, the court ordered one especially slow case to mediation. This case went to an MSC (resulting in settlement) in February 1993, nearly four years after it was filed. We excluded this single, quite unusual case from the Preprogram Group.

9. In analyzing median filing-to-disposition times, we included the open cases, because they were followed up well beyond the computed medians for their groups and thus did not distort the calculations. In other analysis, we used only the closed cases.

10. Often there is confusion about statistical significance. It is not simply a matter of, say, the number of percentage points by which two proportions differ or the amount by which two averages differ. Rather, statistical significance involves both the sizes of the samples of cases or litigants being compared and the amount of variation in each sample. The observed difference in percentages may be large, but this means little if one or both of the samples are quite small—the result could easily be just an accident of sampling. Or, even if both samples are sizable, an observed difference in means may not be significant if there is a large degree of variation within the groups being compared.

11. The median of a set of values is the midpoint. A median time of 2.5 hours means that in half of the cases, the time did not exceed 2.5 hours.

12. These results were based on a sample of 349 closed contested cases subject to mediation orders in the four counties (including the Program Group from the three intensive-study counties plus the Forsyth County cases). The court could have ordered mediation in any of these 349 cases. Note that the Preprogram and Control groups in the three intensive-study counties were not included in these calculations.

13. The trial rate for these impasse cases was 16.7 percent, compared with 8.0 percent for all Mediation Group cases.

14. These calculations omitted the very few cases still open when our data collection ended.

15. The 75th percentile filing-to-settlement time (i.e., the time within which 75 percent of cases settled) also was considerably less in the Mediation Group (458.0 days) than in either the Preprogram Group (511.5) or the Control Group (504).

16. Other dispositions included summary judgment, judgment on the pleadings, and dismissal without prejudice (dismissal without prejudice leaves the case open for further litigation, but often the plaintiff does not pursue it further).

17. The 65 percent settlement rate was determined from court records, and slightly undercounts the true settlement rate, which probably was closer to 72 percent. Because court records did not indicate whether a case settled (unless a consent judgment was entered, which rarely occurred), we applied the following proxy definition of settlement to court record data: A case was considered settled if court records indicated that (1) the plaintiff or both parties filed a voluntary dismissal with prejudice, (2) a consent judgment was entered, or (3) a mediated settlement conference was held and the mediator's report indicated that a settlement occurred. Analysis of the litigant/attorney questionnaire data, in which attorneys and litigants more accurately identified cases that settled, indicated that this proxy definition captured 90.7 percent of actual settlements, and only 3.0 percent of actual settlements did not meet this definition.

18. Normally, fees paid to mediators were included in the fees that attorneys charged their clients.

19. For example, the rate of full payment of money owed was 90.9 percent in mediated settlement, 86.9 percent

in conventional settlement (virtually the same), and 53.9 percent in cases that ended in trial judgments.

20. *MSC Rules*, Rule 1(A)(2) [formerly Rule 1(b)]. The time allowed for filing of the answer is thirty days after the defendant is served with notice of the plaintiff's action [North Carolina Rules of Civil Procedure, Rule 12(a)(1)].

21. Data on 349 cases from four counties (the three intensive-study counties' Mediation Group plus Forsyth County cases) indicate that 43.3 percent of the 240 cases that settled did so without a mediated settlement conference being held.

22. Of the 28 trials among the 349 cases in the four-county sample, 46.4 percent took place without an MSC being held.

23. *MSC Rules*, Rule 3(b), as amended effective October 1, 1995.

24. Court records showed that often parties successfully requested the courts to issue extensions beyond the limit set in the initial MSC order and even beyond the 60-day limit and the 180-day limit. Both the original version of the rules [Rule 1(c), permitting the court to grant a motion to "defer the conference"] and the current version of the rules [Rule 3(c), allowing the court to grant a motion to "extend the deadline for completion of the conference"] provided a way of extending the time for holding the conference beyond what was set in the court's initial order. It is unclear whether these provisions really were intended to authorize judges to let conferences be postponed beyond the time limit of Rule 3(b).

25. Under *MSC Rules*, Rule 5, the resident or presiding judge may punish a party for a failure-to-attend a duly-ordered MSC without good cause by imposing attorney fees, mediator's fees, and expenses incurred by persons attending the conference; by punishing for contempt of court; or by imposing any other sanction authorized by Rule 37(b) of the North Carolina Rules of Civil Procedure. Although our study suggests that enforcement of MSC orders was not vigorous, sanctions have been used. In Triad Mack Sales and Service, Inc., v. Clement Brothers Co., 113 N.C. App. 405, 438 S.E.2d 485 (1994), the North Carolina Court of Appeals upheld the trial judge's entry of a default judgment against a defendant for failing without good cause to attend an MSC ordered in Forsyth County.

26. *See* Stevens H. Clarke, Laura F. Donnelly, and Sara A. Grove, *Court-Ordered Arbitration in North Carolina: An Evaluation of Its Effects* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1989).

Special Series: Local Government on the Internet

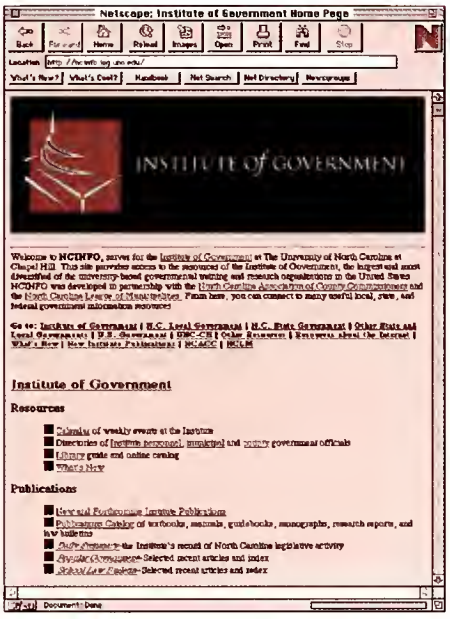
Part Two: Electronic Mailing Lists

Patricia A. Langelier

Part One of this series (see the Summer 1995 issue of Popular Government*) explained some basics about the Internet: what you can get, how to get on, and how to get around. It also introduced many readers to NCINFO, a comprehensive site for North Carolina state and local government resources on the Internet. NCINFO is a joint project of the Institute of Government, the North Carolina League of Municipalities, and the North Carolina Association of County Commissioners. It contains pointers to executive, legislative, and judicial sources (state and federal), links to the Association of County Commissioners, the League of Municipalities, and the home pages of North Carolina cities and counties. It also provides access to Institute of Government resources, including recent articles from* Popular Government *(such as Part One of this series) and* School Law Bulletin*—as well as news, weather, online library catalogs in North Carolina and throughout the world, and other reference material. It's available on the Internet at the following addresses:*

http://ncinfo.iog.unc.edu
and
gopher://ncinfo.iog.unc.edu

In Part Two, we'll take a closer look at an Internet feature known as electronic mailing lists; we'll explain how to participate in a mailing list and will describe some mailing lists set up by the Institute to facilitate communication among local government officials.



NCINFO home page

David Harris, regional cable TV administrator for the Piedmont-Triad Council of Governments, logs onto the Internet first thing each day at work. He quickly runs through his listservs (electronic mailing lists). One of these listservs is operated by the Federal Communications Commission, one by the Bell telephone systems, and one by the Alliance for Community Media. In a matter of minutes, he is completely up-to-date on new FCC rules and orders, the current lobbying interests of the telephone companies, and the regulatory concerns of public, educational, and government-access channels and community TV organizations. If he discovers the need to examine federal legislation, he can find it through NCINFO.

"I made up my mind when I joined the Internet," Harris says, "that I would use it for easier management of my time and for ease of gathering necessary information for my work. My professional life has been enhanced in that I have access, in a faster way, to job-related information."

Harris is in the first wave of governmental professionals who use electronic mailing lists to gain immediate access to information that simply was not available before the Internet.

What Are Mailing Lists?

Mailing lists are based on a simple idea: sending an e-mail message to many people at once. When you e-mail a message to one person, you send it to that person's e-mail address. If you wanted to send that message to several people, you could send it to each one individually. If you thought you might have occasion to send another message to that same group, however, you could create a group name (called an "alias") that includes the addresses of everyone in the group. Then with one e-mail entry you could send the same message to everyone on the list.

With the proper software and access to the Internet, that basic notion can be expanded to create mailing lists that reach people anywhere in the world and allow list members to correspond with everybody on the mailing list at once.

One-way lists. Some mailing lists are used for one-way-only communications, such as announcements or bulletins to a designated list of people. The telephone companies' Bell.COM listserv, which David Harris uses, is an example of a one-way-only news bulletin. This method is a convenient way for a central source to disseminate information quickly.

The author is the Institute of Government librarian and former project manager for NCINFO.

Discussion-type lists. Mailing lists also may be used to stimulate discussion and information sharing among a large number of people. Subscribers to these listservs can exchange program ideas and find solutions to problems. The Alliance for Community Media is an example. This discussion-type mailing list gets started when someone decides to "host" a discussion, sets up a mailing list on a computer, and invites people to subscribe, at no cost. The host—or someone else—serves as an administrator, or "listowner," using a software program to manage the work of subscribing, unsubscribing, and so on. Examples of mailing list manager software programs include Listserv, Listproc, Mailbase, Majordomo, and Procmail. Participants in a mailing list are referred to as "the list," and the discussion group as a whole is called "the listserv" or mailing list.

When any participant sends a message to the list, the listserv software posts the message to the list automatically. In other words, the message is forwarded to the entire group of people who subscribe to the list. Any response that another participant sends is distributed automatically, and the entire transcript of the "conversation" is written on the "bulletin board." This feature allows individuals to catch up at any time. There are mailing lists on thousands of subjects, and new lists are created every day.

Bob Henshaw, of the Rural Center for Economic Development, says he uses mailing lists for a number of reasons. "One obvious advantage," says Henshaw, "is the time savings associated with being able to reach a large number of people with a single message. Another is the use of listservs as an information-gathering tool. When I need to acquire specific information, the subscribers of a list can usually provide me with immediate feedback, often from a range of perspectives, depending on how diverse subscribers are."

Effective Use of Mailing Lists

The only requirement for participation in these mailing lists is an Internet connection. North Carolina local government officials interested in connecting to the Internet should contact the State Information Processing Services office (919-981-5555) for information.

Subscribing. Once you are connected to the Internet, subscribing to a mailing list entails merely sending an e-mail message to the listserv address. To subscribe to mailing lists, leave the subject line blank, and, in the body of the message, type

Subscribe *<listname>* *<your name>*

For example, if you wished to subscribe to the Municipal Telecommunications List (a forum for local government officials interested in telecommunications), you would address your e-mail to

majordomo@civicnet.org

For the body of your e-mail message, you would type

subscribe muni-telecom *<your name>*

Be careful to type the proper combination exactly. For example, it may matter whether you type upper case or not, and it does matter where you put your spaces. Any typos in the address will keep your message from being delivered.

If you find subscription to a particular mailing list unproductive, you can unsubscribe just as easily. Key in the following:

unsubscribe *<listname>*

When you sign up for a list, you will receive a message confirming your subscription. Save your confirmation message for reference. It will answer many administrative questions you may have later: how to send messages to the list, how to unsubscribe, how to suspend mail, how to search the mail archives, and so on. The greatest source of confusion about mailing lists comes from the fact that every listserv has two addresses. The first is the listserv address you use when subscribing and unsubscribing. For instance, for the Municipal Telecommunications List, the listserv address is

majordomo@civicnet.org

The second address is the list address. You receive this when you subscribe. You use it when sending messages that you intend for distribution to all subscribers.

Using your listservs. Once you have an e-mail account and you subscribe to mailing lists, you will find yourself checking for messages. To some extent, e-mail will reduce the number of telephone messages on your desk, and you'll find it easier to reply to an e-mail message than to try to track someone down by phone, especially after normal business hours. E-mail can be composed and "mailed" anytime. The message is mailed at your convenience and read at the recipient's convenience.

Some mailing lists generate many messages (five to thirty per day); others are used by participants only as needed. Providing a clear, succinct subject line when you post your message will enable recipients to quickly determine the nature and urgency of the message. The message itself should be similarly concise. Of course, everyone on a mailing list has the freedom to delete a message without ever reading it. And there's no need to become overwhelmed by messages. If a mailing list generates more messages than you can handle, or doesn't address issues that interest you, you can simply unsubscribe from the list to stop the flow of messages.

Mailing lists can be an effective way for members of a committee to communicate, and they provide a simple and direct forum for colleagues to share information and seek guidance from one another.

Mailing lists may be moderated or unmoderated. In a moderated list, the

listowner previews all of the messages sent by participants of the list. The listowner decides which messages are appropriate for the list and then distributes them to list members. For example, a listowner may discard some messages to keep businesses from inundating members with advertisements. Some moderators combine several messages on a related topic into a digest that's distributed periodically. This reduces the amount of mail and saves time for list members. When a list is created, the listowner usually indicates the scope and purpose of the list and outlines what types of messages will be accepted. Unmoderated lists are much more common than moderated ones.

Mailing lists may be open or closed. Anyone can subscribe to an open list; closed lists are open to qualified participants only. A professional organization may restrict list subscriptions to its members, for instance. In a closed list, the administrator receives the requests to subscribe and accepts subscription requests only from individuals who qualify.

Barbara Semonche not only subscribes to a number of lists, she is also a listowner of three relating to special libraries and journalism. As director of the UNC–CH School of Journalism and Mass Communication Library, she maintains that running listservs is "akin to running the pony express 135 years ago. I don't think that the quantity, quality, and timeliness of this information could be exchanged any other way. It is exciting, even dramatic sometimes, when you connect with a remote source who comes up with *the* answer to a hitherto impossible-to-solve reference query."

The World Is Moving toward the Internet

As you read this issue of *Popular Government*, new users are joining the Internet. In overwhelming numbers, they are gaining access through the popular and user-friendly interface of the World Wide Web. But even before the WWW, as it is known, emerged, the Internet bustled with activity in the form of electronic mail, the electronic transfer of files (known as FTP), and mailing lists.

Created to support military research and communication, the Internet expanded greatly when the National Science Foundation (NSF) got involved in the late eighties. The NSF created five supercomputer centers around the country and developed regional networks to link researchers and scientists in educational institutions and industry to the supercomputers. The networks supported e-mail, FTP, and listservs. Use of the Internet gradually expanded throughout the academic research world to faculty, staff, and students on many college campuses.

The usefulness of the Internet has been demonstrated by users far from college campuses. Organizations and businesses use e-mail and mailing lists to alert their workers in far-off locations of new policies, prices, and procedures or to communicate with their suppliers and customers. As local area networks are developed for federal, state, and local government agencies, connections to the Internet are established and use of the Internet by public officials becomes a reality. In fact, a federal law passed in May, which mandates that federal agencies reduce paperwork, encourages the dissemination of public information by federal agencies via the Internet. The Paperwork Reduction Act of 1995, as it is known, also allows for the creation of a Government Information Locator Service (GILS) to list and describe public information available from federal government agencies and to help the public locate the information maintained by federal agencies.

In North Carolina the Office of the State Controller's Information Resources Management Commission has issued "Principles for Statewide Information Resource Management," which recommends that the state encourage agencies to "promote sharing of resources, including data and information, and to support direct access and interaction by citizens" and that "once captured, information will be stored and exchanged using electronic means."

How to Find Listservs

To obtain a current catalog of all mailing lists, you can send an e-mail message to

listserv@listserv.net

Leave the subject line blank. In the message, type

LIST GLOBAL

The file will be large, more than 300kb. If you want to find lists on a particular topic such as law, your message would look like this:

LIST GLOBAL/LAW

You would receive a list of listservs with the word *law* in the name.

Another way to search for mailing lists is to connect to a World Wide Web service provided by Indiana University. This site (**http://scwww.ucs.indiana.edu/mlarchive**) enables you to search a database of nearly 13,000 listservs by keyword. A search for the word **economic** yielded a list of thirty-four mailing lists in four countries. For more information about an individual list, you can send an e-mail message to the address given on the screen by clicking on the hypertext links (usually, underscored or differently colored items).

The Institute of Government has begun to set up mailing lists to provide a quick and accessible means of communication for local government officials, enabling them to interact with one another easily to share expertise and solve problems. Charles D. Liner has set up a

Data Processing Officials Online

The World Wide Web home page of NCLGISA (North Carolina Local Government Information Systems Association) is now online. From the Institute of Government's home page, NCINFO, just click on NCLGISA under "North Carolina Local Government" (or enter the World Wide Web address: **http://ncinfo.iog.unc.edu/nclgisa/nclgisa.html**). The purpose of the home page is to provide a way for NCLGISA members to communicate through the Internet and for the Institute of Government to communicate with them. Here are some of the key features:

- The Announcements section allows the Institute to post announcements to all members and also allows the members to post messages and announcements that might be of interest to others (they can send an e-mail message containing their announcements directly to the Institute from this section).
- Documents of interest to NCLGISA members can be printed, and members can download those documents from the home page. For example, in the summer of 1995 the new public records law and an Institute of Government analysis of that law were posted soon after the law was enacted.
- The List of Members includes e-mail addresses of members. One can send an e-mail message to one of the people on the list just by clicking on the e-mail address, which causes an e-mail form to appear.
- Members can e-mail to the Institute changes in names and addresses in the membership and mailing list directly from the membership listing.
- Members can subscribe to the NCLGISA listserv, which is another way for members to communicate. Members who subscribe can send e-mail messages to all other subscribers and will receive all messages sent by others. In effect, the listserv creates a discussion group for members.

listserv for members of the North Carolina Local Government Information Systems Association (NCLGISA, see "Data Processing Officials Online"). Another listserv provides communication with and among alumni of the Institute's Facilitation and Organization Development Group course. Still another, set up by David Owens, is aimed at planners in North Carolina.

Finally, a mailing list has also been developed for members of the North Carolina Information Highway Local Government User Workgroup and anyone else interested in the work of this group. The workgroup's mission is to identify, encourage, and facilitate cost-effective uses of telecommunication and information technologies and the state information highway to enhance the delivery of services by local governments. The list is managed by this writer, interim chair of the workgroup. To subscribe to the list, simply send a message to

majordomo@ncinfo.iog.unc.edu

Where your e-mail screen asks for "message," type

subscribe LocalGov@ncinfo.iog.unc.edu
<your name>

For more lists, see "Sample Mailing Lists of Interest to Local Governments," page 45.

In Part Three we'll explain how local governments are using World Wide Web home pages on the Internet to improve communication among elected officials and agency personnel, to provide government information and services, and encourage public participation of citizens.

Suggested Reading

Allison, G. Burgess. *The Lawyer's Guide to the Internet*. Chicago, Ill.: American Bar Association, Section of Law Practice Management, 1995. 347 pp. $29.95.

Practical and technical guide to the Internet and how it works. Lists legal resources and explains how to access them.

Gilster, Paul. *The Internet Navigator*. New York: John Wiley and Sons, 1993. 496 pp. $24.95.

How the Internet works, use of e-mail, and how to find sources. A good tutorial for learning your way around the Internet.

Krol, Ed. *The Whole Internet User's Guide and Catalog*. 2d ed., Sebastopol, Calif.: O'Reilly and Associates, Inc., 1994. 543 pp. $24.95.

Excellent basic how-to guide.

MacLeod, Don. *The Internet Guide for the Legal Researcher: A How-to Guide to Locating and Retrieving Free and Fee-Based Information on the Internet*. Teaneck, N.J.: Infosources Publishing, 1995. 305 pp. $50.00.

Finding and using legal information on the Internet.

Public Technology, Inc. *Surfing the 'Net: A Local Government Guide to Internet Connection*. Washington, D.C.: Public Technology, Inc., 1995. 56 pp. $16.00. (telephone 800-852-4934).

Explains what the Internet is, why a local government might connect, what type of connection a city or county might need, and how a jurisdiction might provide services on the Internet.

Sample Mailing Lists of Interest to Local Governments

Alliance for Community Media—Southeast Region

A national nonprofit, membership organization that promotes political, regulatory, and industry support for public, education, and government-access channels and community TV organizations. It facilitates networking and education among people and organizations involved with community media. The Alliance monitors the latest developments in telecommunications technology and advocates for the public's access to emerging media systems.

URL:
http://www.shadow.net/wlrn/tapacm.html
Listserv address:
alliance-nw-request@isu.edu
Message: subscribe

AWD (Americans with Disabilities)

The Americans with Disabilities Listserv (AWD) is a moderated forum for discussion related to the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Fair Housing Amendments Act, the Individuals with Disabilities Education Act (IDEA), and other laws related to discrimination and disability compliance. Areas of discussion include litigation, pleadings, settlements, verdicts, corporate polices, agency guidance, regulations, statutes, and cases.

Listserv address:
majordomo@counterpoint.com
Message:
subscribe awd <*your e-mail address*>

Bell.COM

Operated by the Alliance for Competitive Communications (ACC), which is coordinating the seven Bell telephone companies' effort to open communications markets. Their Internet site provides users with information on regulatory and policy issues associated with the ongoing telecommunications policy–reform debate. Materials available on Bell.COM include information on issues such as cable TV competition, American universal service policies and practices, and the impact of regulations on consumers. The listserv provides regular updates on telecommunications legislation.

URL: gopher://bell.com
URL: http://bell.com
Listserv address: listserver@bell.com
Message: subscribe bell <*your name*>

CD4URBAN

Urban-development discussion group maintained by the Community Development Society.

Listserv address:
listproc@u.washington.edu
Message:
subscribe cd4urban <*your name*>

CJUST-L: Criminal Justice Discussion List

CJUST-L is meant to serve as a forum for free and open discussion of criminal justice issues and problems—both real and theoretical—from individuals' experiences or the newspaper's front page. Research done by list members is especially welcome. It is meant to be primarily an academic discussion list, although all subscribers are encouraged to participate regardless of their backgrounds.

Listserv address:
listserv@cunyvm.cuny.edu
Message: sub cjust-l <*your name*>

COMMUNET

Discussion list for issues related to community or civic networks.

Listserv address: listserv@uvmvm.uvm.edu
Message:
subscribe communet <*your name*>

ECON-DEV

Discussion for local government economic development practitioners. Managed by Stephanie Neumann, economic development specialist in Littleton, Colorado.

Listserv address: majordomo@csn.net
Message:
subscribe econ-dev <*your name*>

ELECNET

A list for elections administrators and anyone else interested in elections law or the mechanics of running elections. Managed by the Center for Governmental Services at Auburn University.

Listserv address: maiser@cgs.auburn.edu
Message: subscribe elecnet <*your name*>

FODG

Restricted to Facilitation and Organization Development Group (FODG) members—people who have attended the Institute of Government's group facilitation and consultation workshop. To reach the listowner, send e-mail to the following:
FODGMGR.iog@mhs.unc.edu

GOVMANAG:
Management and Leadership in Government

This list is intended as a place for government managers at all levels to discuss ideas, problems, and solutions. The focus is on managerial excellence, leadership, and career development, with an emphasis on real-world experience and practical ideas. Government managers and leaders in different agencies and branches of government can ask advice, compare notes, forward news, and generally communicate with others in similar positions.

Listserv address: listserv@list.nih.gov
Message:
subscribe govmanag <*your name*>

JUST INFO:
Justice Information Electronic Mailing List

The National Criminal Justice Reference Service (NCJRS) list is designed for criminal justice professionals to obtain accurate, current, and useful criminal justice–related information. Subscribers to the service will receive an electronic newsletter on the first and fifteenth day of every month. It will report on such relevant topics as

- new information from the Office of Justice Program agencies,
- the latest products and services from NCJRS,
- updates on federal legislation,
- important criminal justice resources on the Internet, and
- NCJRS international services.

Listserv address:
listproc@ncjrs.aspensys.com
Message: subscribe justinfo <*your name*>

Sample Mailing Lists of Interest to Local Government

LOCALGOV

This list is for members of the North Carolina Information Highway (NCIH) Local Government User Workgroup and anyone else interested in the work of this group. The workgroup's mission is to identify, encourage, and facilitate cost-effective uses of telecommunication and information technologies and the North Carolina Information Highway (NCIH) in order to enhance the delivery of services by local governments. The list is managed by Pat Langelier (Institute of Government), interim chair of the workgroup.

Listserv address:
majordomo@ncinfo.iog.unc.edu
Message: subscribe localgov <*your name*>

MUNEX-L:
Municipal Information Exchange

A service created especially for local governments in New York State. The project aims to help rural communities and citizens utilize the emergent technological infrastructure to improve the capacity and performance of their governments. MUNEX is a project of the Cornell Local Government Program.

Listserv address: listproc@cornell.edu
Message: subscribe munex-l <*your name*>

MUNI-TELECOM

The Municipal Telecommunications List focuses on the design, use, and policy of municipal telecommunications networks, including regional networks supporting multiple municipalities (for example, regional library networks). Currently, this list is open to all subscribers, but Center for Civic Networking intends this to be a forum for municipal officials and staff, such as management information systems (MIS) directors, telecom directors, cable commissioners, geographic information systems (GIS) managers, library automation managers, dispatch system operators, etc. Secondarily, it is intended to be a forum for those who provide equipment and services to the municipal telecom environment. The intent is to focus on nitty-gritty design issues surrounding the construction of municipal networks, including the following:

- city- and townwide data networking,
- use of cable television I-net infrastructure to support town needs,
- consolidation of school/library/municipal networks,
- regional network approaches for rural areas, and
- purchasing and negotiation strategies.

Listserv address: majordomo@civicnet.org
Message:
subscribe muni-telecom <*your name*>

NC PLANNING List

The NC PLANNING list allows planners to communicate through e-mail. The list is currently open and unmoderated. Although participation is open to anyone, the focus of the discussion is on professional planning in the state of North Carolina, and most participants are professionals in that field.

Listserv address:
majordomo@ncinfo.iog.unc.edu
Message:
subscribe NCPlanning <*your e-mail address*>

NCLGISA Listserver—
North Carolina Local Government Information Systems Association

Say you have a technical problem and want to know if other NCLGISA members can help. Or you want to know if someone else already has an application like the one you are developing. The NCLGISA listserver enables NCLGISA members to share information and seek advice from one another through e-mail. The listserver is unmoderated; participation is open to all NCLGISA members.

Listserv address:
majordomo@ncinfo.iog.unc.edu
Message:
subscribe NCLGISA <*your e-mail address*>

REGO-ORG

A reinventing-government discussion list that focuses on organizational structure.

Listserv address: listproc@gmu.edu
Message: subscribe rego-org <*your name*>

REGO-QUAL

A reinventing-government discussion list that focuses on quality leadership.

Listserv address: listproc@gmu.edu
Message:
subscribe rego-qual <*your name*>

ROADMAP

A free, twenty-seven-lesson Internet training workshop conducted via LISTSERV in the fall of 1994 and early spring of 1995. You can no longer subscribe to Roadmap, but you can get all of the Roadmap workshop lessons sent to you. Every single one of the Roadmap workshop's twenty-seven lessons is on a computer at the University of Alabama, and you can retrieve the lessons using a few, simple e-mail commands.

Listserv address:
LISTSERV@UA1VM.UA.EDU
Message: GET MAP PACKAGE F=MAIL

After you send off your letter, a computer at the University of Alabama will process it and—usually within twenty-four hours—will e-mail you two letters: one telling you a little more about the Roadmap workshop, and another telling you how you can retrieve the workshop lessons. You can also find the Roadmap workshop archives on the University of Alabama's CMS Gopher server (UA1VM.UA.EDU) in the "Network Resources, Services and Information" menu, or at **http://ua1vm.ua.edu/~crispen/crispen.html** on the World Wide Web.

Ruraldev

Open discussion list on community and rural economic development interests.

Listserv address: listserv@ksuvm.ksu.edu
Message:
subscribe ruraldev <*your name*>

Sister City Listserv

This electronic mailing list was created as an international focal point for the exchange of information concerning the Sister Cities programs. This connection will promote and foster easy, affordable, and timely communication between all Sister Cities members. The mailing list is now

accessible as a central information location for the 931 U.S. Sister Cities communities, including 16 in Kentucky, and some 1,530 foreign communities in 111 nations. The host computer system is located at the National Distance Learning Center, Owensboro, Kentucky.

Listserv address: siscity-request@siscity.occ.uky.edu
Message:
subscribe siscity <*your name*>

TRDEV-L

TRDEV-L provides a forum for the exchange of information on the training and development of human resources. The primary focus of this list is to stimulate research collaboration and assistance in training and development for the professional and the academic communities.

Listserv address:
listserv@psuvm.psu.edu
Message:
SUB TRDEV-L <*your name*>

Municipal Attorney Listserv

The Municipal Code Corporation has established a listserv for municipal attorneys. Anticipated uses include sending an ordinance of the month, fielding requests for sample ordinances, and facilitating debate among municipal attorneys on topics of current interest.

Listserv address:
listserv@list.municode.com
Message: subscribe MCC-MUNIATTY-L <*first name_last name*> (for example: *John_Doe*)

Other Internet sites mentioned in the article:

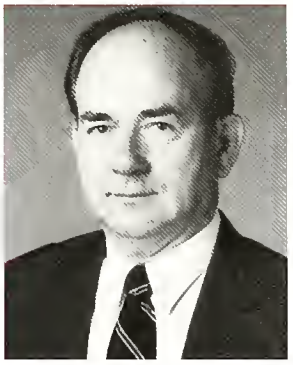
Daily Digest (Federal Communications Commission)

The Daily Digest provides a brief synopsis of Commission orders, news releases, speeches, titles of public notices; published every business day, available by 4 P.M. via WWW.

URL: http://www.fcc.gov/daily.html

At the Institute

Sanders Receives UNC's Highest Award


Bob Donnan

John L. Sanders

John L. Sanders, retired member of the faculty of the Institute of Government and its director for twenty-five years, is the 1995 recipient of the University Award. In 1979 the Board of Governors of The University of North Carolina created this award to recognize illustrious service to higher education and dedicated it as "the highest distinction of this nature that the University bestows." In the intervening years, the award has gone to thirty-six individuals, including William Friday, John Hope Franklin, Terry Sanford, and Charles Kuralt.

The tribute to Sanders that accompanied the award, given by James E. Holshouser, Jr., former governor of North Carolina and member emeritus of the Board of Governors, cites Sanders's "honesty, legal acumen, and common sense" and his "unyielding principle and unwavering devotion to the University and the state."

During his tenure at the Institute, Sanders played key roles in reorganization of state government, in legislative and congressional redistricting, in the creation of the community college system, and in the restructuring of public higher education. He is recognized as a leading expert on the North Carolina Constitution.

From 1973 to 1978 Sanders served the university as vice president for planning, writing the university's first long-range planning document and drafting the early plans relating to desegregation of the university. —*Editors*


Will Owens

Anne S. Davidson

Davidson Newest Faculty Member

The Institute of Government's newest faculty member is Anne S. Davidson, who has been working with the Institute's management group since September. Davidson served for the past seven years as the training coordinator for the city of Asheville, and worked on a number of projects with the Institute's management faculty during that time. At the Institute she will work with the Effective Management Program, facilitate retreats by local governmental units, work with county and municipal administrations, and participate in management projects already under way.

She began working in Asheville in 1988, where she was in charge of training and organizational development for the city and its related boards and commissions. "Lots of days I was in the sewers with a video camera, and lots of days I was working directly with council members," she says. "And lots of days my tasks were in between." Her focus in recent times was on the city's total quality management and employee involvement programs.

Davidson is a South Carolina native and a graduate of that state's Presbyte-

Recent Publications of the Institute

Elder Law Bulletin No. 2
"1995 Legislation Affecting Senior Citizens and Government Programs for the Elderly"
September 1995
John L. Saxon (10 pages)
$4.00 plus 6% tax for N.C. residents

Guidebook for North Carolina Property Mappers
Second edition, 1995
William A. Campbell
[95.04] ISBN 1-56011-232-8
(64 pages)
$11.00 plus 6% tax for N.C. residents

A Legal Manual for Area Mental Health, Developmental Disabilities, and Substance Abuse Boards in North Carolina
1995
Mark F. Botts
[95.16] ISBN 1-56011-247-6
(102 pages)
$12.00 plus 6% tax for N.C. residents

Mental Health Law Bulletin No. 1
"1995 Legislation Affecting Mental Health, Developmental Disabilities, and Substance Abuse Services"
October 1995
Mark F. Botts (13 pages)
$4.50 plus 6% tax for N.C. residents

State and Local Government Relations in North Carolina: Their Evolution and Current Status
Second edition, 1995
Edited by Charles D. Liner
[95.10] ISBN 1-56011-244-1
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rian College. She received a master's degree in library science from The University of North Carolina at Chapel Hill and another master's in business administration from Western Carolina University. For several years she was a professor of marketing and management at Western Carolina and acted as a consultant on management matters to a number of large private corporations, such as Carolina Power & Light Company and Glaxo.

Davidson can be reached at (919) 962-6712. —*Editors*

Measuring Public Services

Are the police, solid waste collection, and street maintenance services where you live accomplishing their objectives and providing the levels and quality of service expected of them? How much are these and other services really costing, and how have those costs changed over time? Are other jurisdictions providing the same types, level, and quality of service? Are they doing it less expensively? Could a private company do the jobs at lower cost?

The members of the North Carolina Local Government Budget Association (NCLGBA)—probably more than others—know that budgets and financial statements cannot completely answer these questions. There is no tool available, but the NCLGBA and the Institute of Government are working together to develop one, through the North Carolina Local Government Performance Measurement for Benchmarking Project.

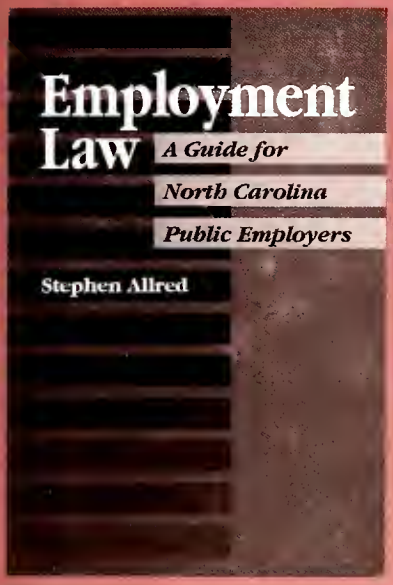
The goal of the project is to develop a methodology for measuring the performance and costs of local government services and then provide a framework for comparing service levels and costs over time within a jurisdiction, between jurisdictions, and between governmental entities and the private sector.

The project got off the ground in mid-1995, with the assistance of Institute budgeting specialist A. John Vogt, when Paula Few, formerly budget officer for the town of Cary, was hired as project coordinator. Phase I of the three-phase project, expected to be completed in March 1997, is now under way. Phase I will focus on development of the measurement methodology and then on compiling performance and cost data for the seven participating cities: Asheville, Cary, Durham, Greensboro, Raleigh, Wilmington, and Winston-Salem. In Phase II, occupying much of 1996, five to seven large counties will join. A project steering committee composed of representatives of the cities and counties participating in Phases I and II is providing direction and guidance. The committee is cochaired by Ann Jones (budget and evaluation director for Winston-Salem) and Joseph Bartel, Jr. (budget and management director for Forsyth County). The systems developed in the project will be disseminated to all North Carolina cities and counties in the third phase.

The project will develop measures that relate costs to service level or quality and to outcomes achieved in meeting service demand or need or in accomplishing particular objectives. From these, participating cities and counties and other North Carolina local governments will be able to identify or develop benchmarks against which service levels and costs in any particular jurisdiction can be compared.

Participation by counties and cities in Phase III will be purely optional. Vogt, Few, and the members of NCLGBA are optimistic that the results of the project will entice wide participation. For futher information about the project, contact Paula Few by phone (919-962-3707) or by e-mail (few.iog@mhs.unc.edu). —*Editors*

Off the Press



Employment Law: A Guide for North Carolina Public Employers

Second edition, 1995

Stephen Allred

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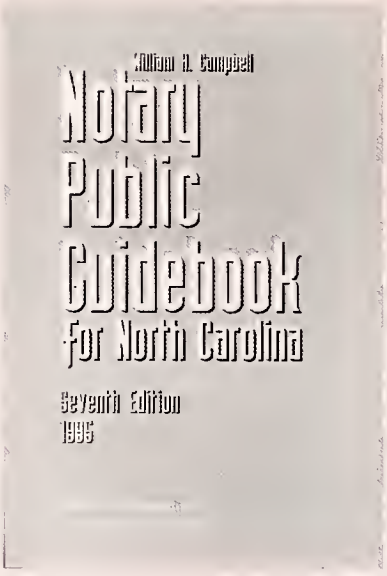

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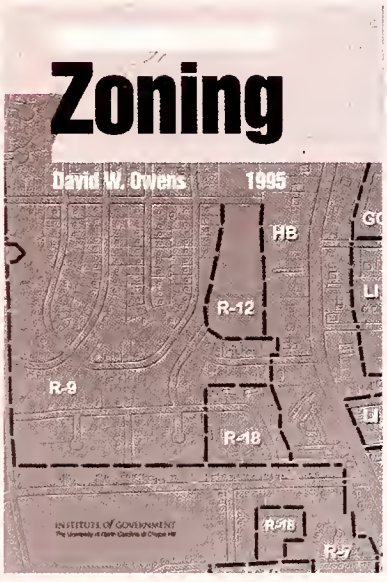

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. . . and at the same time
to preserve the form and spirit of
popular government . . .

—James Madison
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