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On the cover Severe illnesses or traumatic accidents sometimes render people unable to decide for themselves the kind of medical treatment that they would like—or not like. Advance directives such as health care powers of attorney and living wills guide family, friends, and health care professionals in such circumstances. Photo © Jerry Markatos.

Advance Directives for

Nancy M. P. King and Arlene M. Davis

Part One of Two Articles

All people make decisions nearly every day that affect their lives, their health, and their future. Everybody has a powerful interest in retaining control over important decisions, and for many people, decisions about health care and medical treatment are among the most important. People who are concerned about their health care often make "advance directives" to direct their treatment decisions during times when they are unable to decide for themselves. Advance directives can name decisions, or decision makers, or both.

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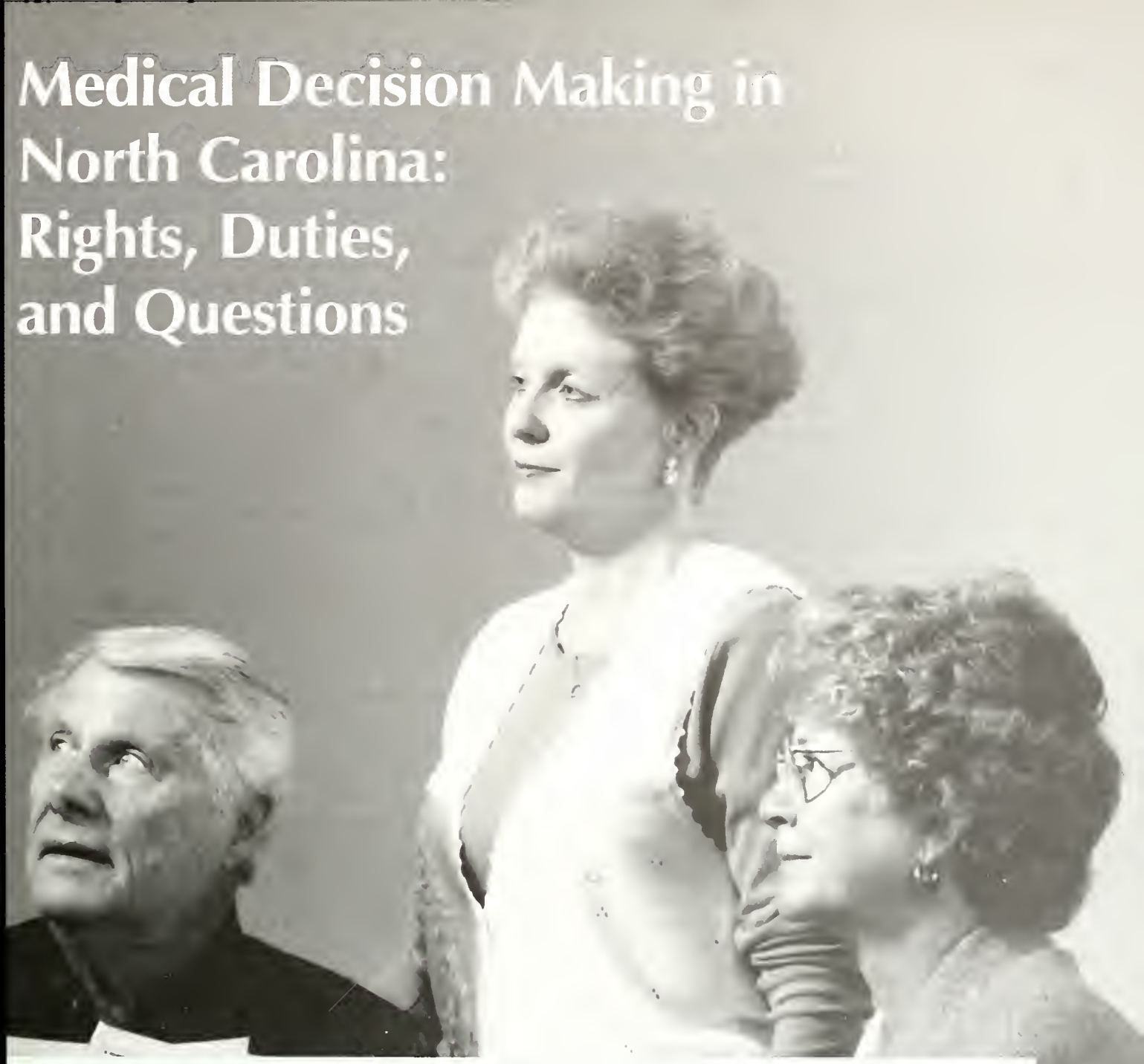
Medical Decision Making in North Carolina: Rights, Duties, and Questions



North Carolina law protects and promotes individual control over health care decisions in several ways. However, many citizens, including health care providers, administrators, and policy makers, lack full knowledge and understanding of the health care decision-making rights of North Carolinians.

This two-part article provides basic information that individuals, families, health care providers, and policy makers in North Carolina can use to help guide decision making about medical treatment—including decisions both to provide and to withhold treatment—for persons who are no longer able to decide for themselves. Part One discusses common and constitutional law about health care decision making and the North Carolina statutory scheme for advance directives and end-of-life decisions. Part Two, to be published in the Summer 1997 issue of *Popular Government*, discusses do-not-resuscitate (DNR) orders outside the hospital context and North Carolina's first high court ruling relating to end-of-life decisions, in *First Healthcare Corp. v. Rettinger*, a case dealing with payment for nursing home care. Both parts of this article also address questions, issues, and problems that can arise from many quarters: from patients who wish to make their own treatment decisions; from friends, family, and others who may be called upon for assistance; from physicians, nurses, and emergency personnel who honor—or fail to honor—patients' wishes; from hospitals, nursing facilities, and other institutions whose policies and practices affect patients' decision-

making authority; and from lawyers, policy makers, and state officials who must understand, teach about, make, and revise state policy with regard to health care decision making.

The Case of Julia Hawthorne

Consider the following hypothetical case, compiled from true stories about health care decision making and advance directives. Julia Hawthorne, eighty years old and widowed, had a good relationship with Dr. Martin, her personal physician for over forty years. However, they never discussed what Mrs. Hawthorne would want or who should speak for her if she were not capable of making decisions. Mrs. Hawthorne did not like to talk about dying, and Dr. Martin did not initiate discussions about advance directives with his patients. Mrs. Hawthorne's adult children, however, did try to talk with their mother about what she would want if they should have to decide for her. She indicated some strong but nonspecific preferences about "not lingering" and "not suffering," which fit her independent spirit and life experience.

Mrs. Hawthorne's daughter, Rita, who lived in a nearby city, had written her own advance directive refusing treatment; so had her husband. Mrs. Hawthorne's son, Dan, had never married. He lived with his mother and managed the household, was deeply religious, and never wanted an advance directive for himself.

When Mrs. Hawthorne suffered a mild stroke and was hospitalized, Dr. Martin discussed the issues with her, and her attending physician wrote a DNR order in her chart at her request. A week later, when she was admitted to a nearby nursing facility, she listed her son as a family contact person and declined to complete a formal advance directive. Some months later Mrs. Hawthorne developed severe pneumonia with respiratory failure. She was transferred back to the local hospital, placed on a ventilator, and treated aggressively. Now she was confused, and she was conscious only some of the time. She had lost her capacity to make decisions and had little chance of returning to her previous level of functioning. It might not be possible to wean her from the ventilator.

When Rita and her husband arrived at the hospital, they discovered that the hospital had not honored the DNR order written during Mrs. Hawthorne's previous hospitalization. A nurse explained to them that DNR orders are generally time limited and must be renewed periodically. She pointed out that Mrs. Hawthorne's previous DNR order had expired around the time that she had left the hospital for the nursing home. Rita asked Dan why he had agreed to such aggressive treatment for their mother when he should have known that she would not want it. He answered that he knew their mother probably would have chosen differently but that his religious beliefs made it impossible for him to agree to any limitation of treatment. Because his mother had no formal advance directive and had told the nursing home to consult him, he had made the decisions that he thought best.

This case, typical in many respects, will help lead readers through the issues and the stakeholders in end-of-life decision making. First, however, some background on law and policy may be helpful.

The Right to Decide

In 1914 the highest court in New York State made the nation's first announcement of health care decision-making rights: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body. . . ."[1] During the past twenty years, beginning with the decision in the Karen Ann Quinlan case,[2] many state and federal courts have recognized the common law and constitutional rights of individuals to make informed decisions about medical treatment, to request or refuse treatment, and to have treatments withheld or withdrawn when they have lost the capacity to make health care decisions for themselves. In 1990, in the Nancy Cruzan case, the United States Supreme Court addressed health care decision making for the first time, stating: "The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."[3]

It is important to distinguish the right to make medical treatment decisions, including the right to refuse treatment, from the issue of a right to physician-assisted suicide. Both have loosely been called the "right to die." However, the constitutional and common law basis of the right to consent to or refuse a bodily intrusion, even for health care purposes, is quite different from the basis of a right to receive medical assistance in hastening death through the administration of a lethal dose of medication.[4] This article does not address physician-assisted suicide.

Starting in the 1970s, essentially all states have supplemented the pronouncements of the courts with

legislation specifically recognizing advance directives. North Carolina, like most states, has passed more than one such statute. In addition to a law requiring that physicians obtain informed consent to all treatments from patients or their legally authorized representatives,[5] there are laws providing for the two types of advance directives—execution of a living will[6] and appointment of a health care agent[7]—and for making decisions on behalf of a patient who has lost the capacity to decide but has no advance directive.[8] North Carolina is also affected by a federal law, the Patient Self-Determination Act (PSDA),[9] which requires federally funded health care institutions to give patients and clients information about their decision-making rights according to state law, to ascertain their wishes, and to honor those wishes as far as possible.

The Breadth of Advance Directives

The North Carolina statutes just mentioned explicitly recognize that people have broad rights relating to health care decision making. In addition, these statutes clearly acknowledge that their purpose is to provide one way, but not the only way, for a person to exercise the right to decide about medical treatment. However, most people who are interested in advance directives do not have the opportunity to read all the sections of the relevant statutes. Instead, they see only the statutory "model forms" contained in the two advance directive statutes: the living-will statute and the health care powers-of-attorney statute.

The "general purpose" clauses in the Natural Death Act (which contains the living-will law and the statute governing decisions made in the absence of a living will) and the Health Care Powers of Attorney Act (which contains the law governing appointment of health care agents) make clear that the North Carolina legislature recognizes a person's right to control decisions relating to his or her medical care. The Natural Death Act explains that refusing treatment at the end of life is included in the right to make health care decisions, and it establishes "an optional and nonexclusive procedure by which a patient or his representative may exercise these rights."[10] The Health Care Powers of Attorney Act similarly establishes "an additional, nonexclusive method for an individual to exercise his or her right to give, withhold, or withdraw consent to medical treatment when the individual lacks sufficient understanding or capacity to make or communicate health care decisions."[11]

Thus it is clear from the legislation itself that the statutory model forms are not the only "legal" forms. They are "optional," "nonexclusive," and "additional"; other evidence of a person's wishes also has legal status. For example, forms that look different; handwritten documents; conversations with health care agents, family members, physicians, or other health care providers; and notations in the medical record—all are legally accepted means for people to express their wishes and exercise their decision-making rights. Moreover, the legislation acknowledges that the choices and the circumstances listed in the statutory forms do not represent the only decisions that people have the right to make. The choices and the conditions in the North Carolina advance directive statutes—the right to refuse "extraordinary" or "life-sustaining" treatment and artificial nutrition and hydration when terminally ill, permanently comatose, suffering from severe dementia, or in a persistent vegetative state—are included in the broader right to make health care decisions. As explained later, the statutory model forms focus on these limited choices and conditions. The statutes do not, however, limit a person's decision-making rights to these choices and conditions. The language of the law itself makes this very clear.

When a person can no longer make or communicate health care decisions, some form of advance directive, made when the person could decide, and intended to apply in the future, provides important guidance for health care decisions. Advance directives can take many forms, and all forms that appear to provide reliable and useful information should be honored. The statutory models focus on decisions that the legislature thought would be of greatest concern to most citizens, and they provide forms that the legislature thought would be clear and easy to use. No one ever intended that the model forms would list the only legal withholding and withdrawal of treatment in North Carolina.[12]

The "Living Will"

The type of advance directive with which people are most familiar is the so-called living will. In North Carolina's statutes, it is called the Declaration of a Desire for a Natural Death, or Declaration. Like most statutory living-will forms, North Carolina's is a short "laundry list" with places where the person making the Declaration may initial different items. North Carolina's form lists only the following choices: if the

person has a "terminal and incurable" condition or is in a persistent vegetative state (as Karen Ann Quinlan and Nancy Cruzan were), he or she may refuse "extraordinary means" alone or both extraordinary means and artificial nutrition and hydration.[7] The form provides no space for changes, additions, or special instructions and does not offer the option of specifically requesting any of the listed treatments.

The North Carolina statutory living-will form thus consists almost entirely of technical legal and medical language. Even people who know what each term means are likely to feel that the living-will form fails to address some of the decisions that most concern them and fails to reflect their choices and preferences in a way that is meaningful to them, their families, and their physicians.

The Health Care Agent

The Health Care Powers of Attorney Act is a relatively new and very comprehensive statutory scheme that has not yet been used to its full potential. When a competent adult, called the "principal," appoints a health care agent, the agent takes over health care decision making anytime the principal lacks the capacity to decide, temporarily or permanently. The principal may give the agent "full power and authority to make health care decisions to the same extent that the principal could make those decisions for himself or herself if he or she had understanding and capacity to make and communicate health care decisions, including without limitation the power to authorize withholding or discontinuing life-sustaining procedures."[8] The principal may also change, specially tailor, or limit the agent's decision-making powers and include directions and instructions to guide the agent's decision making.

The statutory powers-of-attorney form lists choices that are slightly different from the list in the Declaration. The form grants the agent the powers of having access to information, consenting to admission to and discharge from health care facilities, deciding about routine diagnostic procedures and treatment, and consenting to autopsy and anatomical gifts. It then states, in capital letters, "I desire that my life not be prolonged by life-sustaining procedures if I am terminally ill, permanently in a coma, suffer severe dementia, or am in a persistent vegetative state."[9] Next comes a space in which any "special provisions and limitations" may be included to change, specially tailor, or limit the agent's powers or to give the agent instructions.

Potentially the basic grant of agency in this statute can reach much farther than the decisions explicitly addressed in the Declaration. This is so because a person who wishes to do so can specially tailor the grant of agency. For example, this part of the form permits a principal to authorize the agent to refuse treatment for potentially reversible illnesses and conditions, to request trials of treatment, and in general to specify treatment choices much different from what is given in capital letters on the model form. However, most people simply sign the model form. Thus in practice the agent is almost always guided by what is in capital letters, a list of end-of-life choices that is fundamentally similar to the list in the Declaration.

Decisions in the Absence of a Declaration

If someone is unable to make his or her own decisions and has not completed a living will or formally appointed a health care agent, another North Carolina statute permits decisions about that person's end-of-life treatment to be made by relatives, listed in a particular order, or by the attending physician if no one on the list is available. This statute is very similar to the living-will statute. It offers the same few choices and applies only if the person is terminally ill or permanently unconscious.

Generally when an adult becomes incapacitated, there is no legally obvious and automatic substitute decision maker unless a legal guardian has been appointed. In emergencies, physicians may go ahead and treat, in order to avoid harm, on the assumption that most people would want emergency treatment under the circumstances. For example, cardiopulmonary resuscitation (CPR) has come to be used routinely in emergencies without the patient's consent. DNR orders have become necessary to fend off unwanted CPR.

Without an emergency, however, when the patient cannot make decisions, physicians have no authority to act unless a court grants it to them or a legally authorized decision maker steps in. In practice, physicians usually call on close family members to decide for incapacitated patients. The "deciding without a Declaration" statute gives legal authority to those family members, in a hierarchy of closeness.[10] After an appointed health care agent or a legal guardian, first comes a spouse, then "a majority of relatives in the first degree." First-degree relatives are parents and (adult) children. If none is available, the attending physician may make the decisions as long as a second

physician confirms the diagnosis. Again, though, the statute appears to give these decision makers authority only to decide about withholding or withdrawing "extraordinary treatment" or artificial nutrition and hydration from a patient who is terminally ill or in a persistent vegetative state. It does not appear to guide decision making for a patient without a directive who is not terminally ill or in a permanent vegetative state, nor does it say anything about the role of the patient's friends and other relatives. Partners, lovers, close friends, cousins, nieces and nephews, in-laws, even siblings, have no role except perhaps to influence the attending physician.

The health care powers-of-attorney law intends to overcome this limitation by permitting a person to name whomever he or she chooses—except his or her attending physician—to make health care decisions. This gives a nonrelative, such as a close friend or a partner, a role in decision making if the patient so wishes. It also allows the patient to choose among relatives, giving priority to a sibling over a parent, for example, or choosing one decision maker out of a number of adult children.

The Philosophy of Advance Directives

Under normal circumstances, even an ill adult is generally able to make his or her own health care decisions after being given appropriate information and advice by physicians. When an adult has lost the ability to decide for himself or herself and that ability cannot be restored in enough time to be useful for the decision faced, the decision has to be made in some other way.

The living-will type of advance directive is intended to record, in advance, some of the patient's actual choices, much in the same way that patients decide to undergo surgery before being rendered incapable of choice through anesthesia. Alternatively, someone else can decide for the patient. Health care proxy statutes are intended to spell out who can do so. How it is to be done must also be answered.

None of the North Carolina statutes discuss the grounds on which the health care agent should make decisions. The working assumption is that decisions should be made by someone who knows the patient well—hence the emphasis on close, available relatives and named proxies—or who will act in the patient's best interest, as the attending physician is charged to do. Although it is not discussed extensively in law and policy, the following hierarchy of decision-making standards is generally recognized in medical ethics[5] and seems to be implicit in the North Carolina statutory scheme:

1. Do what the patient wanted (as evidenced by a living will or by some other form of prior expression from the patient, such as "If I am ever dependent on a breathing machine, turn it off," or "If surgery has even a small chance of helping me, I want to try it").
2. If no advance directives cover the circumstances of the needed choice closely enough, use the "substituted judgment standard"—that is, do what the patient would want if you could ask him or her. Try to determine what the patient would choose, based on what the patient said or did or chose in similar circumstances, and on what you know of the patient's history, character, values, and general preferences.
3. If there is not enough evidence to say with confidence, "This is what the patient would want," make the decision according to the patient's best interests—not just on medical advice and not according to your own preferences or values, but according to what is best for this particular person, knowing everything that there is to know about him or her, medically and otherwise, past life and current circumstances alike.

Even when a person has completed a living will, appointed a health care agent, or done both, the documents need to be interpreted and applied to particular health care decisions by the attending physician, the health care agent, family members, and other health care providers. It is quite common for everyone to know *that* a patient has an advance directive but for no one to know *what* it says—as if its mere existence made the patient's choices and preferences self-evident. The philosophy of advance directives makes it absolutely essential to view the existence of documents as only the beginning of the inquiry into the patient's wishes.

The Case of Julia Hawthorne Revisited

Mrs. Hawthorne has no formal advance directive, and her children disagree about her treatment. She named one of her children as a contact person for the nursing home, and, as a result, he was looked to for health care decisions when she lost the capacity to make them. She agreed to a DNR order some time

ago, before her condition worsened. What information and knowledge about her can help her physicians and family make decisions for her now?

As mentioned earlier, a small army of interested parties has a stake in medical treatment decision making and advance directives: patients themselves; family, friends, and others who may be called upon, formally or informally, to interpret a patient's preferences and predict choices; individual health care providers, including physicians, nurses, and emergency medical services personnel; health care institutions; and the state, whose policy considerations and regulatory authority play an overarching role. The following discussion briefly surveys the roles, the interests, and the special concerns of the stakeholders and examines what they might say about the Hawthorne case.

The Patient

Mrs. Hawthorne's reluctance to discuss her wishes for the end of life is common and understandable, but it is an important barrier to effective treatment decision making on her behalf. She probably thought that her wishes were sufficiently clear to her children that no further discussion of them was necessary. However, end-of-life decisions are so important, and sometimes so controversial, that patients often have to be extremely vigilant about communicating about them. Patients should discuss their advance directives with their physicians, family, and friends—and *must* discuss them with their health care agents—so that these parties are both willing and able to be their advocates when the time comes. To give just one example of the usefulness of discussion, suppose a husband has told his wife to "do what's best" if he becomes unable to decide for himself. He might be surprised to find that her idea of what is best is very different from his, or that she is torn between doing what she thinks he would want and what is best for her and their children, or even that she might find it difficult to disagree with his physicians if necessary.

It is vital to remember that advance directives are useful and even necessary *anytime* a person lacks the capacity to make health care decisions and decisions need to be made. Thus advance directives are of concern to everyone. Acknowledging their importance should not be associated with a dire prognosis. Certainly, persons who are older and those who have health problems may be more likely to need advance directives and may find it easier to formulate preferences, but it is becoming common for young, healthy people to write advance directives too. The PSDA requires that all people being admitted to hospitals be asked if they have a directive. As a result, it is gradually becoming less likely that the pregnant woman coming in to deliver her baby or the athlete being prepared for knee surgery will think, "Is there something my doctor isn't telling me? Am I dying?"

Mrs. Hawthorne's failure formally to name a health care agent, while informally instructing the nursing home to consult her son, is also common and also problematic. It is hard to know whether she intended Dan to decide for her on medical matters or simply thought that the facility needed a contact person for other reasons. Did she name him because he was nearby, knew about her household and business affairs, and was easy to reach? Did she believe that he knew and would do what she would want? Or did she intend to acknowledge his closeness to her by allowing him to choose what he, not she, would need most?

Because she now seems dependent on a ventilator, the statute that provides for decision making in the absence of an advance directive might help sort out what can be done. Unfortunately, however, Rita and Dan appear to disagree, so there is no majority opinion among relatives of the first degree.

Family, Friends, and Other Advocates

Many North Carolina physicians assert that before the enormous increase in medicine's technological capabilities and the subsequent explosion of legislation and litigation around end-of-life choices, they rarely encountered problems in family decision making for older patients. Close-knit multigenerational families would caucus with the health care team and reach consensus, often with little difficulty and little need for intervention by caregivers. It was natural for physicians to make commonsense judgments about who knew Grandmother best and who was trying to act in her best interests, leaving the family hierarchy to smooth over any dissension. In practice this worked rather well; in theory, however, without guardianship proceedings or statutory authorization, no one had the legal right to decide for another adult. Now that legal authority has been granted to family members by statute, it is important for them to exercise their authority morally, even in the face of ever-growing technological complexity.

For Mrs. Hawthorne's children, this means recognizing that the decision makers' role is to do what their mother would want or what is best *for her* under

all the circumstances. Dan and Rita have a difficult path ahead of them. They each must attempt to ensure that their own end-of-life preferences do not replace their mother's: Dan must face the possibility that his not wanting to lose his mother may be unduly affecting his choices for her, and Rita must try to be sure that her concerns about prolonging her mother's life are not based on her own sense of inconvenience and burden.

Several factors combine to make end-of-life decision making especially hard for families. First, making health care decisions about serious illness is necessarily emotional and often deeply wrenching; it is never a simple exercise of logic or mere promise keeping. Second, discussions may call for a degree of candor that is unprecedented in the family. Especially when these issues have not been discussed before, families may find themselves confronting disagreements never before acknowledged. Finally, when much is left unresolved—or even unsaid—until very near the end of the patient's life, and important decisions are made at the bedside in an institution, then private issues may be shared with relative strangers, and family councils may be opened to outsiders.

First, families should remember to keep the wishes and the best interests of the patient foremost. Second, they should know that responsible caregivers and institutions can provide much help and support to them in their decision making. Ultimately it is up to Dan and Rita to reach a decision together that respects their mother's choices, insofar as they are able to determine those choices. Dan may need a little extra time; Rita may need to be assured that some delay in abating treatment, for Dan's sake, does not violate what Julia would want; and they both must be concerned with their mother's comfort before their own. This process of coming to a resolution may appear to them to be very time-consuming. But if they continue their disagreement, each voicing a different view of what is best for Julia, they may well end up in court, and resolution may take much longer.

Caregivers

Many physicians, like Dr. Martin, are reluctant to discuss advance directives with their patients. They may view such discussion as unnecessarily alarming, may consider it superfluous because they already know their patients well, and may have a variety of other conceptual and practical objections—as many as their patients might have. All these well-intentioned arguments fall before the overriding necessity of offering their patients the opportunity to express, in advance and while they retain the capacity to make decisions, important choices and preferences about medical treatment, including end-of-life treatment. Patients may decline to take the opportunity, but it must be offered, just as informed consent must be sought. Many physicians who think they know their patients well turn out to be poor predictors of their patients' wishes for end-of-life treatment, so it is wise for physicians to ask, even when they think they already know.[19]

There are many ways of raising the issue that are relatively unalarming. For example, one well-known internist and teacher tells her patients, "In order to take good care of you, I need to know something about what your wishes would be if you were not able to speak for yourself. This isn't because there is anything wrong with you now; but you could walk out of my office and get hit by a bus, and I'd need to know who can speak for you while you cannot, and whether you have any views about your treatment that I should be aware of."

Since the PSDA went into effect in 1991, all people admitted to federally funded hospitals and nursing homes (which means almost all such facilities) and all people becoming clients of home health agencies and hospice programs receiving federal funding (also the great majority of such programs) are told about their decision-making rights, asked if they have an advance directive, and offered further information if they wish it. The inquiry about advance directives thus has been situated in health care institutions, outside the relationship between patients and their personal physicians. However, nobody ever thought that was the best place or the first place for discussions about advance directives. These discussions belong in physicians' offices, in homes, and in communities. In fact, most patients want to talk about advance directives with their physicians, but they want the physicians to bring up the subject!

Many hospitals have responded to the requirements of the PSDA by making it a nursing task to inquire about advance directives. This is plainly preferable to placing the inquiry in admissions office paperwork, for nurses often have extensive training and interest in advance directives, as well as in patient education. In general, nurses serve as principal sources of information and referrals for patients, with the capacity to involve social workers, hospital chaplains, patient ombudsmen, ethics committees, and even institutional

legal personnel in a discussion or a disagreement about advance directives.

Nurses are often placed in the position of interpreter and interlocutor between physicians and patients, reminding physicians about patients' wishes or alerting physicians to potential problems or misunderstandings. However, an important study has recently shown that nurses often are ignored by physicians or institutional providers, even when they have vital information to convey about patients' wishes and choices.[20]

Once discussion has taken place and the patient's choices and preferences are established, caregivers face the task of interpreting and honoring the patient's advance directive. This task is multifaceted and complex. Sometimes it requires caregivers to carry out wishes and choices that they had no part in discussing with the patient. Sometimes it requires caregivers to remember that knowing that a patient has a directive is not the same as knowing what is in it. Sometimes it requires much conversation with family members, and sophisticated judgments about whose information interprets the patient's expressions best. Sometimes it may mean responsible "conscientious objection" and withdrawal from caregiving, with the substitution of another provider who is prepared to do—or not do—as the patient wishes.

In Mrs. Hawthorne's case, Dr. Martin could (and should) have done more to explain her wishes and be her advocate when she was admitted to the hospital, including having discussions with her children and with her attending physician in the hospital. With or without a formal advance directive, Mrs. Hawthorne had some wishes that Dr. Martin appeared to understand and therefore had a duty to promote.

Institutions

Many of the duties and the responsibilities of institution-based caregivers are shaped and informed by institutional policies, procedures, and administrative organization. Most hospitals have policies about advance directives, DNR orders, withholding and withdrawal of treatment, and so forth; many nursing homes still do not. As mentioned, the PSDA requires institutions to have a procedure for inquiring about advance directives and connecting them to the care of patients (for example, by ensuring that a copy is placed in the patient's record). The Joint Commission on Accreditation of Healthcare Organizations, which accredits hospitals and many nursing homes, has recently begun to require health care institutions to establish and maintain a mechanism for addressing ethical issues, including organizational ethics, and patients' rights.[21] This requirement often is met by the creation of administrative mechanisms like patient advocate offices and institutional ethics committees, in addition to policies and procedures for the recognition and implementation of advance directives.

There are many ways to resolve misunderstandings and disagreements without calling in lawyers and going to court. Sometimes a meeting involving the family, the health care team, and support staff like social workers and hospital chaplains is enough. Other times the hospital's ethics committee can provide a forum to talk matters over and help think them through. Many health care institutions in North Carolina are in the beginning stages of developing ways to support end-of-life decision making and ways of sharing information and resources with other institutions.[22]

Still, the great temptation for health care institutions is to create paperwork requirements and fail to get beyond them. Many institutions have gone no farther with advance directives than establishing a set of administrative requirements. The admissions clerk makes checkoffs on a form, which is counted by someone but ignored by caregivers. The ethics committee is never consulted because caregivers do not trust it and patients do not know it exists. The institution's unwillingness to honor certain types of directives or choices is buried in admissions papers handed to families but never discussed until a conflict arises. All this is as understandable as it is regrettable. Just as understandable but somewhat less excusable is the reality that institutions are conservative by nature, sometimes in ways that infringe on patients' rights and interests in order to maximize simplicity, specificity, and uniformity.

In refusing to honor Mrs. Hawthorne's DNR order because it had expired, the hospital was responding by rote and ignoring the purpose behind law and policy. This often happens with advance directives and end-of-life treatment. There are many reasons for this mechanical response. First, many health care providers do not wish their institutions to be seen as places where people die. Second, dying well is complicated and time-consuming, and requires many supportive resources that may not fit easily into the institution's sense of mission. Third, decision making in this area is so fraught with uncertainty and ambiguity that everyone in the institution, including its lawyers, may prefer to deal only in what are as close to certainties as they can get. By viewing the DNR order as an invalid piece of

paperwork rather than a piece of valuable, though incomplete, evidence of Mrs. Hawthorne's wishes, the hospital shut off an important inquiry that it should have furthered.

The State

The state has two interests that it must balance in advance directives: supporting people's right to make their own health care decisions and ensuring that the law and policy supporting that right do not facilitate its abuse. Thus the state must not unduly restrict the scope of this important right, so as to make it easy for every person to exercise it, but must also provide enough safeguards to make it difficult for other people to implement a decision that the person never made. By devising a statutory scheme that recognizes the broad right of people to make their own choices and that provides standardized forms and procedural safeguards (a second physician's signature, notarization, a revocation clause, and the like), North Carolina has taken the first step toward this important balancing of interests.

However, the experience of patients, families, health care attorneys, and health care providers across the state suggests that the practical implementation of advance directives policy has so far fallen short of taking the next step. Many caregivers and institutions feel empowered to ignore a person's rights and wishes whenever those wishes, or their expression in an advance directive, fall outside the zone of maximum certainty provided in the statutes. Many caregivers and institutions feel no obligation to honor a person's rights by communicating and collaborating with each other to share information about that person's important end-of-life choices. It is the state's place to protect and promote the rights that it acknowledges by encouraging and requiring health care institutions to honor patients' choices and implement their advance directives.

Part Two of this article will conclude the story of Julia Hawthorne and further explore ways of improving popular and professional understanding and implementation of patients' advance directives in North Carolina.

Notes

1. Schloendorff v. Society of New York Hospitals, 211 N.Y. 125, 105 N.E. 92 (1914).

2. *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

3. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990).

4. The United States Supreme Court heard argument in Quill v. Vacco, 80 F.3d 716 (2nd Cir. 1996), *cert. granted*, 65 U.S.L.W. 3254 (U.S. Oct. 1, 1996); and Washington v. Glucksberg, *sub nom.* Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3254 (U.S. Oct. 1, 1996), on January 8, 1997. In these cases each court found a different constitutional right to physician-assisted suicide.

5. N.C. Gen. Stat. § 90-21.13. Hereinafter the North Carolina General Statutes are referred to as G.S.

6. G.S. 90-320 through -321.

7. G.S. 32A-15 through -26.

8. G.S. 90-322.

9. Omnibus Budget Reconciliation Act, Pub. L. No. 101-508, §§ 4206–4207, 4751, 104 Stat. 1388-115 through -125, -204 through -206 (1990); codified at 42 U.S.C. §§ 1395cc *et seq.* (1990).

10. G.S. 90-320(a).

11. G.S. 32A-15(b).

12. Opinion of Att'y Gen. to C. Robin Britt, Sr., secretary, Department of Human Resources (Jan. 6, 1995).

13. G.S. 90-321(d).

14. G.S. 32A-19(a).

15. G.S. 32A-25, pt. 3E of the model form.

16. G.S. 32A-25, pt. 4 of the model form.

17. G.S. 90-322(b).

18. *See, e.g.*, Alan Meisel, "The Legal Consensus about Forgoing Life-Sustaining Treatment: Its Status and Its Prospects," *Kennedy Institute of Ethics Journal* 2 (1992): 309.

19. *See generally* Special Supplement: "Advance Care Planning: Priorities for Ethical and Empirical Research," *Hastings Center Report* 24, no. 6 (1994): S1–S36.

20. Special Supplement: "Dying Well in the Hospital: The Lessons of SUPPORT," *Hastings Center Report* 25, no. 6 (1995): S1–S36.

21. Joint Commission on Accreditation of Healthcare Organizations, *Comprehensive Accreditation Manual for Hospitals* (Oakbrook Terrace, Ill.: JCAHO, 1995).

22. For example, the Charlotte-based Bioethics Resource Group and the North Carolina Medical Society serve as information-sharing resources for individual and institutional health care providers on many ethical issues, including end-of-life decision making. Many hospital ethics committees around the state also communicate regularly through continuing education programs for their members and institutions.

Taking a Pragmatic View of Privatization

David N. Ammons

The collection of articles on privatization published in the Winter 1997 issue of *Popular Government* is a welcome departure from the customary debate on the topic, tinged as that debate often is with ideological overtones that cloud managerial issues and on occasion even distort the truth. It is not that framing privatization in ideological terms is necessarily shallow or inappropriate. Clearly the topic has plenty of grist for the ideological mill. It is simply that a more pragmatic view of privatization, with few overtly ideological leanings, deserves to be aired as well. Overwhelmingly the *Popular Government* articles reflect such a view.

A Balance of Ideological Perspectives

None of the articles tout privatization as a panacea. None proclaim the superiority of corporate management or the private-sector work ethic. Instead, they collectively describe privatization's promise and pitfalls. They describe noteworthy successes in privatization and acknowledge some failures as well. They offer suggestions for successful privatization, but they neither imply that privatization will be simple nor disregard the sensitive issues that it almost inevitably evokes.

The debates that take place in city halls, county courthouses, and legislative chambers are often dominated by perspectives that contrast sharply with one another and rest on preconceived notions regarding the presumed superiority of one sector's skills or the other's motives. When the argument pits privatize-as-much-as-possible zealots against their privatize-nothing opponents, more pragmatic views sometimes are shoved to the sidelines.

Wherever the role of government extends beyond the delivery of routine public services, the issue of privatization is apt to become especially murky. Debate shifts from questions of practicality and potential economic gain to questions of propriety (for example, in discussions concerning privatization in law enforcement and criminal justice).

Some of the most ardent foes of privatization, including public employee unions, challenge the appropriateness of privatizing any public service. Theirs is an ideological argument. Staunch opponents of privatization depict private contractors in unflattering

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David Ammons joined the Institute of Government faculty after the Winter 1997 issue of *Popular Government*, on privatization, was complete. This article reflects Ammons's considerable expertise on privatization and incorporates his comments on the preceding issue.—*Anne Dellinger*

terms and caution decision makers against embarking on that course. They warn that it is a dead-end trail, rife with corruption, exploitation of employees, uncaring attitudes in service delivery, and corner-cutting practices that compromise workmanship for the sake of profit.

A pragmatic public official would be ill-advised to ignore warnings of corruption, exploitation, unresponsiveness, and shoddy workmanship in contracted work, because each of these can happen. The potential benefits of privatization, however, warrant something more than outright surrender to the assumption that undesirable results are inevitable.

Humorist Mark Twain once wrote about a shortsighted but adamant and unrelenting response to an unpleasant event:

> We should be careful to get out of an experience only the wisdom that is in it—and stop there; lest we be like the cat that sits down on a hot stove-lid. She will never sit down on a hot stove-lid again—and that is well; but also she will never sit down on a cold one any more.[1]

The trick is to learn how to recognize the difference between a hot stove-lid and a cold one—or, better yet, to figure out how to control the stove's temperature. This article suggests precautions that local government officials might take to maximize their satisfaction with privatization. Also, it offers some insights into privatization's allure and some observations about privatization's track record.

Reduction of the Burn Potential

A pragmatic view of privatization recognizes that the "burn potential" from contracting is greater in some functions than in others. The official who weighs the potential risks, great or small, against the anticipated benefits and decides to proceed is wise to take steps to minimize the likelihood of adverse consequences from privatization—in other words, to regulate the temperature of the stove—even if the burn potential is slight. Truly pragmatic officials recognize that the potential benefits of privatization are not automatic but must be earned through careful administrative action at every step. They realize that poorly developed contracts or poorly monitored contractors may produce the unsavory results that opponents of privatization predict, but they also know that public agencies are hardly immune from the array of shortcomings attributed to contractors, even if their lapses into uncaring attitudes and shoddy workmanship are not inspired by the profit motive.

What steps can lessen a government's chances of an unsatisfactory experience in service contracting? The fundamental precautions reduce to five:

1. *Be sure that more than one vendor wants the business.* Multiple bidders are likely to keep one another honest in their tactics and their pledges, and competitive in their bids. Unless several vendors will still be interested when the contract term expires, the government may find itself vulnerable to price escalation, declining responsiveness, and other characteristics commonly associated with monopolies.
2. *Follow bid procedures precisely whenever they are required, and interject competition at other times too.* Local governments should adhere carefully to legal requirements governing advertisement, sealed bids, and other procedures, as well as any local regulations supplementing these safeguards. Most provisions are designed to ensure fair competition and reduce the possibility of corruption. Although local governments in North Carolina are not required by state law to seek competitive bids for most services,[2] they may find that competitive procedures are beneficial, even when self-imposed.
3. *Specify expectations and standards for service clearly and completely.* The invitation to bid and the contract itself should clearly state the requirements for performance and the standards that will be applied to judge the adequacy of performance.
4. *Establish penalties for nonperformance.* Local governments should require performance bonds for major contracts to protect themselves in the event of a contractor's failure. In addition, the contract should specify penalties for substandard performance. Some governments might consider offering incentives to contractors to exceed minimally acceptable levels of performance.
5. *Monitor a contractor's performance carefully.* Local governments should establish procedures for monitoring a contractor's performance to be sure that desired results are being achieved.

These five steps address in only a general way the more detailed prescriptions available to officials who plan to contract for government services.[3] A good strategy would be based on these fundamentals but would also draw on the detailed prescriptions.

A Choice of Mechanisms, Not an Abdication of Duty

As Bluestein and Gray[4] and others[5] point out, service provision and service production are separable elements in the chain of service delivery. "Provision" is what governments do when they decide what services citizens will receive, prescribe the quality of the services, and collect the revenues necessary to pay for them. In other words, a government provides for a service if it *arranges* for that service to be received. "Production" is the actual delivery of the service.

A government may arrange for a service and choose to deliver that service using its own employees, thereby handling both provision and production. That is the traditional route for many government services. On the other hand, a government may specify the level and the quality of a desired service and collect the revenues necessary to pay for it but arrange for the actual delivery of that service by another entity, perhaps another unit of government, a not-for-profit organization, or a private, profit-seeking contractor. In its most extreme form, privatization removes government from both provision and production of services—in essence, taking government out of the picture altogether. More customarily, however, the term refers to something less extreme. In the United States, privatization generally refers to the delivery of public services by a private company under contract with a unit of government.

The popular book *Reinventing Government* asserts that the difference between service provision and service production is the difference between steering and rowing. In describing this difference, the authors draw on the work of E. S. Savas, a staunch advocate of privatization. Savas notes, "'The word government is from a Greek word, which means *to steer*. The job of government is to steer, not to row the boat. Delivering services is rowing, and government is not very good at rowing.'"[6]

Savas's harshness aside, his contention underscores the fact that the role of service provider can be separated from that of service producer. A decision to privatize the rowing, however, neither relieves the government of ultimate responsibility for a given function nor removes its liability. In other words, contracting for a service in hopes of shifting the responsibility to an outside company is a misguided move; it will not bring that result politically or financially. Disgruntled service recipients *will* and *should* continue to call the government if a contractor fails to satisfy their complaints. Legal actions may now target the contractor but will not necessarily exclude the government.

Contracting for a service does not wash the government's hands of responsibility for a given function or service. It is not an abdication of duty. It is simply a choice of one mechanism of service delivery over another.

The Allure of Contracting

Apart from contracting's ideological appeal to many proponents of privatization, its allure is that in some instances it may be an avenue to quality services at a lower cost than government employees can achieve. This is sometimes the case but not always.

Case studies touting contracting successes are often less equivocal. Many suggest, perhaps even declare, that contracting is a better choice every time. A collection of pro-contracting case studies can be rather persuasive.

Matters are not quite that simple, however. A further search of case studies usually uncovers at least a few examples that go the other way, proclaiming the success of decisions to turn over to public employees services that were previously performed by contractors. The change is declared to have improved services while saving dollars.

How can such disparate findings be possible, and what guidance can a public official hope to gain from them? Two lessons are embedded in the seemingly contradictory evidence of case studies.

The first lesson is that a good contract operation can probably beat a poorly managed in-house operation, and a well-managed in-house operation can probably beat a poorly managed or exorbitantly priced contract operation. Case studies are rarely random. The most interesting cases describe dramatic results, the kind that are most likely when the need for improvement is greatest. A good operation, whether in-house or contractual, is less likely to be targeted for change than one that is struggling. A change from a poor example of the current mode of operation—either in-house or contractual—to a good example of the other mode will produce the dramatic results that make a good story.

The second lesson flows from the first: do not place too much faith in isolated studies focusing on single jurisdictions. They can be misleading. It is unwise to abandon a good contract on the strength of a case study touting an in-house success. It is equally unwise to get caught up in the wave of enthusiasm for priva-

tization and abandon a good in-house operation. On the other hand, a viable option exists if the current mode of operation is unsatisfactory.

Studies of service contracting that encompass more than one jurisdiction are less vulnerable to misinterpretation than case studies of a single jurisdiction because they are more likely to include data from contract and in-house operations that reflect good, average, and poor examples of each mode. Their results are usually expressed as "tendencies," in acknowledgment that all examples of one mode of operation are not superior to every example of the other mode. Almost always, some cases will defy the general tendency.

Broad-based studies, though sometimes producing less dramatic results than single-jurisdiction studies, have generally contributed to the allure of privatization, for some of the most rigorous ones have yielded results favoring contractual arrangements for service delivery. In a famous study conducted at Columbia University two decades ago, researchers found the collection of solid waste by municipal crews to be, on average, 35 percent more expensive than collection by contract haulers.[8] Why? The primary explanations were these:[8]

1. Municipal sanitation departments tended to use more crew members to perform a given amount of work.
2. Municipal workers tended to have more absences.
3. Municipal departments tended to use less productive vehicles and serve fewer households per hour.

Another frequently reported study of multiple jurisdictions—a federally funded comparison of contract and in-house operations in southern California cities in the mid-1980s—discovered substantial cost savings in contractual arrangements for seven of the eight services reviewed.[9] In-house municipal operations were more costly for street tree maintenance by an average of 37 percent, for turf management by 40 percent, for refuse collection by 42 percent, for street cleaning by 43 percent, for traffic signal maintenance by 56 percent, for janitorial services by 73 percent, and for asphalt overlay construction by 95 percent. Only for the function of payroll preparation did the analysts find no significant cost difference between municipal and contract services.

How were the contract operations able to post such impressive numbers? It was not because of poorer service quality, lower wages, or fewer fringe benefits—reasons that many would suspect. In fact, the analysts found the service quality of contract operations to be approximately equal to that of in-house operations, average monthly salaries of contract employees to be slightly higher than those of their municipal counterparts, and average expenditures per employee by contractors to be slightly greater for benefits such as retirement and insurance. The favorable cost figures for contract operations were better explained by the following:[10]

1. Workers employed by contractors worked more days per year than municipal employees did.
2. Contractors were more likely to use part-time labor and to employ younger, less-tenured workforces.
3. Contractors were more likely to use the least-qualified personnel capable of doing the job (that is, contractors were less likely to use overqualified workers).
4. Contractors' first-line supervisors were more likely to have hiring and firing authority.

Competition as the Key

Countless case reports and, what is more important, several broad-based studies have shown private contractors to be capable of producing public services at savings—sometimes substantial ones—compared with production by municipal forces. Does this reflect an inherent superiority of the private sector for service delivery? Probably not.

The magic of privatization is competition, not some mystical quality with which all private-sector organizations are imbued. Many private-sector businesses fail each year. Competition weeds them out and forces the survivors to get better and better in order to meet the challenge of new contenders for market share. Competition encourages innovation and aggressive management practices.

Not all businesses, however, operate in a competitive environment. Some enjoy monopoly status, free from the pressures of competition. Companies that do possess monopoly status are rarely singled out as paragons of efficiency and responsiveness.

Most government services also operate in a monopoly environment. Apart from moving to another jurisdiction, service recipients confronting inadequacies can only register their complaint, try to coax the

responsible department to improve, or run for office. They cannot simply reject the current offering and switch to a competitor's product. Given that most government services are monopolies, it should not be surprising when government departments *behave like monopolies*. The ramifications of such status and behavior can be significant. Monopolies, whether corporate or governmental, have fewer pressures to be innovative, to be cost-sensitive, and to remain responsive to their customers.

Some governmental units have been jolted out of their monopoly status, simply stripped of their service delivery role without recourse or thrust into competition to fend off outside vendors, sometimes through a bidding process. When forced to compete *and when provided with the tools and the flexibility to compete*, governmental units often have fared reasonably well. For example, when the city of Phoenix divided that community into several refuse collection zones and forced the sanitation department to bid against private haulers, the department performed poorly at first and lost the bid for zone after zone. It responded to the challenge, however, by upgrading its equipment, improving operating practices, and revising accounting methods. In time it won back the business that it had lost.[11]

The story has been much the same for the cities of Charlotte, Indianapolis, Milwaukee, and San Diego and other units of government that have been given not only the challenge of competition but also the flexibility to respond on a level playing field. In Charlotte, for example, when the operation of a pair of water and wastewater treatment plants was put out for bid, seven international competitors plus a team representing the city of Charlotte and the Charlotte-Mecklenburg Utility Department responded.[12] Even in the face of stiff competition, the Charlotte team won the bid with a package that relies on management practices common in competitive environments but decidedly uncommon in state or local government. Among the incentives for cost savings, for example, is the promise of "gainsharing bonuses" (shares in the savings) for employees if service quality meets expectations and costs come in under budget.

A unit of government that feels no sense of competition is likely to behave like a monopoly. Why shouldn't it? Its customer base is assured. Its market share is 100 percent. To a large degree, it can define the quality of service and the level of efficiency that its customers must accept.

By the same token, if a vendor has no competitors eager to replace it at the first opportunity, turning over the production of a service to that vendor merely replaces a public-sector monopoly with a private-sector monopoly. The results are unlikely to be much better and may be much worse. The key is competition.

Contracting as an Option

Blanket prescriptions about contracting are risky. It is one option for getting the job done. It may be the best option in some situations but a poor choice in others.

After examining a host of privatization studies conducted over the years, John Donahue of Harvard University refrains from too much generalization: "To ask whether bureaucrats or private contractors perform better *in general* is as meaningless as asking whether, *in general*, an ax or a shovel is the better tool. It depends on the job."[13]

Private contractors are a good option when the contracted service can be specified clearly and completely, the government is fairly flexible on methods of service delivery, multiple vendors are eager to secure the business, and performance can be monitored easily. They are a less suitable option when those conditions do not exist.

Even when conditions are favorable for contracting, however, that option is not necessarily the best choice in every case. A public-sector unit that is aggressively managed and granted the flexibility to operate in a truly competitive fashion may be able to outperform or at least match its rivals. Harvard's Donahue notes that although the question of "public versus private" does indeed matter, the question of "competitive versus noncompetitive usually matters more."[14]

For the pragmatic official, the objective is service that meets prescribed levels of quality at a good price. Privatization is one route for getting there but not the only route. Competition, a consistently successful avenue to the twin objectives of good quality and good price, does not necessarily exclude the public sector.

Making competition rather than privatization the centerpiece of a strategy to improve performance has two positive effects: First, it puts operating officials on notice that the days of a monopoly mindset are over. The private sector and other units of government are options for service delivery that can and will be considered. Second, it announces the government's intention to provide efficient services but does not presuppose

that the private sector is a superior agent for service delivery or that government employees are incapable of competing with business. It simply declares that the services produced by government employees must be competitive in cost and quality if those employees are to retain their service delivery role.

Delivering a challenge to public employees to meet ambitious service expectations—to be the best at what they do—in some cases may imply dissatisfaction with current performance. However, the effect on morale is likely to be far less damaging than that of a program that seemingly has given up on public employees and has the clear intent of turning operations over to the private sector. When given a fair opportunity and sometimes increased managerial flexibility, public employees have shown an ability to compete successfully. That is why city officials in Charlotte and Indianapolis, two municipalities considered to be among the leaders in contracting for local government services, prefer to label their efforts as a quest for competition rather than a drive for privatization per se.

The market can infuse competition into a public service where it does not exist otherwise. When that happens, the government and its service recipients gain certain advantages but lose something too. According to Donahue, they gain "the cost discipline of competition and the benefits of accelerated innovation" but yield "control over methods and the right to change mandates as circumstances require."[15] Some governments have discovered ways to achieve most of the former while relinquishing less of the latter.

One way for government to infuse competition into the delivery of public services without abandoning the production role altogether is to divide the task geographically or in some other meaningful manner and award contracts for some zones or tasks while retaining others for service by a slimmed-down public-sector department. The government retains the capability of service delivery and a greater degree of flexibility to respond to events that have not been anticipated in service contracts. Simultaneously it gains the benefits of market discipline not only in the zones served by contractors selected following a competitive process but also in the zones adjoining them, where its own employees operate. Because the government can compile performance and cost statistics for each service zone, it gains a measuring stick for evaluating the performance of every service producer.

Several cities have operated competitive systems—that is, municipal employees serving some zones for a given function and contractors serving others—for many years. A 1995 study reviewed cost statistics for five cities with long-standing competitive systems for refuse collection: Akron, Kansas City, Minneapolis, Montreal, and New Orleans.[16] Cost increases for the systems were well below the national average over the thirteen years of the study, not just in the zones served by contractors but in adjacent zones covered by municipal crews. Competition helped both.

Still another way to gain the advantages of competition without sacrificing the benefits of in-house operation is to instill within an organization a *sense of competition*, even if only artificially. By insisting that departments report their performance not simply in terms of inputs and workload but, what is more important, in terms of efficiency and effectiveness, and by comparing those measures with suitable benchmarks, departments will begin to feel the challenge of competition. Comparison of expenditure and workload statistics will not achieve the desired results. Pointing out the differences between two units in total dollars spent and calls answered or applications received reveals very little of managerial significance and is unlikely to inspire improvement. Differences in unit costs, service quality, and rates of achievement are more likely to have that effect.[17]

Conclusion

If the objectives are greater efficiency and effectiveness, contracting out a given service is often a good option under proper circumstances. This is a limited endorsement, however, for contracting is not an ideal arrangement for every service or every set of conditions.

In some instances, governments large enough to do so may wish to divide their service territory and arrange for contract operations in some zones while retaining direct service production in others. Such arrangements have produced many of the benefits of more conventional contracting while preserving the government's ability to resume complete service delivery expeditiously if it ever chooses or is forced to do so. In still other cases, governments may prefer to retain a full complement of public employees but to instill in that workforce a sense of competition by comparing its performance with relevant, outside benchmarks.

There is value in competition. Privatization is one option, but not the only option, for achieving that value.

Notes

1. Mark Twain, *Following the Equator: A Journey around the World* (1897; reprint, New York: Dover Publications, 1989).

2. *See* Frayda S. Bluestein, "Privatization: Legal Issues for North Carolina Local Governments," *Popular Government* 62 (Winter 1997): 28–40.

3. *See, e.g.*, Donald F. Harney, *Service Contracting: A Local Government Guide* (Washington, D.C.: International City/County Management Association, 1992); International City Management Association, *Service Delivery in the 90s: Alternative Approaches for Local Governments* (Washington, D.C.: ICMA, 1989); John Tepper Marlin, *Contracting Municipal Services: A Guide for Purchase from the Private Sector* (New York: John Wiley & Sons, 1984); Lawrence L. Martin, "Evaluating Service Contracting," *ICMA Management Information Service Report* 25, no. 3 (March 1993): 1–14; John McGillicuddy, "A Blueprint for Privatization and Competition," *Public Management* 78 (Nov. 1996): 8–13.

4. Frayda S. Bluestein and Kyle Gray, "Privatization: Considerations for North Carolina Local Governments," *Popular Government* 62 (Winter 1997): 2–11.

5. *See, e.g.*, David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector* (Reading, Mass.: Addison-Wesley Publishing Co., 1992); United States Advisory Commission on Intergovernmental Relations, *The Organization of Local Public Economies* (Washington, D.C.: USACIR, Dec. 1987).

6. Osborne and Gaebler, *Reinventing Government*, 25.

7. E. S. Savas, "Policy Analysis for Local Government: Public versus Private Refuse Collection," *Policy Analysis* 3 (Winter 1977): 49–74; Barbara J. Stevens, "Service Arrangement and the Cost of Refuse Collection," in E. S. Savas, ed., *The Organization and Efficiency of Solid Waste Collection* (Lexington, Mass.: Lexington Books, 1977), 121–38.

8. E. S. Savas, *Privatization: The Key to Better Government* (Chatham, N.J.: Chatham House Publishers, 1987), 125.

9. Barbara J. Stevens, ed., *Delivering Municipal Services Efficiently: A Comparison of Municipal and Private Service Delivery* (Washington, D.C.: U.S. Department of Housing and Urban Development, 1984).

10. Stevens, *Delivering Municipal Services Efficiently*, 545–47.

11. Osborne and Gaebler, *Reinventing Government*, 76–78.

12. Pamela A. Syfert and David Cooke, "Privatization and Competition in Charlotte," *Popular Government* 62 (Winter 1997): 12–18; Barry M. Gullet and Douglas O. Bean, "The Charlotte Model for Competition: A Case Study," *Popular Government* 62 (Winter 1997): 19–22. For an overview of the experience in Indianapolis, Milwaukee, and San Diego, see Gary Enos, "Four Words That Can Wake a Sleeping Bureaucracy: 'We May Go Private,'" *Governing* 10 (Nov. 1996): 40–41.

13. John D. Donahue, *The Privatization Decision: Public Ends, Private Means* (New York: Basic Books, 1989), 84.

14. Donahue, *The Privatization Decision*, 78.

15. Donahue, *The Privatization Decision*, 80.

16. David N. Ammons and Debra J. Hill, "The Viability of Public-Private Competition as a Long-Term Service Delivery Strategy," *Public Productivity and Management Review* 19 (Sept. 1995): 12–24.

17. For a collection of performance standards, targets, and performance results relevant to local government services, *see* David N. Ammons, *Municipal Benchmarks: Assessing Local Performance and Establishing Community Standards* (Thousand Oaks, Calif.: Sage Publications, 1996).

Reprints of the preceding article can be purchased from the Institute of Government for $2.50* each.

All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

NORTH CAROLINA CONSTITUTION, ARTICLE I, SECTION 18

"Without Favor, Denial, or Delay"

The Recommendations of the Commission for the Future of Justice and the Courts in North Carolina

Michael Crowell

In the 1997 session of the General Assembly, much of the debate on court reform will focus on the report of the Commission for the Future of Justice and the Courts in North Carolina (the Futures Commission). This article describes why the Futures Commission was created, how it has gone about its work, and what it recommends. The focus of its recommendations is to meet the constitutional promise of "justice . . . administered without favor, denial, or delay."

The Last Round of Court Reform

In 1994, when the Futures Commission was formed, the state had been operating under its current court system for a quarter of a century. The present General Court of Justice grew out of a call from Governor Luther Hodges in 1955 for a thorough study of the courts. It was prompted by a sense of uneven justice from one part of the state to another, widespread dissatisfaction with the patchwork of local courts that existed, the backlog of cases, and the obvious conflict in some court officials being paid according to the fines that they collected.

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The North Carolina Bar Association responded in 1955 with a study committee chaired by prominent Charlotte lawyer J. Spencer Bell. The Bell Commission, as the committee came to be known, reported in 1958, declaring the principles that should govern organization and operation of the courts. To address the details, the governor convened a second committee, chaired by J. Spencer Love of Burlington Industries. Legislation was introduced in 1959 but did not succeed. It was revamped and presented again, in 1961. By the end of the 1960s, after several fits and starts, the major changes were in place.

The changes put North Carolina's court system in the forefront of court reform. They abolished the fourteen hundred or so local courts—recorders' courts, mayors' courts, and so forth—many of which were presided over by part-time judges, a number of whom were not lawyers. A statewide district court, based on the same districts as the existing superior court, took their place. Justices of the peace, many of whom were paid according to the costs that they assessed, were replaced with salaried magistrates. "Solicitors" (the old name for district attorneys), some of whom had practiced law on the side, became full-time district attorneys. All court officials went on the state payroll, and a uniform fee schedule was established. The districts used for the organization of superior court, district court, and district attorneys' offices took on common boundaries.

The Administrative Office of the Courts was created to support the courts statewide. The court of appeals was formed as an intermediate appellate court to relieve the supreme court's burden.

Many states are still trying to accomplish what North Carolina did in the 1960s. A uniform, statewide, state-funded court system is the model recommended by the American Bar Association and experts in court management.

Reasons for Another Study

If North Carolina already has such an ideal court structure, why has the Futures Commission been necessary? There are several reasons.

First, the caseload has grown tremendously. From 1970 to 1995, the state's population increased by 40 percent. In the same period, the annual number of filings in the courts more than doubled. In a state of about 7 million people, approximately 2.7 million cases are filed each year. Of more importance, the growth has not been even. Urban centers are carrying an ever larger share of the caseload. The yearly number of felony filings has increased almost fourfold. The number of domestic cases has climbed even faster, and introduction of the law of equitable distribution of marital property has complicated such cases. The state's expenditure on counsel for indigent defendants has gone from less than $1.5 million a year to nearly $50 million. This growth in the court's business alone would justify a reexamination of the system. As Futures Commission chair John G. Medlin, Jr., has said, "Any organization with growth statistics like those, which has not undergone comprehensive reassessment and modernization in forty years, probably already is or soon will be in serious trouble."[1]

A second reason for another study is that the courts, like most government institutions, clearly are losing public support. Focus groups, a statewide poll, and public hearings have shown that citizens generally believe the courts are too slow and cost too much. In the poll only 38 percent of the respondents had a favorable impression of the courts statewide. When people were asked about their local courts, the favorable rating went up to 50 percent but still ranked behind the ratings of the public schools, law enforcement, the news media, and even the legislature. A majority of citizens believes that delays in deciding cases are a serious problem and that wealthy people receive preferential treatment. If the public has such opinions—whether or not they are well founded—something must be done.

There is dissatisfaction within the courts also. Many judges feel overworked and underpaid and believe that some colleagues do not pull their load. Prosecutors in urban areas think their offices are shortchanged. Clerks are unhappy that they do not have the technology they see in law firms and private businesses. Some court officials seem to view the Administrative Office of the Courts as an unresponsive Raleigh bureaucracy. There is a strong cry for more active management of cases by judicial officials, but the legislature has been unwilling to invest in the technology and the personnel needed to make that happen. The public criticizes the courts but has no understanding of what judges do or why.

Finally, another study has been necessary because times have changed. Technology has improved to the point that ordinary folk do their banking at automated teller machines (ATMs) and use their Touch-Tone telephones to order movies. It is not surprising, then, that they resent still having to stand in line and pay by cash when they receive a traffic ticket. A more disturbing trend of the last several decades has been the seeming disintegration of the family, reflected in the enormous growth in divorce and support cases, leaving district courts to pick up the pieces. Further, as privatization has changed the public's notions about traditional governmental functions—postal service, police, garbage collection, schools—citizens are increasingly turning to mediation, private adjudication, and other forms of dispute resolution outside the courts. Also, more people want to represent themselves in court. These changes in the way that society functions justify revisiting court organization and procedures to see whether they are meeting the needs of the times.

The Commission and Its Work

Former chief justice James G. Exum, Jr., appointed the Futures Commission in spring 1994, and the current chief justice, Burley Mitchell, continued the project after he took office. Exum persuaded Medlin, the chairman of Wachovia, who had no direct experience with the courts—and no preconceived notions of how they should be run—to head the commission. The vice-chairs are Rhoda Billings, a Wake Forest University law professor who has also been a district court judge and a chief justice, and Robert A. Collier, Jr., a retired superior court judge who has become one of the most active mediators in the state. A majority of the remaining twenty-four members are lawyers, but the list also includes the chief executive officer of a home supply company, other law professors, several

current or retired newspaper publishers, a police chief, and the director of a social agency. The chief justice intentionally omitted from the commission any sitting judges, clerks, district attorneys, or other court officials, to avoid even the impression that members had a vested interest in maintaining the status quo. A number of court officials have aided the commission as advisers, however. The whole effort has been funded by the Governor's Crime Commission and the Z. Smith Reynolds Foundation.

The commission met monthly for more than two years. Committees sometimes met more often. All the meetings were public, and most of them featured speakers from both inside and outside the state. Members visited courts in Illinois, New Jersey, and other jurisdictions. Representatives of similar commissions in California, Colorado, Maryland, Massachusetts, Pennsylvania, Tennessee, and Virginia came to North Carolina. Public hearings were held in eight cities in early summer 1995 and another five cities a year later. The commission contracted with a professional marketing firm to convene half a dozen focus groups and conduct a statewide telephone poll. A wide-ranging survey was sent to all the judges in the state, and a questionnaire on technology went to all clerks. The North Carolina Association of County Commissioners helped collect data on local expenditures on courts. Information about the commission was placed on the judicial branch's home page on the Internet, and a newsletter was sent regularly to about two thousand people.

Members or staff of the commission appeared at meetings of local bar associations, civic clubs, virtually every organization of lawyers in the state, associations of judges and clerks and prosecutors, the League of Women Voters, and the North Carolina Courts Commission. They spoke on radio talk shows, on the OpenNet statewide cable television call-in show, and almost everywhere else someone would stop and listen. Articles about the commission were published in the newsletters of several sections of the bar association. Before the last round of public hearings, the commission published a lengthy, detailed summary of its likely recommendations in the State Bar's newsletter. It also sent the summary to all the major newspapers and all the state's judges, clerks, district attorneys, public defenders, and trial court administrators.

The Commission's Conclusions

The court system that the Futures Commission has proposed differs significantly from the one designed by the Bell Commission nearly four decades ago. However, the Futures Commission has found much to admire in the work of the earlier group. In 1958 Bell described to the North Carolina Bar Association's annual convention what his committee was trying to accomplish:

> The whole group of recommendations might be summed up by stating that the Committee has sought to establish a court structure which is capable of meeting the needs of the people of the state, to make those courts responsible for their judicial product, to give the courts authority to manage their internal affairs, and adequate administrative machinery, so that they can discharge their responsibilities; to assure that the courts are manned and served by the best qualified persons, and to assure accountability to the public by clearly fixing responsibility at the proper levels.[2]

The Futures Commission recommends a court system based on the same principles: fixed responsibility, independence, flexibility, and uniformity. In a few instances, accomplishment of these goals means returning to proposals first offered in the 1950s, because some key parts of the Bell Commission's vision were never fulfilled. In most cases, Futures Commission recommendations mean modifying the current structure to fit new times. Still, it is useful to revisit what Bell said and consider how the present system of court organization and operation is meeting the goals of the Bell Commission.

Fixed Responsibility

> The 1958 report of the [Bell Commission] was predicated upon the thesis that effective administration of justice, as any other type of administration, requires that responsibility be fixed upon a single point or agency.[3]

For the Bell Commission, responsibility for the court system as a whole was to be fixed clearly on the chief justice and the supreme court because "only by pin-pointing responsibility can the people fix the blame for failure and force corrective action."[4] In the committee's view, responsibility had to rest with those who had the expertise to do the job, which meant the courts themselves. Thus autonomy and accountability went hand in hand.

The vision was not realized. Three examples should suffice to make the point. First, the original proposal to replace the local courts of the 1950s with the district court called for the chief justice to appoint the

new district judges. The legislature chose partisan local elections. Second, the Bell Commission proposed that the jurisdiction of each division of the court system be determined by a rule of the supreme court rather than by an act of the legislature. Instead, the General Assembly retained control. Third, the Bell Commission recommended that the supreme court set the rules of practice and procedure for both the appellate and the trial courts. The legislature kept to itself responsibility to make the rules for trial courts. Thus in each instance the autonomy and the fixed responsibility of the court system were diluted.

Fixed responsibility—accountability—is key to the court system recommended by the Futures Commission. The proposals principally based on this idea include the following:

- That the chief justice be the head of this equal branch of government and be responsible for the judicial system
- That all judges be appointed by the governor from names submitted by a blue ribbon panel; that they be evaluated periodically on objective standards; and that they stand for a yes or no election on being retained in office at the end of each term
- That the forty present judicial districts be replaced with no more than eighteen circuits, each to be headed by a chief judge chosen by the chief justice
- That state and circuit judicial councils that include lay members help oversee and coordinate the work of the courts
- That the chief judge of a circuit, assisted by a circuit administrator, be responsible for setting court schedules and assigning judges as needed for the caseload in that circuit
- That, when appropriate, a case be assigned to a single judge to see it to completion
- That trial judges rotate throughout the circuit but not farther
- That the chief justice and the state judicial council set standards for trial judges and other court officials
- That county clerks of court become appointed officials of the judicial department, answerable to those responsible for overall management of the court system, rather than being independent, locally elected officials
- That the prosecution and defense functions be moved from the judicial branch of government to the executive branch, relieving the chief justice of even nominal administrative responsibility for lawyers who serve as advocates in the courts

Accountability is possible only if resources are available to do the work. North Carolina has run a relatively low cost court system for many years. Its judges have some of the highest caseloads in the country, with few support personnel to help. Data processing technology is ten to fifteen years behind the times. Many records are still written by hand or typed. The statewide computer information systems—one of the benefits of a unified court system—are not linked and provide limited information. The more than 1.3 million traffic tickets handled each year, constituting the most voluminous and repetitive portion of the caseload, are still processed by being stuffed into "shucks" that are sorted by hand.

Each circuit chief judge will need an administrator or a case manager to assist with scheduling and case assignment. Computerized case management systems are essential, as are modern, integrated information systems. Information entered in one system should be automatically transmitted to others, and data should be entered no more than once. There must be state standards for technology.

Independence

> The second general proposition which the Committee has kept in mind is that the judicial department of the government should be non-political.[5]

In the 1950s the Bell Commission saw the danger of partisan election of judges. A subcommittee submitted a recommendation that all judges be appointed, but it was dropped from the final recommendations because of political opposition.[6] Each commission that has studied the state's courts since then, however, has come to the same conclusion: elimination of the election of judges is essential to maintaining an independent judiciary.

The changed circumstances of recent years make the case for appointment more compelling today. The system of electing judges was tolerable when most judges first reached the bench by appointment and seldom faced opposition in standing for reelection. They did not have to solicit lawyers for campaign funds, hire campaign managers, run newspaper advertisements, purchase radio time—or worry about the political consequences of their decisions. Contested

elections are now common, not just between the two parties but within party primaries. Candidates for appellate judgeships may spend hundreds of thousands of dollars. The state is extremely fortunate that the judiciary has not yet been tainted by a scandal. It is also fortunate that the quality of the elected judges is so high, considering how little voters know about them.[7]

Of course, independence means more than appointment of judges. It means the judicial branch having sufficient autonomy to perform its functions unimpeded. "The impartiality, fairness and overall quality of the judicial product are at risk when someone else controls such critical elements of the courts as their rules, procedures, personnel allocations, and line item budget."[8] Among the recommendations designed to provide independence are these:

- That the chief justice and the state judicial council, not the legislature, have authority to redraw circuit lines
- That the supreme court adopt rules of civil and criminal procedure and evidence, subject to a legislative veto
- That the chief justice and the state judicial council have discretion to reallocate funds appropriated by the legislature, as the needs of the courts change

Flexibility

> A third major premise of the [Bell Commission] was that the court system should be flexible.[9]

Bell noted, "The Committee has recognized that specific solutions which are sufficient for particular circumstances may not be permanently good."[10] The Committee had responded, he said, by "proposing solutions of sufficient flexibility to permit adjustment and change as the need therefor becomes apparent."[11] Medlin has expressed the same goal for the Futures Commission: "None of us can predict the challenges and needs of the court ten, twenty or thirty years from now. Therefore, court governance and structure must be sufficiently flexible and adaptable to permit revisions which meet changing circumstances without undue delay."[12]

The Bell Commission sought flexibility through the establishment of "one court, rather than many different courts, to serve the state."[13] In a single court, there are no questions of whether the court has jurisdiction or whether the parties have filed papers in the right place. Sessions of court can be set and judges assigned as needed. Moreover, if responsibility for governing the courts has been fixed with the courts themselves, the duties and the jurisdiction of the different court officials can be altered as times change. This is exactly what the Bell Commission envisioned: "The authority and responsibility of each division—'jurisdiction' in the traditional concept—would be fixed by rule of the Supreme Court. Whenever changed conditions required that the authority of a particular division be enlarged or contracted, the Supreme Court could act promptly by rule change."[14]

The General Court of Justice was created in the 1960s as a single court for the state. However, the trial court was bifurcated into the superior and district court divisions, and the legislature retained authority to set the jurisdiction of the different levels of court.

Circumstances have proven the need for flexibility. As noted earlier, the court's business has changed dramatically in the last quarter century. Unfortunately the existing court structure has not proven sufficiently flexible to cope with the changes. The state's citizens and many of the courts' officers believe that the judicial branch is responding inadequately and ineffectively to crime and family matters. Some courtrooms sit empty while others are overflowing. Some traveling judges finish their week's business on Wednesday and return home because no other matters have been set for that term in that county. Court calendars break down because of scheduling conflicts or because of failure to factor in the unavailability of key witnesses.

The Futures Commission proposes to enhance the flexibility of the court system through the following measures:

- Merging the superior court and the district court into a single trial court called the circuit court[15]
- Initially dividing the cases in the trial court into four categories: major criminal cases, minor criminal cases, civil cases, and family law cases
- Eliminating the concept of terms of court and providing instead that court be in session at all times within a circuit
- Designating all judges as circuit judges, subject to assignment by the chief circuit judge as the courts' needs and the judges' experience warrant
- Assigning to each judge a reasonable balance of different kinds of cases but using the most experienced judges for the most difficult disputes
- Allowing pretrial conferences, hearings on motions, and similar events to be conducted in the

first available courtroom in the circuit, even if it is outside the county where the case is filed, but continuing to group counties together to limit jury trials to neighboring counties not requiring extensive travel
- Authorizing the state judicial council to increase the civil jurisdiction of lawyer magistrates in stages

Flexibility is also the motivation for expanded use of alternative dispute resolution. Experimentation in recent years confirms that many disputes can be resolved satisfactorily in ways other than trial. Thus the Futures Commission recommends statewide implementation of programs for alternative dispute resolution; discretion for circuits to experiment with new programs; clear ethical rules requiring attorneys to participate in alternative dispute resolution in good faith and to advise their clients of this option; and early screening of criminal cases for diversion from the courts, when appropriate.

One area in which alternative dispute resolution will be particularly important is the family court—that is, the family law section of the circuit court. Time and time again, the commission heard of the need to consolidate all matters involving the same family—divorce, alimony, child custody, support, equitable distribution, and so forth—within a single court, to provide special training for the judges who hear such matters, to provide case managers to direct those cases to the right forum, and to mandate mediation and other nontrial methods of resolution when appropriate. The proposed court structure includes sufficient circuit-level flexibility and discretion to allow the family court to operate differently in urban areas of the state from how it operates in rural areas, if necessary.

Finally, the Futures Commission proposes constitutional amendments to allow six-member juries in civil cases and petty criminal cases and to permit a defendant in a criminal case to waive the right to jury.[3] Twelve-member juries would still be required for felonies.

Uniformity

> A[nother] major premise of the [Bell Commission] was that justice requires that persons all over the state have available basically the same court facilities, and that these courts approach their business in a generally uniform manner—or, as it was phrased by some proponents of the recommendations—that justice not be a matter of geography in North Carolina.[4]

The changes of the 1960s made great strides toward uniformity. Time has eroded some of what was accomplished, however, especially in the alignment of judicial and prosecutorial districts. There was concern about uneven justice in the 1950s when some solicitorial (prosecutorial) districts had three times the population and the caseload of others. The reforms largely corrected those disparities by making the new district court districts and prosecutorial districts identical with the superior court districts. Over the last quarter century, however, the extraordinary population growth in some urban counties and the legislative splitting of districts in response to local political problems have left far greater differences. There are now judicial districts with ten times as many people as other districts have. The number of felonies disposed of each year ranges from fewer than five hundred in some districts to more than six thousand in others.

The problem is not so much one of disparity in the size of districts as it is one of some districts being too small to support the kind of administrative assistance and technology needed to improve the operation of the courts. One current district has just fifty thousand people. In a recent year, it held only five criminal jury trials and two civil jury trials. An enterprise like that is too small to justify the investment of people and money needed to improve court management and technology.

The Futures Commission proposes scrapping the existing judicial and prosecutorial districts and substituting twelve to eighteen circuits. Because of the real differences from the Piedmont to the eastern and western ends of the state, the circuits will not be equal in population nor have the same number or kinds of personnel, but each will have the minimum population and caseload necessary to support the administrative staff, local technology, and specialized family court services essential to court improvement. The circuit lines will honor county boundaries and maintain manageable travel distances.

Two critical features of the commission's proposal are that (1) the circuit lines be the same for judicial and prosecutorial purposes and (2) the authority to redraw the lines reside in the courts. Legislative realignment of judicial and prosecutorial districts—too often done to satisfy the local bar or local politicians who are unhappy with incumbent judges or district attorneys—has been one of the most disappointing erosions of the uniform court system. For uniformity, as well as for flexibility, independence, and fixed responsibility, the power to determine the geographic

subdivisions of the court system should rest within the judicial department.

Perhaps the greatest single improvement in the courts in the 1960s was state assumption of the funding of all personnel and operating costs. The Futures Commission debated vigorously whether local governments should be permitted to supplement those state funds and whether the state should also assume responsibility for court facilities. In the end the commission concluded that the present system was the right one. The state should continue to pay all operating expenses. Local supplementation would too easily lead to an uneven judicial system. Facilities should remain a local obligation, though the state should be more active in defining the minimum standards and in helping plan new courthouses. With enactment of the circuit court system, a one-time assessment of facilities should be made, and the state should assist in bringing buildings up to par. If new facilities are needed only for state- or circuit-level use—for example, for a circuit executive's office or for a single high-security courtroom to serve the entire circuit—they should be financed by the state.

Conclusion

When Chief Justice Exum organized the Futures Commission in 1994, he began by saying, "This is the first opportunity since court reform in the late sixties to provide a comprehensive reexamination of our system and assess how it is faring after a quarter century."[18] The chief justice instructed commission members to envision the ideal judicial system and not to assume that anything had to remain the way it had been. The commission has taken that admonition to heart. Although it believes that its recommendations are practical and feasible, it recognizes that they may not all be politically popular at the moment. In proposing what it believes should be done for the long term, not just what it thinks can be done in the short term, the commission again has heeded the words of J. Spencer Bell:

> The Committee has declined to consider political feasibility as an appropriate factor in shaping its recommendations. What is politically expedient changes, and is always a matter of conjecture, even among experts. . . .
>
> The Committee has consistently urged that specialized problems be dealt with by those most expert in the field. It would be inconsistent, and even ridiculous, for the Committee to decide that it was sufficiently expert politically to predict what would be most acceptable to the legislature or to the people. Furthermore, it was not the aim of the Committee to discover the most popular solution; our function was to arrive at the best solution, and to set forth our reasoning so that others may benefit from our work.[19]

Notes

1. John G. Medlin, Jr., speech delivered at the annual meeting of the North Carolina Bar Association, Myrtle Beach, S.C., June 1996 (hereinafter referred to as Medlin Speech), 2.

2. J. Spencer Bell, "The Report of the Committee on Improving and Expediting the Administration of Justice to the 1958 Conference of the North Carolina Bar Association," speech delivered at the annual meeting of the North Carolina Bar Association, Myrtle Beach, S.C., June 1958 (hereinafter referred to as Bell Speech), 5.

3. Clyde L. Ball, "A Summary of Court Improvement Efforts, 1955–1963," paper prepared for the North Carolina Courts Commission (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, Oct. 1963), 3.

4. Bell Speech, 3.

5. Bell Speech, 3.

6. Ball, "Court Improvement Efforts," 7–8.

7. In the statewide poll conducted by the Futures Commission in 1995, only half of the 60 percent of voters who had voted in the 1994 general election recalled that they had voted for judges, and three-fourths of those could not name any individual judicial candidate.

8. Medlin Speech, 6.

9. Ball, "Court Improvement Efforts," 4.

10. Bell Speech, 3.

11. Bell Speech, 4.

12. Medlin Speech, 5.

13. Ball, "Court Improvement Efforts," 4.

14. Ball, "Court Improvement Efforts," 5.

15. Establishment of the statewide district court system, of course, was a great advance over the variety of local courts that existed before then. Even though the Bell Commission could not go the further step of creating a single trial court, it recognized the value of having judges subject to assignment wherever needed: "In keeping with the desire for maximum flexibility in the system, a superior court judge might be assigned for temporary duty with either the district court or the court of appeals." Ball, "Court Improvement Efforts," 6.

16. The Bell Commission proposed constitutional amendments to give the legislature authority to reduce the size of juries and to provide for less than unanimous verdicts. Ball, "Court Improvement Efforts," 7.

17. Ball, "Court Improvement Efforts," 4.

18. James G. Exum, Jr., "Remarks," presented at the initial meeting of the Commission for the Future of Justice and the Courts, Chapel Hill, N.C., June 21, 1994, 1.

19. Bell Speech, 4.

Hiring a City or County Manager

Kurt Jenne

Hiring a city or county manager is one of the most important actions that a local governing board can take. The working relationship between the manager and the board can have a significant influence on the effectiveness of the local government that they both serve. This article suggests a process designed to ensure, as much as possible, that a board's selection of its next manager will meet its own needs and those of the citizens. The process is appropriate whether a board is hiring its first manager or replacing one who has resigned or been fired.

There is one circumstance in which the process described in this article might not be necessary: if a clearly qualified and agreed-on successor such as an assistant manager is already present in the organization, the local governing board may want to proceed directly to appointing that person at the next regular or special meeting.[1] Even in such a case, however, the board may want to use part or all of this process in its deliberations.

Some local governing boards go through the hiring process relying entirely on varying degrees of assistance from staff. Others call on the Institute of Government, the North Carolina League of Municipalities, or the North Carolina Association of County Commissioners for help in structuring or conducting the process. Some boards have hired commercial search firms to manage parts or all of the process for them. These firms generally charge either a flat fee or 15 to 30 percent of the hired manager's first-year salary to perform some combination of the various tasks involved. Some boards are attracted to using a search firm because it can plan and manage the entire recruitment process for them. Others want to take advantage of the ability of most search firms to seek out and recruit persons who might fit the particular needs of the community but might not currently be intending to move. Some boards also like the idea of having a search firm perform the initial screening of applicants and present to the board only a short list for serious consideration. Others, however, prefer to see the whole pool of applicants. Regardless of how a board decides to conduct its search or how involved it is in particular parts of the process, it might use the steps described in this article as a framework for planning and arranging its search and as a checklist of essential tasks.

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Perspective: Selection of a Manager as a Decision-Making Process

A local governing board can select a manager in a rational way by figuring out what the community needs, looking at several candidates with an eye to how well each one fits the needs, and then choosing the best of the candidates on that basis. Assuming that the board's goal is to hire the best manager whom it can attract, it can answer the following questions using the various steps:

- What skills and personal characteristics should a person have to be the ideal manager for this community, and what is the relative importance of those skills and characteristics? (Step 1)
- How can the board find people who have some mixture of the skills that it needs and who are interested in the job? (Step 2)
- How do those people compare with one another, especially with respect to the most important skills? (Steps 3–4)
- All things considered, which of those people would be best for this community? (Step 5)

Step 1: Determine the needs of the jurisdiction and develop a profile of the ideal candidate.

Before it does anything else, the local governing board can smooth the path that it is about to take by assessing future demands on the manager: What will be happening in the community? What will the prominent or controversial issues be? What are the strengths and the weaknesses of the current organization as it moves into the future? What will the public workforce be like, and how will it change? How does the board want the manager to divide his or her efforts between internal management of the organization and external management of the board's agenda in the community?

The answers to these questions are likely to be different for almost every city and county. Figure 1 shows the list of community issues developed by the Kinston City Council in 1994 during this initial stage of recruiting a new city manager.

Having taken time to think and talk specifically about the most important issues facing the community now and in the future, the local governing board should then identify specific skills, abilities, knowledge, and previous experience that it seeks in candidates. Otherwise, it runs the risk of choosing a manager on the basis of stereotypical characteristics that will not necessarily be relevant to its particular circumstances. For example, if a county is steadily losing employment opportunities and population and the county commissioners think that the new manager must play a key role in helping to reverse these trends, a candidate who has built a glittering reputation serving a series of affluent suburban communities will not necessarily meet that particular county's needs. Similarly, if a city is experiencing serious problems of employee morale, it may want to make an effort to identify and attract applicants who have demonstrated records of successfully dealing with employees' problems, even applicants who may have less experience in other aspects of the job.

Figure 1
Issues Facing Kinston over the Next 5–10 Years
(January 1994)

Development of the Global Transpark
Need to develop a surface water source for growth
Keeping utilities and general service costs as low as possible
Maintaining a healthy tax base to keep taxes as low as possible
Attracting new businesses while preserving existing ones
Crime prevention
Equal opportunity for development of human potential
Providing more job opportunities for young people in the community
Meeting the needs of a growing elderly population
Finding alternatives to traditional landfill disposal
Improving the quality of education with better preparation, ages birth to five years
Improving communication with citizens about public issues
Improving race relations in the community
Making city government more efficient
City beautification
Maintaining and replacing infrastructure
Affordable housing becoming more scarce
Providing more parks and recreation opportunities
Effective planning and development

In 1996 about eighty-two hundred members of the International City/County Management Association (ICMA) met the standards of education and experience in local government management necessary to qualify for membership. With this large a pool of qualified local government managers, the majority of applicants who respond to a local governing board's advertisement will probably be impressively qualified in some respect. However, no two of them will be the same. Applicants will have different combinations of strengths and weaknesses. The challenge facing a board is to choose from many capable applicants the person who comes closest to having the unique set of skills and abilities that is needed to deal with the board's most important community and organizational issues. Therefore it is useful for board members to review the list of issues that they have developed and to specify the kinds of characteristics that they think their manager will need to be effective.

A local governing board can identify community issues and manager characteristics by brainstorming, or by having members take turns contributing, until everyone is satisfied that the group has not missed anything relevant. Usually the resulting list of desirable attributes is fairly long. The board can focus on

Figure 2
Characteristics to Be Sought in the Kinston City Manager
(January 1994)

Score	Characteristic
16	Proven track record of success in management and leadership
14	Very sensitive to tax burden on citizens and business; promotes efficiency
12	Sensitive to and works well with employees; good team-building skills
12	Experience in local government
9	Effective communicator among council, employees, and citizens
9	Knowledge and background in planning and development
8	Strong financial skills
8	Will implement council decisions effectively even when he she disagrees
7	Knowledge of economic development
6	Knowledge of electric and water utilities
6	Open to new ideas
5	Ability to work well with the county
4	Can relate to and communicate well with all parts of the community
3	Willing to speak up for own professional judgment
2	Will participate actively in community outside of governmental duties
1	Progressive
0	Experience in transition from agricultural to industrial base

the most critical items by combining any redundant or similar items and then trying to agree on the relative importance of the characteristics. A somewhat tedious but very effective way to do this is to perform a "pairwise comparison" of all the items on the list.[2] Then the board has a short manageable list of the criteria on which it might focus in reviewing applicants' qualifications during the rest of the process.

Some local governing boards have asked department heads or other employees to add their point of view on the profile of an ideal manager.[3] The advantage of doing this is that it can give the elected officials insight into characteristics that might not be directly important to them but might affect morale and efficiency in the organization on which the board depends for administration. A possible disadvantage is that it might create unrealistic expectations among employees about the extent to which the board will follow their advice, unless the board is very clear about how it intends to use the advice.

Figure 2 shows the requirements and the priorities that the Kinston City Council developed from the community issues shown in Figure 1 and from advice that it solicited from department heads.

Developing this profile of the ideal candidate makes almost every other step in the hiring process easier and more effective. First, the local governing board has a realistic basis on which to decide what salary range it will offer in order to obtain the skills and the experience that it needs. Second, it is in a position to compose a clear, specific advertisement that can save time and effort by discouraging inappropriate applications. Third, it has a valid and effective screening device with which to select the applicants who appear most qualified and whom it wants to examine in more detail. Fourth, it can use the criteria to construct a valid set of questions or tasks to use in its interviews or other assessment procedures. Finally, it can use the criteria to evaluate the qualifications and the performance of the finalists overall.

Step 2: Plan a hiring strategy and recruit applicants.

Before it goes further, the local governing board should outline an overall strategy and a rough timetable for hiring the new manager. Doing this will give board members a realistic view of how long it is likely to be until a new manager is at work and how much of their time they should expect to devote to the effort. Table 1 shows a typical and a faster timetable that a board might expect to follow. It is unusual for a board to do a thorough job of recruiting outside candidates and have a new manager on duty in less than four and a half to five months. The process may take longer if there is substantial disagreement among board members, a shortage of good candidates, or other complicating factors. Overall, time spent up front developing a clear profile for the new manager and planning carefully for the recruitment can save time in the long run by making everything else that the board does in the process more efficient and more effective.

Setting a salary range at the outset has the same advantages as setting a maximum price when one is going out to buy a car: it makes the search realistic and limited. Like a car buyer, the local governing board might later decide to exceed its planned limit if it wants a candidate badly enough to do so, but setting a tentative limit establishes reasonable expectations for board members and potential candidates. The board should consider factors such as the skills and the qualifications in the profile that it has developed, the size and the complexity of the community and its governmental operations, the general cost and standard of living in the community, and the salary levels of managers of comparable jurisdictions in and possibly outside North Carolina.[4]

Providing salary information in the advertisement can serve as a screening device. If the salary is significantly higher or lower than the needs or the reasonable expectations of some prospective applicants, they might be less likely to submit a fruitless application.

An advertisement that reflects the profile also serves as a screen by deterring applicants who do not have the characteristics that the local governing board seeks and by attracting the attention of persons who do. Other information that candidates look for in an advertisement includes the board's size and method of election, the past rate of turnover among managers (typically expressed as the number of managers who have been in the job over some number of years), the population of the jurisdiction, any significant future directions in which the board and the community are headed, and any peculiarities in how the jurisdiction is organized or how it provides services.

Advertising in the biweekly *ICMA Newsletter*[5] will bring in more applications from experienced professional city and county managers than any other single effort. Most boards choose to use other recruitment media as well, especially if they want to make a special effort to reach candidates in particular fields of the public or private sector, in particular geographical areas, including their own locality, or from particular racial or ethnic groups.[6] The jurisdiction's human resources staff can help the board identify these special arenas and arrange to advertise in them.

The board might also employ an executive search firm to find and recruit candidates who fit the profile, or do this itself if members know of promising candidates and the board is not concerned about creating ill will by recruiting another jurisdiction's manager.

Table 1
Reasonable Recruiting Timetable for a City or County Manager

Step	Amount of Time	
	Typical	Fast
1. Determine needs.	1 week	1 week
2. Recruit applicants.	8 weeks	6 weeks
3. Screen applicants.	3 weeks	1 week
4. Assess candidates.	6 weeks	4 weeks
5. Hire manager.	1 week	1 week
	19 weeks	13 weeks
	(5 months)	(3 months)
Manager gives notice and reports.	2 months	1 month
	7 months	4 months

Step 3: Screen applicants.

The local governing board should designate one person to receive applications, check them for completeness, and ensure that only board members have access to them. Care must be taken to preserve the confidentiality of the applications unless and until the applicants release the city or the county from that obligation.[7] If the board is using a search firm, it should provide this service. Otherwise, a staff person can assist the board, in which case it is important that the person chosen have the full confidence of the entire elected body.

The local governing board has many options for screening applications in a way that minimizes the risk of violating confidentiality and satisfies board members' needs for access to the applications. The personnel officer might screen out applications that clearly fail to meet basic factual qualifications in the profile, or sort applications into several groups according to apparent level of qualification. A committee of board members might do an initial screening for the whole board. If, in the interest of openness, the board wants to give all the members access to all the applications, it might appoint the whole board as the recruiting committee and either screen applications as a committee or create a subcommittee for that purpose.[8] If such a subcommittee is appointed to produce a short list from which the entire board will select persons to interview, any member can still review all the applications received to satisfy herself or himself that no promising candidate has been missed in the screening process.

Applications can be copied for distribution to members during screening. However, many local governing boards feel more secure about meeting the requirements of confidentiality if members review the original applications in the place of custody, normally the office of the personnel officer.

When all the members have reviewed applications in whatever manner the board decides, they can meet as a board, compare notes, and decide whom they want to interview. Most boards invite three to seven candidates for an interview or an assessment center (explained later). However, some boards have conducted short screening interviews of up to ten or so applicants before narrowing the field to a smaller set of candidates. The board or its subcommittee can conduct these screening interviews, or it can contract with a search firm to conduct and videotape the interviews for

board members to view at their convenience. In any case, when the screening interviews are complete, the whole board agrees on a few candidates to invite for more intensive assessment.

The screening of applications can usually be done in two or three weeks. The use of screening interviews can double or triple that time, depending on how they are done.

Step 4: Assess candidates.

The most common method of assessing candidates is to interview them. However, the interview is limited in its reliability in predicting success on the job. The best predictor of a person's behavior on the job is behavior itself, and interviews reveal only what candidates *say* about their behavior. To a large extent, the person being interviewed can tell the interviewer what she or he wants to hear without having to back it up. The "assessment center," a series of exercises designed to demonstrate candidates' actual ability to perform relevant work tasks, is a more reliable predictor of a person's ability to do a given job.[7] However, because a valid and effective assessment center is difficult to design, and expensive and time-consuming to administer, most local governing boards still depend on interviews to assess candidates.

The board can take several precautions to increase the validity and the reliability of its interviews. First, it can carefully design the interview. If the desirable characteristics and the priorities that the board has identified in step 1 accurately reflect the needs of the community and its government, then they provide a valid focus for the board's examination of each candidate and its designing of questions that will yield relevant data in the limited time available for each interview. Allowing for introductions, follow-up questions from board members, and closing questions from the candidate, a one-hour interview permits only four or five questions to be explored adequately. If the board wants to obtain more information than that from the interview, then it should plan to increase the time that it allots to each candidate accordingly.

Figure 3 presents a list of possible interview questions developed by the Kinston City Council using the desired characteristics shown in Figure 2. Two observations about this list are especially important: (1) The characteristic of fourth-highest priority in Figure 2, experience, can be determined from a candidate's résumé, so the council did not plan to spend scarce interview time on it. (2) The council ultimately chose just a few of the questions to include in its interviews in order to keep within the time limits that it had set.

A second step that a local governing board can take to improve its interviews is to conduct them consistently. Asking each candidate the same set of key questions in the same sequence and in the same manner provides a yardstick by which to compare candidates' responses. As long as the board establishes this common basis for comparison, it is still free to vary its follow-up questions to explore the differences among the people whom it interviews.

Third, after each interview, while impressions are fresh, the board should discuss the ratings that members have given to the candidate's responses. Where the ratings differ significantly, divergent members should discuss their reasoning. Sometimes one person sees, hears, or infers something that another did not. It is helpful for the members to exchange information and impressions and try to resolve the different perceptions. Some boards try to reach consensus on the ratings. Others find that hard to do and do not consider it worth the effort.

The board should plan and arrange each candidate's interview visit with care. Several purposes can be accomplished during the visit: the candidate can tour the community and get a feel for it; meet department heads and community leaders such as the superintendent of schools and the director of the chamber of commerce; and obtain information about housing, schools, and other matters of interest to the candidate's family. Some jurisdictions invite spouses to accompany candidates so that they can form an opinion about the community, but this is neither expected nor necessary if the board thinks that the cost is too high. Other jurisdictions prefer to invite the successful candidate back with his or her family to be courted after the board has extended an offer. Some boards invite all the candidates at the same time and set up tours, interviews, and other events in rotation. They might then have the candidates together at one or more social functions. Other boards invite each candidate separately. Bringing in candidates all at once shortens the time spent on the search but requires more careful planning and coordination.

Overall, it is realistic to allow a month or more to arrange and conduct the interviews.

Because of the exposure that candidates receive when they visit the community, most boards obtain from each person whom they invite, written permission to release relevant information so that whatever information on candidates is revealed is consistent

with the requirements of *Elkin Tribune* and the candidates' expectations. The open meetings law permits but does not require interviews to be held in closed session.[11] However, most jurisdictions have found it difficult and not worthwhile to try to conceal the identity of candidates throughout the visit, even though promising candidates occasionally withdraw in the absence of a guarantee of confidentiality.

Step 5: Hire the manager.

After the interviews the local governing board usually tries to reach consensus on one candidate, perhaps with a backup in case the chosen person does not accept the board's offer or terms of employment. Some managers insist on consensus before they will accept a board's offer, believing that anything less would make their position too tenuous to survive the stress and the strain that the demands of governance and management put on the relationship between a board and a manager. Many managers, however, are willing to start with the tentative security of support from a simple majority of the board.

While it negotiates the terms and the conditions of employment, the board should arrange for final background checks, usually on two or three finalists from whom it will probably select the manager, or on the person who is its first choice. The background investigation usually comprises, as a minimum, a check for a criminal record and a check of the driving record through the jurisdiction's law enforcement agency; verification of education and past periods of employment by the personnel office; and a credit check, which can be performed by any agent of the board with a release from the candidate. Private firms (in addition to search firms) will perform all these background checks as a package for a fee.

Most local governing boards will also make some inquiry of the jurisdiction that the prospective manager currently is serving or the last jurisdiction that she or he served. This might involve calls or a personal visit by an individual or a delegation on behalf of the board to verify personal references, talk to supporters and detractors on the jurisdiction's governing board, and check newspaper coverage to help evaluate how the manager handled tough or controversial issues. The visitors might also check whether there is any person or group with an ax to grind that might try to generate adverse publicity in the manager's new jurisdiction, so that the board can be prepared for it.

The objective of gathering all this information is to verify what the candidates have asserted about their previous experience and to protect the board from embarrassing revelations after it announces its choice. To this end, most boards ask each candidate who interviews to tell the board about anything in his or her background or experience that might embarrass the board were it revealed publicly.

When the investigation and the negotiations have been successfully completed, the local governing

Figure 3
Possible Questions for Kinston City Manager Interviews (1994)

Track Record

1. Tell us about the major things you accomplished in the last two or three jobs you've held.
2. Give us a few examples of times when you have assumed a position of leadership, either on a particular issue, or of a process over time.
3. Tell us of times when your particular management style has gotten good results and why you think so.

Promotion of Efficiency

1. What are some things a city can do these days to cope with rising costs of goods and services, and still meet community needs without breaking the back of the taxpayer?
2. What are some things the city manager can do directly to reduce pressure on the city's tax base?
3. Tell us about some of the things you've done in your present job to increase efficiency of operations.

Employee Relations

1. Tell us ways you have empowered subordinates in your present job and what benefits that has brought.
2. What things can the city manager do to build teamwork among employees?
3. To whom in your organization would you look for the development of good employee relations, and what would you expect them to be doing?

Planning and Development

1. What are the two or three most important things a city needs to undertake to have reasonable control over its future development? What should the manager's role be in these?
2. How does the city's regulation of development fit in with economic development?
3. Describe what the relationship should be among city council, advisory boards, and staff in planning for the city.

Finance

1. What things should the city pay attention to in order to get a high bond rating?
2. What constitutes a sound, prudent idle funds investment policy under today's economic conditions?
3. What are different ways the adopted budget can be used by the city?

Additional Resources

Publications

International City/County Management Association. *Compensation 96: An Annual Report on Local Government Executive Salaries and Fringe Benefits.* Washington, D.C.: ICMA, 1996.

International City Management Association. *Employment Agreements for Managers: Guidelines for Elected Officials.* Washington, D.C.: ICMA, 1984.

International City Management Association. *Recruitment Guidelines for Selecting a Local Government Administrator.* Washington, D.C.: ICMA, 1987.

Organizations

International City/County Management Association, 777 North Capitol Street NE, Washington, DC 20002

National Association of Counties, 440 First Street NW, Washington, DC 20005

National League of Cities, 1301 Pennsylvania Avenue NW, Washington, DC 20004

North Carolina Association of County Commissioners, P.O. Box 1488, Raleigh, NC 27602

North Carolina City/County Management Association, P.O. Box 3069, Raleigh, NC 27602

North Carolina League of Municipalities, Albert Coates Local Government Center, 215 North Dawson Street, Raleigh, NC 27602

board notifies the other candidates and then takes formal action in open session to hire the successful candidate. Once the board and the new manager have settled on the terms of employment, the board (usually the mayor or the chair, as the board's representative) should contact each of the other candidates directly to ensure that they learn of the board's decision firsthand. These last steps should be completed carefully to protect the board's interests, but they should also be completed in a timely fashion out of respect for the position of the other candidates. Experience suggests that the more time that passes after the final interview, the less control the board has over the time and the conditions under which its decision becomes public.

An increasing number of cities and counties in North Carolina have formal employment agreements with managers. Sometimes called contracts, they may set out a variety of conditions specific to the manager's employment, such as leave, use of a car for official business, expense accounts, participation in professional activities, and virtually anything else that establishes a clear understanding between the board and the manager about the responsibilities, the benefits, and the privileges of the office. They cannot guarantee a term of employment because state law specifies that the manager serves at the pleasure of the governing board. However, recognizing the risk that the manager and his or her family assume by coming to a new community to serve at the will of a political body, some governing boards include provisions in the agreement that require advance notice of resignation in exchange for a lump-sum severance payment in the event that the manager is fired without cause.

Next Steps

At the outset of a new manager's tenure, it is useful for the board and the manager to establish what they expect of each other beyond the very general tenets of statutory and professional responsibilities. Their relationship can enhance or impede the process of governance significantly, so devoting some time to establishing and maintaining a good one is important. No two boards are exactly alike, nor are any two managers. No matter how much previous experience a new manager has had or how many managers a particular community has had, the relationship between a particular governing board and a particular manager is certain to be different in some ways than either of them has previously experienced.

Soon after a new manager is hired and again whenever a significant turnover in the local governing board occurs or a new mayor or chair is elected, the board, the mayor or the chair, and the manager usually find it helpful to review their specific expectations of one another more comprehensively and more specifically than was possible in the interview. Such a discussion allows them to understand what each thinks she or he needs from the others to be effective in carrying out major responsibilities.

Often this discussion takes place in the setting of a retreat, at which the local governing board and the manager might also discuss the substantive goals and plans that the board wants to accomplish as part of its long-range agenda. The result of such a retreat should be a common understanding of what the board wants to achieve and how the board and the manager will work together to accomplish that.[12]

Agreeing on the board's expectations of the manager provides a sound basis for the board's formal and informal evaluations of the manager's performance. The expectations also provide the manager with one reliable reference for continuing self-evaluation during the year. Most governing boards find it effective and convenient to conduct a formal evaluation of the manager once a year, usually associated with their consideration of adjustments in the manager's compensation. Typically the evaluation is held in closed session, with the manager present and participating.[13]

Conclusion

The process of hiring a city or county manager is neither quick nor simple, but it is critically important to the effectiveness of governance in a city or a county with the manager form of government. Time and effort spent on defining carefully what the community and the elected board need in the near future, searching systematically for candidates with attributes that will meet the needs, and thoroughly examining the candidates can yield significant future returns in the form of satisfied citizens, board members, and employees.

[*The next issue of* Popular Government *will include an article on evaluating the manager, by Margaret S. Carlson. A follow-up to her article in the Winter 1994 issue, it will address the most common questions on the subject raised by boards and managers.*]

Notes

1. G.S. 153A-81 (for counties) and G.S. 160A-147 (for cities) permit the local governing board to appoint a manager to serve at its pleasure. The board is bound by no procedural requirements beyond a majority vote in an open meeting.

2. To perform a pairwise comparison of items in a list, a group starts by voting on the relative importance of the first item compared with each other item in turn. It places a mark by whichever item wins each vote. Then the group compares the second, third, and each succeeding item with every other item on the list in the same manner until the group has worked through the whole list. At that point, every item has been compared with every other item, and the number of marks next to each item indicates how many times it was voted more important in comparison with another item. Thus the items with the most marks next to them should be the ones that the group believes to be the most critical ones.

3. In two recent recruitments, in Guilford County and Kinston, the boards asked department heads to develop a list of characteristics that they wanted in their next manager to help them do their jobs well. The boards then considered these lists as they developed the profiles.

4. The ICMA publishes *Compensation*, an annual report of managers' average salaries by state, region, and size of jurisdiction. Each year the Institute of Government publishes *County Salaries in North Carolina*, and the North Carolina League of Municipalities publishes *North Carolina Municipal Salaries for Municipalities above 2,500 Population*.

5. Guidelines for advertisements and publication deadlines are published annually and may be obtained from ICMA or the Institute of Government.

6. ICMA also publishes *J.O.B.* (*Job Opportunities Bulletin*), a special newsletter circulated among women and minority managers nationwide. A local governing board can request an advertisement in *J.O.B.* at the same time that it requests an advertisement in the *ICMA Newsletter*.

7. *See* Stephen Allred, "North Carolina Supreme Court Issues Decision on Personnel Records Act," *Local Government Law Bulletin*, no. 43 (July 1992), which discusses disclosure of personnel records, specifically applications for employment. The North Carolina Supreme Court decided in Elkin Tribune, Inc. v. Yadkin County Board of County Commissioners, 331 N.C. 735, 417 S.E.2d 465 (1992), that all information maintained by a city or a county on applicants for employment had to be kept confidential, that no information whatsoever about an applicant might be released, and that the local government had no discretion in the matter.

8. The decision of the court in *Elkin Tribune* appears to exclude anyone from seeing the records of an applicant without his or her release except the official having custody of the personnel records (the personnel officer) and the hiring authority (the elected board in the case of the city or county manager).

9. An assessment center might require each candidate to write a brief analysis of an issue, present the analysis to a group including persons playing the role of hecklers, mediate a simulated dispute among persons playing the role of employees, and dispose of a series of items in an in-basket, in addition to going through a structured interview. *See* Ronald G. Lynch, "Assessment Centers: A New Tool for Evaluating Prospective Leaders," *Popular Government* 50 (Spring 1985): 16–22.

10. Reaching consensus is different from the more familiar process of compromising, and it is hard work. To reach consensus, disagreeing parties must exchange enough valid information so that each can freely agree on and fully support the final position or solution.

11. G.S. 143-318.11(6). In 1993, in an unusual action, the Wilmington City Council opted to hold its interviews of candidates for city manager in an open meeting with no restriction on public attendance.

12. *See* Kurt Jenne, "Governing Board Retreats," *Popular Government* 53 (Winter 1988): 20–26.

13. *See* Margaret S. Carlson, "How Are We Doing? Evaluating the Performance of the Chief Administrator," *Popular Government* 59 (Winter 1994): 24–29.

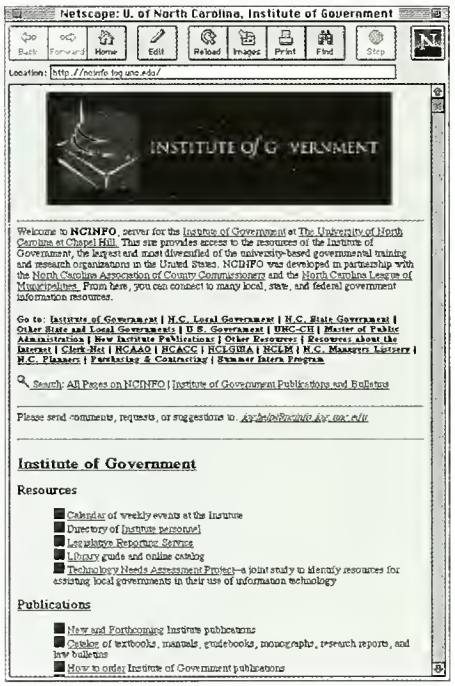
Special Series
Local Government on the Internet

Part Five:
Appropriate Use of the Internet

Patricia A. Langelier

Part One of this special series (see the Summer 1995 issue of Popular Government*) explained some Internet basics and defined some terminology. It also described NCINFO, an Internet site for North Carolina state and local government resources. Part Two (Fall 1995) took a look at electronic mailing lists. Part Three (Winter/Spring 1996) described local governments' use of home pages on the Internet. Part Four (Summer 1996) discussed ways to evaluate Internet resources.*

[Any of the articles in this special series can be accessed on NCINFO at ***http://ncinfo.iog.unc.edu****. To purchase a copy of an issue of* Popular Government *or to obtain a photocopy of a particular article, contact the Institute's Publications Sales Office at (919) 966-4119.]*



Anyone working in government who was around when computers were first introduced into the workplace can remember a common use of the new technology. Snoopy and "Bon Voyage" banners decorated the offices of workers savvy enough to use mainframe computers to create images or messages on a steady stream of continuous-feed paper. Was that a misuse of the organization's resources? Possibly, but because it provided quick and easy results to learners who followed a series of instructions, it might also be seen as computer skills training. Like Windows programs that include solitaire and other games for learning control of the computer's mouse, banners make the computer less intimidating for new users and help spread the acceptance and the use of a new technology.

The Internet is the latest new technology confounding managers. Is it a toy or a tool? Should employees have access to it? Should an employer regulate its use in the workplace? This article looks at the potential problems created by the Internet, some policies on appropriate use that organizations have adopted, and some topics for training of new Internet users.

"Appropriate use" of the Internet may be defined as responsible, cooperative, community-minded behavior that protects the common good. At work, it also means promoting the legitimate goals of the Internet user's employer. Users should respect the rights of others, respect the integrity of the Internet and the organization's local area computer network, and observe all relevant laws, regulations, and contractual obligations.

That sounds general enough to cover use of any organization's facilities, resources, and services, so why should an employer adopt an appropriate-use policy specifically for the Internet? Is misuse of the Internet different from misuse of a telephone or a photocopier? Yes. The scale of the possible damage is much greater on the Internet. A harassing phone call to one person pales in comparison with an e-mail message that offends thousands of people on a listserv or in a newsgroup. Also, the full text of an e-mail message is delivered to and can be stored on the computers of all recipients of the message. Moreover, recipients can forward it to others. An e-mail message a public employee sends or receives may be a public record. Angry words e-mailed in haste can come back to haunt the sender in a way that no unrecorded telephone conversation can. The illegal or inappropriate actions of an employee can damage the goodwill enjoyed by the organization or subject it to a lawsuit. Also, immoderate use of the Internet can tie up Internet resources and prevent others from gaining access to them.

"Acceptable-use policies," as they are often called, have been around since the Internet began, as the NSFNET (National Science Foundation network). At the network's inception, no selling, advertising, recreation, or entertainment was allowed. Use was intend-

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ed to support research and education at not-for-profit academic institutions in the United States, as stated in the *NSFNET Backbone Services Acceptable Use Policy* [see "Selected Resources on Appropriate Use of the Internet" (hereafter "Selected Resources"), pp. 36–37]. However, in the early 1990s, with the transfer of support for the network's "backbone," or major pathway, from the National Science Foundation to the private sector, prohibitions against commercial use were eliminated. With growth from thousands to millions of users, the development of the World Wide Web, and the simplicity of creating and distributing content, abuse of the Internet has become a cause for concern.

Misuse of the Internet has resulted in numerous lawsuits relating to privacy, confidentiality, pornography, copyright infringement, sexual harassment, defamation, and "cybercrime." Organizations in the public and private sectors have begun to confront the potential effect of the Internet on them, especially from exposure to liability, by adopting policies and guidelines for employees' use of the Internet.

Problems

Misuse of an organization's Internet connection can range from inappropriate e-mail messages to a breach of the security of an external computer network and damage to its files. Monopolizing the organization's Internet connection can slow the internal computer network. Someone can willfully obstruct property by "spamming" the Internet, that is, by sending a message to multiple mailing lists or newsgroups in order to reach a large number of people.

E-Mail

E-mail is the most heavily used feature of the Internet and can be the greatest source of difficulty for an organization. E-mail messages can be defamatory, harassing, or "indecent," or they can be considered "hate speech" (such as racist language). A determined Internet user can send inappropriate messages from another person's e-mail address without that person's knowledge. An unwitting user can distribute information via e-mail in violation of copyright laws. E-mail can supply false or misleading information. An employee can use the organization's name inappropriately or send information that is out-of-date.

Downloading

Downloading programs and files may violate United States copyright laws. It may also introduce a virus into an organization's computer network. Employees may need guidance about copyright restrictions and virus protection software, and instructions for protecting the internal computer network.

Privacy and Permissible Activities for Work Purposes

E-mail users tend to forget that their e-mail messages are not private. In an organizational setting, messages in the e-mail system may be monitored, intercepted, or copied to a backup tape. Even if a person deletes e-mail from his or her mailbox, it may still exist in the backup files created by computer system administrators. Unless employees can encrypt e-mail messages containing confidential or other sensitive information, they are better advised to use other communication methods.

Personal Use of the Internet

The Internet has changed the way that many people work. As they have learned more about the extensive resources of the Internet, it has become part of their personal lives as well. Using their employer's Internet connection, many employees exchange personal e-mail messages with friends, family members, and co-workers, and search for information that has nothing to do with their work. Unless an employer specifically promises privacy and no retaliation for such communications, employees should not assume that they have either.

As for appropriate use of time, questions abound. If an employee searches a medical resource on the Internet to find information about a disease that a friend has contracted, is the employee misusing the employer's resources?

Glossary

Backbone — A high-speed line or series of connections that forms a major pathway within a network such as the Internet.

Encryption — Use of an algorithm, by a sender to scramble words into unintelligible text and then by a receiver to unscramble the text. There are two methods of cryptography, secret and public. In secret cryptography, both sender and receiver hold the same (secret) key. In public cryptography, the sender holds one key (the private key), used to encrypt, and the receiver holds the other key (the public key), used to decrypt. PGP is an example of encryption software that creates a pair of keys, one private and one public.

Spamming — Sending a message to multiple mailing lists or newsgroups in order to reach a large number of people. Many people subscribe to more than one list or newsgroup, so they may receive the same message several times. Spamming is considered inappropriate behavior on the Internet.

What if the employee uses the Internet to plan a vacation? He or she can search for the lowest airfare, locate a list of hotels and tourist attractions, track down restaurant reviews, and find theater schedules. The employee can even print maps of the places that she or he intends to visit. Is that an acceptable use of the Internet?

Employees and supervisors alike are uneasy about whether personal use of the Internet is appropriate at work and, if so, how to monitor its use. A later section of this article describes positions taken on these questions by selected North Carolina institutions.

Policies

Public- and private-sector organizations alike adopt Internet policies for many reasons. As noted, an organization has an interest in limiting its liability if an employee misuses the Internet. A policy also provides the organization with legal recourse for dealing with internal offenders.

An organization's reputation can be undermined by inappropriate, offensive, or harmful e-mail from a representative of the organization. Organizations that encourage employees to participate in online discussion groups relating to their professional responsibilities often recommend that employees use a disclaimer in their e-mail and mailing lists—for example, "The views and opinions of this author do not represent the views, opinions, or policies, stated or otherwise, of [name of employer]." A disclaimer is usually placed within the signature block of an e-mail message, which typically contains the sender's name, address, and telephone number, and the organization's name. In some e-mail systems, once a signature block is created, it is automatically added to each message sent.

Organizations that allow their employees to post personal home pages on the organization's Internet Web site should require, at a minimum, a disclaimer similar to the one recommended for e-mail and mailing lists, and they may want to impose stricter limitations. The following incident illustrates the importance of considering these matters. In May 1996 Arthur Butz, a professor of electrical engineering at Northwestern University, created a home page on the university's Web site. The university allows employees to do so as long as the material conveyed is not illegal and is labeled as personal opinion. Professor Butz has used his home page to advertise his 1976 book, entitled *The Hoax of the Twentieth Century*. The book promotes Butz's view that the Holocaust is "an extermination legend." Some people in the university community, as well as many outside it, oppose this use of the Web site. However, the university's president, Henry S. Bienen, maintains that academic and intellectual freedom are best served by the university's policy. If an institution chooses to encourage broad freedom of expression, it should be aware of the risk that this case illustrates.

Selected Resources on Appropriate Use

Sample Policies

Administrative Office of Pennsylvania Courts. *AOPC Internet Usage Policy.* **http://www.cerf.net/penna-courts/pub/dp/inpolicy.htm** (Aug. 6, 1996).
Offers a simple, one-page policy on appropriate use.

Catawba County, North Carolina. *Electronic Mail Policy.*
Explains proper use of the e-mail system by county employees. For a copy of the policy, contact Susan Lowman, MIS Director, Catawba County, P.O. Box 389, Newton, NC 28658, telephone (704) 465-8288, or e-mail susanl@mail.co.catawba.nc.us.

City of High Point, North Carolina. *Information Services Policy* (March 1, 1996).
Addresses all aspects of computer use by city personnel in all departments for all hardware, software, networking, and other systems connected to the information technology systems managed by the Department of Communications and Information Services. For a copy of the policy, contact H. Lewis Price, City Manager, City of High Point, P.O. Box 230, High Point, NC 27261-0230, telephone (910) 883-3289.

Mecklenburg County, North Carolina. *Internet Security Policy* (effective March 20, 1996). **http://meckweb.charmeck.nc.us/coinfoct/policy/internet.htm.**
Provides guidance on use of the Internet, protection of information, expectations for privacy, use of resources, public representation, compliance, and cost control. For more information, contact Jerry Pinkard, MIS Director, Mecklenburg County, Charlotte-Mecklenburg Government Center, 600 East Fourth St., Charlotte, NC 28202, telephone (704) 336-2003.

University of California, Berkeley. *Computer Use Policy.* **http://vas.berkeley.edu:7355/policy/usepolicy.html.**
Contains examples of unethical behavior on the Internet.

University of Delaware. *Recommended Guidelines for Units: Implementing the Policy for Responsible Computing at the University of Delaware.* **http://www.udel.edu/eileen/newEcce/guide.020293.html** (Feb. 2, 1993).
Addresses responsibilities of users and system administrators, examples of misuse, and campus judicial policy for cases of alleged misuse.

of the Internet

Related Resources

A Beginner's Guide to Effective Email, by Kaitlin Duck Sherwood.
http://www.webfoot.com/advice/email.top.html (March 5, 1996).
Focuses on the content of e-mail: how to say what one needs to say.

"E-Mail and Beyond," *The Piper Letter* (Piper Resources).
http://www.piperinfo.com/piper/pl02/index.html (Aug. 6, 1996).
Focuses on e-mail, including articles such as "Cybermail Nightmares and Daydreams: The Knotty Issues and Useful Readings," "Making the Most of E-Mail for Public Information," "Eight Neat Tricks with E-Mail," "An E-Mail Checklist for Savvy Managers," and "Reviews: E-Mail Books." This is an issue of the *Piper Letter*, a newsletter written for government agency managers, policy makers, and technical staff who deal with questions regarding public electronic information.

Implementing Sound Corporate Internet Policies: Legal and Management Issues.
Chicago: Gordon & Glickson P.C., June 1995.
http://www.ggtech.com/publist.html.
Describes potential liabilities that a corporation can encounter in using the Internet and suggests policies to reduce the risk of lawsuits.

The Information Law Web: A Collection of People, Places, and Things That Can Help You Understand Your Rights in the Emerging Information Age.
http://seamless.com/rcl/infolaw.html (Aug. 6, 1996).
Offers a searchable database of documents, articles, cases, statutes, people, and Web sites that provide more information about legal aspects of the Internet.

Netiquette Guidelines. **ftp://nic.ddn.mil/rfc/rfc1855.txt** (Oct. 1995).
Provides a minimum set of guidelines for users and administrators. Made available on the Internet by the Responsible Use of the Network Working Group, of the Internet Engineering Task Force, this twenty-one-page document can be used as training material. It addresses one-to-one communication, which includes mail and talk; one-to-many communications, which includes mailing lists and newsgroups; and appropriate use of Internet services such as gopher, WAIS, WWW, FTP, and telnet. A bibliography of selected other sources is included for reference.

The Net User Guidelines and Netiquette, by Arlene H. Rinaldi.
http://www.fau.edu/rinaldi/net/ (Aug. 6, 1996).
Succinctly states good practice for Internet users, including "The Ten Commandments from the Computer Ethics Institute."

The NSFNET Backbone Services Acceptable Use Policy. June 1992.
ftp://ftp.merit.edu/nsfnet/acceptable.use.policy.
Lists acceptable and unacceptable uses of the NSFNET Backbone of the Internet.

Organizations that provide information on Internet Web sites also use disclaimers. Several types of disclaimers appear on government Web sites. A "general disclaimer" might indicate that the suitability and the content of information accessible by link or by reference from the government site's home page are solely the responsibility of the organization that maintains the information—for example, "No link to, or mention of, a particular site or vendor indicates or constitutes an endorsement of that site or vendor. Such links are here solely for the convenience of our users."[1] A local government might also include a "disclaimer of endorsement" for any commercial products, processes, or services referred to on the Web site.[2] A third type is a "disclaimer of liability" for the documents available from the government server.

Internet use policies range from restrictive to unrestrained. Most of the policies to be found on the Web are between these extremes. Many are brief statements that remind employees to use the organization's computing and information resources responsibly and ethically, in accordance with relevant laws and contractual obligations. Organizations considering adoption of an e-mail policy should make it clear to users that internal or external audit or other needs may require examination of the organization's e-mail and that workers should not expect e-mail messages to be free from inspection. Because e-mail is not as secure as other forms of communication, employers should warn users against delivering confidential and other sensitive information through e-mail unless it is "encrypted," or coded. Local governments should ensure the security of confidential or personal information about employees, citizens, and businesses that is transmitted via the Internet. PGP (Pretty Good Privacy) and Viacrypt are examples of available encryption software. PGP can be downloaded from the Internet at no cost.[3]

Some appropriate-use policies restrict the use of computing resources to official business. Others recognize and approve of personal use when employees are off duty. If the computing resources of an organization are limited, it may restrict the amount of time that an employee may use the Internet to reduce waste of resources, lower costs, and prevent inconvenience to other users. Organizations that pay a per-minute fee for Internet access are likely to limit the amount of Internet use that is not work related.

Often, appropriate-use policies

explicitly prohibit commercial activities and remind employees that the organization's Internet account may not be used for personal gain. An Internet policy might encourage employees to obtain private Internet accounts for their personal use. It might also provide examples of unethical behavior [see Babson College, *Computer Code of Ethics*, http://www.babson.edu/mba/ghdbk/hdbkapp2.html, or University of California, Berkeley, *Computer Use Policy* (listed in "Selected Resources," pp. 36–37)].

Some appropriate-use policies prohibit reading or downloading of sexually oriented materials. The policy of the Administrative Office of Pennsylvania Courts includes a "business card rule" to prevent inappropriate use and embarrassment for the organization. The rule reminds network users that connections to the Internet "can be traced back to the originator, leaving a trail of 'business cards' easily tracked by others. Do not visit any sites where you are reluctant to leave your 'business card.'"[4]

Tracking employees' use of Internet sites is one way to discourage misuse. Another approach is to install screening software, software available for the office environment to block access to a wide range of Internet sites that may distract employees, such as sports, gambling, and other entertainment sites. Although such software may reduce the amount of Internet use by an employee, it does nothing to improve workplace productivity, of course. Newspapers, telephones, computer games, and coworkers offer an abundance of alternative opportunities to avoid work.

An employer should carefully consider other ramifications of blocking access. For example, screening software is not sophisticated enough to distinguish between sites that some might consider "indecent" and sites that provide medical information and illustrations. In addition, blocking access to sections of the Internet might raise questions of censorship in a library or another academic setting. Finally, applying such software restrictions to all employees would prevent legitimate use of controversial or "frivolous" Internet resources by employees such as researchers and librarians.

Preparing, implementing, and enforcing an appropriate-use policy are management responsibilities, like other policies that govern employees' behavior. The computer services staff can assist management in preparing an appropriate-use policy and can alert managers to suspected violations. If an appropriate-use policy is adopted, it should describe the organization's procedures for handling alleged violations of the policy. The *Computer Use Policy* of the University of California, Berkeley, describes that institution's enforcement procedures (see "Selected Resources," pp. 36–37). Employers should distinguish for employees between what is illegal and might therefore expose an employee to criminal prosecution or civil suit, and what is against the employer's rules and might result in workplace sanctions up to and including dismissal. Any policy should point out that all users should abide by generally accepted guidelines for appropriate use, in addition to local policies and procedures.

If an organization adopts an appropriate-use policy, it should make all employees aware of the policy and ask them to sign an agreement to abide by it. Before assigning an e-mail address to a new employee, a representative of the employer should discuss appropriate Internet use and obtain the employee's agreement to comply with the policy. The organization might offer Internet training to new and old employees, enabling workers to learn the legal and ethical responsibilities of using the Internet as well as the practical skills of connecting, navigating, and locating and transmitting information. Organizations should plan to reexamine and revise the policy periodically because organizational changes and shifts in technology can make it obsolete.

North Carolina Examples of Appropriate-Use Policies

In April 1996 the treasurer of The University of North Carolina at Chapel Hill responded to employees' concerns about allowable uses of the university's resources by releasing a statement entitled *Personal Use Policy*. The policy provides guidance in the use of computers, telephones, and fax machines for nonofficial purposes. Employees may make personal use of university resources if their use complies with six criteria:[5]

1. The cost to the University must be negligible.
2. The use must not interfere with a University employee's obligation to carry out University duties in a timely and effective manner. . . .
3. The use must in no way undermine the use of University resources and services for official purposes.
4. The use neither expresses nor implies sponsorship or endorsement by the University.
5. The use must be consistent with state and federal laws regarding obscenity, libel, or the like, and state and federal laws and University policies regarding political activity, the marketing of products or services, or other inappropriate activities.
6. *Users should be aware that internal or external audit or other needs may require examination of uses of University resources or services and should not expect such uses to be free from inspection.*

North Carolina's state government has adopted a policy as well, entitled *Use of the North Carolina Integrated Information Network and the Internet.* It applies to employees of executive

state agencies.[6] This policy addresses concerns about downloading viruses, infringing on software copyrights, and keeping personal use reasonable. It recommends appropriate and prudent behavior by public employees. The state policy recognizes that a certain amount of personal use is acceptable because it allows workers to become more familiar with Internet resources. Employees can discover useful information while searching the Internet, and they may find solutions to problems while researching other topics.

A policy from the North Carolina Department of Cultural Resources describes appropriate use of e-mail, addresses the issue of e-mail privacy, and reminds employees that "the contents of electronic mail messages 'made or received pursuant to law or ordinance in connection with the transaction of public business' are a public record and are subject to inspection unless specifically exempted by statute or judicial interpretation."[7]

The Office of the State Controller outlines some do's and don'ts for e-mail in a two-page Internet paper entitled *What You Should—and Shouldn't—Say When You Send Those E-Mail Messages*. It is available at the office's Internet site (**http://www.osc.state.nc.us/OSC/osctoday/marapr96/brief3.htm**).

The policies just described promote prudent behavior while encouraging exploration of the Internet. Of course, most of the problems that expose an organization to lawsuits for discrimination, negligence, copyright violation, or false advertising on the Internet apply to other forms of communication as well. If an organization decides to adopt an appropriate-use policy, it should be consistent with other policies that govern employees' behavior. For example, if an organization has a policy that prohibits employees from talking to the press without proper clearance, it should also include in its policy a statement about making public comments in newsgroups and listservs. Expanding existing policies on employee communications, such as using the telephone and dealing with the press, to include using e-mail and other Internet applications may be sufficient.

Education

An Informed and Effective Staff

For an appropriate-use policy to be successful, it should be simple and easy to understand, brief and to the point. It should define appropriate and inappropriate behavior, and it should be accompanied by a program of training for new employees and new users of the Internet. Good training enables employees to use Internet resources effectively in accomplishing their work, understand the costs, avoid common mistakes made by new users, and reduce overloading of network resources and disruption of the work of others. Effective training diminishes the possibility that staff will compromise the integrity of an organization's communication services. Training should be made available to all employees who might make use of the Internet in performing their official duties. Once trained, employees can judge whether use of the Internet will reduce the organization's cost, time, or effort or will improve the delivery of services.

Basic Internet Skills

Training should cover the basic skills: how to gain access to the Internet, how to locate information, and how to identify useful information (see Part Four of "Local Government on the Internet").[8] It should help users understand costs, the effects of their use of the network, and ways to avoid careless use or misuse.

Training should also cover the appropriate use of e-mail. Its most appropriate use is for distributing objective, factual information. Employees should be cautioned to be diligent in protecting confidential or other sensitive information when using e-mail.

Conclusion

Connecting to the Internet raises legal, managerial, and technical questions. Governments should address all three areas in planning for their information infrastructure. An appropriate-use policy and employee education about the Internet can protect a government and its employees from liability, conserve computing resources, and enable the organization to experience only the beneficial effects of the Internet.

Notes

1. U.S. Naval Research Laboratory, Information Technologies Division, Virtual Reality Lab [**http://www.ait.nrl.navy.mil/vrlab/pages/disclaimer.html**] (Aug. 6, 1996).

2. U.S. Department of the Interior, "U.S. Department of the Interior Disclaimer" [**http://www.doi.gov/doidisc.html**] (Aug. 6, 1996).

3. PGP software can be found at many FTP sites. Search Filez [**http://www.filez.com**] for a list of locations.

4. Administrative Office of Pennsylvania Courts, *AOPC Internet Usage Policy* [**http://www.cerf.net/penna-courts/pub/dp/inpolicy.htm**] (Aug. 6, 1996).

5. The University of North Carolina at Chapel Hill, *Personal Use Policy* (Chapel Hill, N.C.: UNC-CH, April 12, 1996).

6. Office of the State Controller, Information Resource Management Commission, *Use of the North Carolina Integrated Information Network and the Internet* (Oct. 1, 1996). *See also Policy and Guidelines in the Use of the Internet*, available at **http://www.sips.state.nc.us/IRMC/documents/approvals/irmcinet.html**.

7. North Carolina Department of Cultural Resources, *Policy Regarding the Use and Privacy of Electronic Mail* [**http://www.dcr.state.nc.us/ncin/policy.htm**] (Aug. 13, 1996).

8. Patricia A. Langelier, "Special Series: Local Government on the Internet. Part Four: How to Evaluate Internet Resources," *Popular Government* 61 (Summer 1996): 41–48.

At the Institute

Sanders Receives State's Highest Civilian Honor

John L. Sanders, retired member of the Institute of Government faculty and its former director, received one of six 1996 North Carolina Awards, the highest civilian honor the state can bestow. The awards, presented by the governor, are given yearly to men and women who have made significant contributions in science, literature, fine arts, and public service.

The tribute accompanying the award recognized Sanders's achievements as director of the Institute (1962–73 and 1979–92), vice-president for planning for The University of North Carolina (1973–78), member of the Community College and Technical Institute Planning Commission, member of the Commission on the Future of North Carolina, board member for the Research Triangle Foundation and the North Caroliniana Society, founding member and president (1976–91) of the State Capitol Foundation, and member of The University of North Carolina at Chapel Hill Bicentennial Policy Committee.

Sanders assisted in consolidating the state's public universities into one sixteen-campus system, for which he helped develop a desegregation plan. He played a key role in redrawing legislative and congressional districts and in crafting legislation for a community college system. He is an expert in state constitutional law, legislative representation, and state government organization. Also, he has worked to preserve historic buildings, including the State Capitol and Old East (UNC–CH), America's oldest structure on a public university campus.

Sanders says he did not lay out a specific plan for his achievements. "Opportunities came along," he recalled, "and one thing led to another."

Nevertheless, Sanders made the best of his opportunities, earning other awards as well: from the North Carolina Historic Preservation Society, the American Association of State and Local History, The University of North Carolina at Chapel Hill General Alumni Association, The University of North Carolina at Chapel Hill School of Law Alumni Association, the faculty of The University of North Carolina at Chapel Hill (the Thomas Jefferson Award in 1988), and The University of North Carolina Board of Governors (the University Award in 1995).

Bob Donnan

John L. Sanders

UNC-CH News Services / Dan Sears

K. Lee Carter, Jr.

The North Carolina Award tribute notes, "As a teacher Sanders was quick to share his insights with students and his own children. He emulated his mentor, Institute founder Albert Coates, who invited him to join a cadre of 'scholar-teacher-writer-advisers.'" Coates received a North Carolina Award in 1967.

"What I hope compels people to serve is a desire to help their fellow citizens to the best of their ability," Sanders said. "I hope they feel the reward of achieving effective service."

—Jennifer Hobbs

Carter Joins Capital Management Firm

K. Lee Carter, Jr., an Institute of Government faculty member specializing in public finance and government, left the Institute in December to begin work as a vice-president for Charlotte-based Sterling Capital Management. The company distributes shares in the North Carolina Capital Management Trust, a mutual fund available exclusively to North Carolina's local governments, more than half of which choose it as an investment option. Carter will represent the company in Williamston, North Carolina.

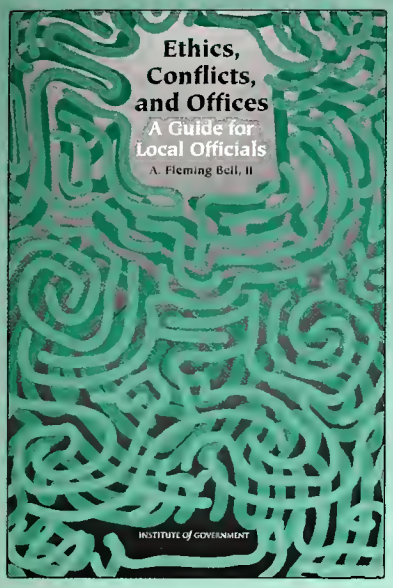
Before joining the Institute as a faculty member in July 1993, Carter directed the Fiscal Management Section of the State and Local Government Finance Division, Department of State Treasurer.

"I've known the people at Sterling since I was in the treasurer's office," Carter said of his new colleagues. Part of his job will be working with clients to discover possible new investment services. "For example, investing and tracking bond earnings is something the North Carolina Capital Management Trust does now because local governments expressed a need for help in that area," Carter explained. Additionally, Carter will conduct cash management and investment seminars for clients.

Plans are in the works for Carter to be an adjunct lecturer at the Institute. "I am delighted that Lee will continue contributing to the Institute's work in governmental accounting and related areas," said Michael R. Smith, director of the Institute. "He has made wonderful and lasting contributions in a relatively short time. It would be impossible to replace his talent, initiative, and commitment."

Carter commuted weekly from Williamston to Chapel Hill while his wife, Danette, Martin County's finance officer, stayed in Williamston. "This gives us a chance to be a full-time family," Carter said. *—Jennifer Hobbs*

Off the Press



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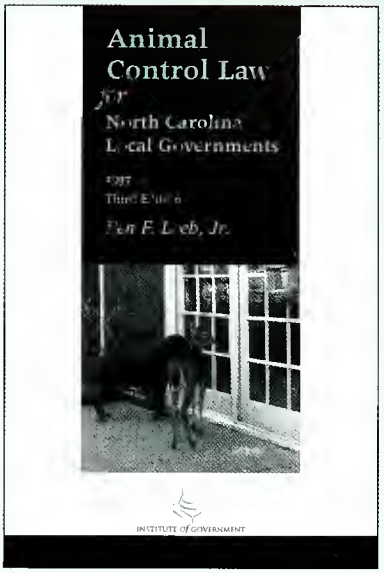

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Public Records Law for North Carolina Local Governments

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David M. Lawrence

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This new book replaces an earlier Institute of Government volume, entitled *Interpreting North Carolina's Public Records Law.* In addition to examining the contours of the public's right of access to public records held by North Carolina local governments, this new edition reflects a 1992 ruling by the North Carolina Supreme Court that endorses a broad definition of "public record," holding that only the General Assembly may establish exceptions to the public's right to access and copy public records. Although focusing mainly on local government, much of this book will also be useful to officials in state government.

Regulating Sexually Oriented Businesses

Special Series No. 15, January 1997

David W. Owens

$15.00*

This publication examines the legal issues associated with government regulation of sexually oriented businesses. It addresses constitutional issues such as what type of sexually oriented activity can be banned entirely; zoning restrictions on the location of sexually oriented businesses—the type of restrictions most frequently used by local governments; how far the First Amendment allows local governments to go in restricting these businesses; what a local government must do to establish a proper legal foundation for its regulations; and the operational restrictions that can be imposed on sexually oriented businesses.

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

—James Madison
The Federalist, No. 10