THE JUDGE'S COMMISSION

Michael Crowell, UNC School of Government (July 2015)

Contents

I. Introduction. Although superior court judges have statewide jurisdiction, generally they must be assigned to a particular term and session of court to have jurisdiction over a particular case. As discussed in the "Out-of-Term, Out-of-Session, Out-of-County" section of this Benchbook, there are instances when a judge may act on a matter that has arisen in the judge's home district, even if the judge is not currently assigned there, but for the most part a judge's substantive involvement in a case depends on the judge's current assignment. The master calendar, issued by authority of the chief justice, is the usual method of establishing a judge's assignment, but commissions must be issued when judges are moved around after the master calendar has been set.

II. Assignment through the Master Calendar. Unlike other jurisdictions, North Carolina superior court judges do not stay put, holding court only in their home districts. If they did, there would never be an issue whether a judge was properly assigned to a district and session. But they travel, often holding court away from home.

Article IV, section 11 of the state constitution says, "The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed." The same provision requires the chief justice to assign judges, based on rules adopted by the supreme court.

The state currently has eight divisions and superior court judges rotate through the districts within their division. Assignments are made by a master calendar for six-month terms. Within a six-month term, judges are assigned for one-week sessions in each county in a district, with the sessions designated as criminal or civil session or mixed. All these assignment are made through the master calendar prepared by the assistant director of the Administrative Office of the Courts.

For regularly scheduled sessions of superior court the master calendar itself serves as the assignment, meaning that no individual commissions are needed or issued. Appellate courts take judicial notice of the assignments made through the master calendar. Vance Construction Company, Inc., v. Duane White Land Corporation, 127 N.C. App. 493, 495 (1997).

III. The Use of Commissions. The master calendar never meets all the needs for assignment of judges. Judges get sick; they have to recuse themselves from cases; trials run past the scheduled end of the session; backlogs require additional sessions; and so on. The assistant director of the AOC spends considerable time moving judges from the assignments on the master calendar.

When a change in assignment from the master calendar is made, or a new session of court scheduled, the assistant director prepares a commission for the new assignment, signed by the chief justice. The commission is sent to the judge, the clerk of court, other designated officials such as the judge's judicial assistant, and also to the district attorney for criminal sessions.

Sometimes a judge will need to extend a session because a trial lasts beyond the end of the week. Although the standard commission says the judge is assigned "until the business is disposed of," probably eliminating the need for a new commission — see Lockert v. Lockert, 116 N.C. App. 73, 77 (1994) — the assistant director of the AOC routinely issues a new commission in that situation. Similarly, a new commission is issued when a judge who has just left a county or district for another assignment needs to sign an order in the previous district or return for a short hearing.

IV. Meaning of the Commission. Occasionally a question will arise on appeal about a judge's authority to have heard a case. If the judge was not properly assigned to that session of court, the judge's acts may be invalid. Vance Construction Company, Inc., v. Duane White Land Corporation, 127 N.C. App. 493, 495 (1997).

If the judge was sitting pursuant to assignment by the master calendar, the master calendar serves as proof of the judge's assignment to sit in that court at that time and resolves any issues about the judge's authority. As stated above, the appellate courts will take judicial notice of the master calendar.

When a judge is assigned separately from the master calendar, the commission is proof of the assignment and of the superior court judge's authority. The critical issue, though, is not whether there is a commission on file, it is whether the judge was properly assigned by the chief justice. A commission is the most convenient proof of the assignment, but it is not essential if there is sufficient other evidence of the assignment. As stated in *State v. Eley*, 326 N.C. 759, 764 (1990): "The issuance of a commission by the Chief Justice . . . does not endow the judge with jurisdiction, power, or authority to act as a superior court judge. The commission so issued merely manifests that such judge has been duly assigned pursuant to our Constitution to preside over such session of court."

Eley involved a challenge to the authority of the trial judge to conduct a murder trial. Although no commission could be found, evidence established that the judge had been assigned by the chief justice and that the commission had been issued in the normal course of business but never received. The supreme court upheld the trial judge's authority based on that evidence and also seemed to say that the issue was properly resolved by the chief justice issuing a commission *nunc pro tunc* dated back to the session in question. (Note, however, that a *nunc pro tunc* order is not used to fix something that was done wrong in the first instance, it is only to be used to have the record reflect correctly what was done earlier. See Rockingham County DSS ex rel. Walker v. Tate, 202 N.C. App. 747, 751-52 (2010).)

V. Emergency and Retired Judges. "Commission" has more than one meaning for an emergency or retired superior court judge. If a superior court judge retires before the mandatory retirement age, that judge may be recalled to service as an emergency judge under G.S. 7A-53. For that to happen the governor has to issue a "commission" to the

judge. In this instance, the commission is documentary proof that the person holds the office, it serves the same purpose as the commissions issued to various elected officials upon certification of the election results. For the emergency judge to hold court the judge needs not only the commission issued by the governor, the judge also needs the commission issued by the chief justice assigning the judge to a particular session of court.

A superior court judge who has retired because of the mandatory retirement age may be recalled by the chief justice under G.S. 7A-57 without the need for a commission from the governor. Instead the chief justice issues an "order of recall" which is to be included in the court file along with the commission assigning the retired judge to that session of court.

VI. Summary and Advice. Issues about a superior court judge's authority to hold court at a particular session are unlikely to arise and usually can be resolved by simply referring to the assignment on the master calendar. When assignments are changed from the master calendar, the assistant director of the AOC consistently and conscientiously prepares and distributes commissions, probably more than legally required. Still, when a judge is being moved at the last minute from one district and one assignment to another the judge should remember to check on the commission and confirm that a copy is on file. While the *Eley* decision includes lots of language to support the validity of an assignment even when a commission cannot be found, it will be considerable trouble for everyone to collect the evidence to establish the validity of the assignment in the absence of the commission.

OUT-OF-TERM, OUT-OF-SESSION, OUT-OF-COUNTY

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Contents

I. Introduction. For many jurisdictions the concept of a session or term of court is not as important as it is in North Carolina because judges in other states no longer move from one district to another as North Carolina's superior court judges still do. Here, a judge's jurisdiction over a matter still can depend on where the judge is assigned and when the judge acts.

The commonly stated North Carolina rule is that a judgment or order affecting substantial rights may not be entered without the consent of the parties (1) after the session of court has expired, or (2) while the judge is out of the county or district. Actually, as explained below, the law is more complicated than that and there are many instances when orders may be entered out-of-session and out-of-county. A better summary of the rule would be:

- A superior court judge may not enter an order in a criminal or civil case after the term, i.e., the six-month assignment by the master calendar, has ended, unless the parties consent.
- In criminal cases a superior court judge may not enter an order affecting substantial rights after the session of court — typically a one-week assignment — has ended unless the decision was announced during the session or the parties have consented to the judge deciding the matter and entering the order after the session is over.
- In civil cases a superior court judge may decide a matter and enter an order

after the session has concluded, so long as the matter was heard during the assigned session.

- A superior court judge may hear and decide at any time non-jury matters, both criminal and civil, arising from the judge's home district, regardless of where the judge may be assigned. This is the judge's in chambers jurisdiction. If it is a criminal matter, the in chambers hearing must be in the county where the matter arose, unless the parties agree to being heard elsewhere. In civil cases, the motion may be heard in any county within the judge's home district.
- In criminal cases a sentence does not have to be entered during the session but must be entered within a reasonable time thereafter.
- Other statutes authorize some particular criminal matters, such as habeas corpus writs and motions for appropriate relief, to be heard regardless of the judge's current assignment.

II. Meaning of "Session" and "Term". In common parlance "term of court" and "session" sometimes are used interchangeably, but they have distinct meanings. Under the rotation system for superior court judges mandated by article IV, section 11 of the North Carolina Constitution — "The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed" — judges are assigned on six-month schedules. Thus in superior court the "use of 'term' has come to refer to the typical six-month assignment of superior court judges, and 'session' to the typical one-week assignment within the term." Capital Outdoor Advertising v. City of Raleigh, 337 N.C. 150, 154 n.1, 2 (1994). *See* Beaufort County Board of Education v. Beaufort County Board of Commissioners, 188 N.C. App. 399, 407-10 (2008), *reversed on other grounds*, 363 N.C. 500 (2009); State v. Trent, 359 N.C. 583, 585 (2005).

III. In Chambers Jurisdiction. Sometimes what might otherwise be an out-of-session issue can be resolved by relying on a judge's in chambers jurisdiction, the authority to hear matters from the judge's home district regardless of the judge's current assignment. Thus it is useful to review briefly when a judge may hear a matter outside a scheduled session of court.[1]

A. The In Chambers Statute, G.S. 7A-47.1. A superior court judge's authority to hear matters outside a regular courtroom session is described in G.S. 7A-47.1. The statute defines the judge's jurisdiction to hear matters "in vacation"—that is, when there is no session of court scheduled—also referred to as "in chambers" jurisdiction. Generally any nonjury matter arising in the district may be heard in vacation, and it may be heard by either the judge currently assigned to the district, a resident judge of the district, or a special superior court judge who resides in the district. Scott v. Scott, 259 N.C. 642, 646 (1963); Patterson v. Patterson, 230 N.C. 481, 484 (1949).

B. Resident Judge Need Not Be Assigned. The resident judge, or a special judge who resides in the district, need not be currently assigned to the district to

[1] G.S. 7A-49.2 delineates when civil motions may be heard during criminal sessions of superior court and vice versa. The statute allows motions in civil cases to be heard during criminal sessions, and it authorizes civil trials during criminal sessions with consent of the parties. The statute prohibits hearing criminal matters during a civil session. *In re* Renfrow, 247 N.C. 55, 60-61(1957); Whedbee v. Powell, 41 N.C. App. 250, 255 (1979). A judge assigned to a civil session still would have in chambers jurisdiction to hear criminal nonjury matters, however.

exercise in chambers jurisdiction.

> The general "vacation" or "in chambers" jurisdiction of a regular judge arises out of his general authority. Usually it may be exercised anywhere in the district and is never dependent upon and does not arise out of the fact that he is at the time presiding over a designated term of court or in a particular county.

Baker v. Varser, 239 N.C. 180, 188 (1954) (quoting Shepard v. Leonard, 223 N.C. 110 (1943)).

C. Parties' Consent Not Needed. A judge's exercise of in chambers jurisdiction does not require the parties' consent. E.B. Grain Co. v. Denton, 73 N.C. App. 14, 24 (1985); Towne v. Cope, 32 N.C. App. 660, 665-66 (1977).

D. Where The Hearing May Be Held. It appears that a superior court judge hearing an in chambers matter in a criminal case must be in the county in which the matter arose, unless the parties agree to being heard outside the county. A civil in chambers matter, on the other hand, may be heard in any county within the district.

Although *Baker v. Varsa, supra*, seems to say that in chambers jurisdiction does not depend on the judge being in the county, the court of appeals later said in *House of Style Furniture Corporation v. Scronce*, 33 N.C. App. 365 (1977):

> Even as to regular judges, "it is the uniform holding in this jurisdiction that, except by consent, or unless authorized by statute, a judge of the Superior Court even in his own district, has no authority to hear a cause or to make an order substantially affecting the rights of the parties, outside the county in which the action is pending."

33 N.C. App. at 369 (quoting Shepard v. Leonard, 223 N.C. 110, 114 (1943)).

Subsequent to the decision in *House of Style Furniture*, the General Assembly enacted Rule 7(b)(4) of the Rules of Civil Procedure providing that a motion in a civil case may be heard in any county in the district. The rule appears to apply regardless of whether the motion is being heard during a regular session or in chambers. Because there is no comparable rule or statute for criminal cases, however, it seems that *House of Style Furniture* continues to apply to criminal cases, requiring an in chambers motion in a criminal case to be heard in the county in which the case arose, unless the parties agree otherwise.

If the hearing was held in the correct county, it does not matter that the judge is sitting in another county when the order is entered. State v. Collins, ___ N.C. App. ___, ___, 761 S.E.2d 914, 919-920 (2014).

IV. Extension of a Session. Sometimes a potential out-of-session problem may be avoided by the extension of the session. G.S. 15-167 authorizes a superior court judge to extend a criminal session if a trial cannot be completed by the end of the day Friday; it also authorizes extension of sessions for civil cases except when the trial of a civil case began after Thursday of the last week of the civil session. Although the statute provides

for an order extending a session to be entered in the record, the extension will be upheld if it is announced in open court and there is no objection from the parties. State v. Hunt, 198 N.C. App. 488, 493-94 (2009); State v. Locklear, 174 N.C. App. 547, 551 (2005).

V. Most Common Statement of the Out-of-Session, Out-of-County Rule. The North Carolina Supreme Court's statement of the out-of-session, out-of-county rule in *State v. Boone*, 310 N.C. 284, 287 (1984) is typical:

> "[J]udgments and orders substantially affecting the rights of parties to a cause pending in the Superior Court at a term must be made in the county and at the term when and where the question is presented, and our decisions on the subject are to the effect that, except by agreement of the parties or some express provision of law, they cannot be entered otherwise, and assuredly not in another district and without notice to the parties interested." *State v. Humphrey*, 186 N.C. 533, 535, 120 S.E. 85, 87 (1923). In prior and subsequent cases, this rule has been stated in various forms, and it has been consistently applied in both criminal and civil cases.

Several keys to the rule are covered in that quote. First, of course, the parties may consent to a decision out-of-session or out-of-county, and judges routinely ask for consent when taking a matter under advisement. Second, the rule only applies when the order substantially affects the rights of the parties; other orders may be entered out-of-session and out-of-county. Third, some other provision of law may authorize an action out-of-session and out-of-county. The legislature has done so in various circumstances, particularly in civil cases.

VI. Out-of-Session Orders in Criminal Cases. The North Carolina Supreme Court affirmed its commitment to the out-of-session rule in criminal cases in *State v. Trent*, 359 N.C. 583, 585 (2005):

> Furthermore, this court has held that "an order of the superior court, in a criminal case, must be entered during the term, during the session, in the county and in the judicial district where the hearing was held." *State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984). Absent consent of the parties, an order in violation of these requirements is null and void and without legal effect. *Id.*

In *Trent* the judge heard a motion to suppress evidence in January but did not enter an order until the trial opened in August. The supreme court held that the decision to suppress was void because it was rendered after the session and term of court had expired and without the defendant's consent. The court rejected the argument that the defendant had consented to the out-of-session order by not objecting when the judge said he was taking the matter under advisement.[2] Nor does the defendant have to show

[2] The *Trent* majority opinion prompted a strong dissent which argued, "[t]he out-of-term, out-of-session rule is now out of date." The dissent asserted that historical factors which led to the rule no longer existed. The rule was justified in the past when judges rode circuit on horseback and held court in a district only a few days a year. Because it might be months before a judge returned to a specific court, it was necessary for the judge to act before the session ended. The dissent also said that crowded dockets now require judges to continue cases from one term or session to the next and that requiring the court to obtain and record all parties' consent would put the trial courts at the mercy of the parties. The dissent argued that, at a minimum, a party should be required to object during the session to the holding of an order for later

prejudice from the late entry of the order. State v. Boone, 310 N.C. 284, 287 (1984).

(Note that if after hearing the motion in January the judge had entered the order before his six-month term expired at the end of June, the in-chambers jurisdiction of G.S. 7A-47.1 might have been applied to uphold the order.[3])

The *Trent* opinion acknowledged that *State v. Horner*, 310 N.C. 274, 279 (1984), provides an exception to the out-of-session rule, holding that an order may be entered after a session has expired if the ruling was announced in open court during the session.

A. Reason for the Rule. In *Boone* the court further explained the purpose of the out-of-session rule and the procedure that should be followed when issuing a judgment or order affecting substantial rights:

> Although we realize that there are situations where it would be more convenient for a judge to mail his ruling to the clerk, and then allow the clerk to notify the respective parties of the judge's decision, we are convinced that the better practice, in criminal cases, is for the judge to announce his rulings in open court and direct the clerk to note the ruling in the minutes of the court. When the judge's ruling is not announced in open court, the order or judgment containing the ruling must be signed and filed with the clerk in the county, in the district and during the session when and where the question is presented. These rules serve to protect the interests of the defendant, the State, and the public, by allowing all interested persons to be informed as to when a judgment or order has been rendered in a particular matter. Since many rights relating to the appeals process are "keyed" to the time of "entry of judgment," it is imperative that the judge's decisions become part of the court's records and that all interested persons know the exact date on which judgment is entered.

310 N.C. at 290–91.

B. The Sentencing Exception. The out-of-session rule does not apply to sentencing. "A trial court is authorized to continue the case to a subsequent date for sentencing." State v. Degree, 110 N.C. App. 638, 640 (1993). "This procedure . . . is an exception to the general rule that the court's jurisdiction expires with the expiration of the session of court in which the matter is

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action and should be required to show prejudice from the delay.

[3] *Capital Outdoor Advertising, Inc., v. City of Raleigh*, discussed in Section VII and decided eleven years before *Trent*, relied upon the in chambers jurisdiction of G.S. 7A-47.1 to sustain an order entered in a civil case the week after the session expired but still within the six-month term of the judge's assignment to that district. *Trent* emphasizes that the order was entered well after the term had expired and does not discuss the effect of G.S. 7A-47.1 or the holding in *Capital Outdoor Advertising*. There was no reason to discuss *Capital Outdoor Advertising*, of course, since no argument could be made about in chambers jurisdiction once the term ended. It would seem that in chambers jurisdiction might have been applied to uphold the out-of-session order in *State v. Boone*, where the order was entered out-of-session and out-of-county but still several days before the term expired at the end of June. *Boone* was decided ten years before *Capital Outdoor Advertising* and its construction of G.S. 7A-47.1, however, and the opinion muddles the distinction between a session and a term of superior court.

adjudicated." *Id.* at 641. The continuance for sentencing, most commonly referred to as a prayer for judgment continued, may be for a definite or indefinite period of time, provided that the sentence is entered within a reasonable time after the conviction or guilty plea. Although such a continuance is recognized in G.S. 15A-1334(a), the authority to delay sentencing predates the statute and is considered the trial court's "inherent power to designate the manner by which its judgments shall be executed." State v. Lea, 156 N.C. App. 178, 180 (2003).

"Deciding whether sentence has been entered within a 'reasonable time' requires consideration of the reason for the delay, the length of the delay, whether defendant has consented to the delay, and any actual prejudice to defendant which results from the delay." State v. Degree, 110 N.C. App. at 641 (sixty-day delay considered reasonable, based largely on defendant's failure to request entry of judgment). In an extreme case, a five-year delay in sentencing was upheld in *State v. Lea, supra,* because the trial court was awaiting an appellate ruling in another case which would affect the validity of one of defendant's convictions. The defendant had not objected to the continuation nor requested that judgment be entered.

When deciding whether a trial court may delay action on a sentence to a later session, it is important to remember that there is a distinction between a case in which prayer for judgment is continued with conditions and a case in which the continuance is without conditions. If conditions are imposed (e.g., prayer for judgment is continued for one year upon payment of a fine and costs and good behavior) and the defendant meets the conditions, the court may not impose a different sentence at a later time. State v. Absher, 335 N.C. 155, 157 (1993). Conditions amounting to punishment turn a prayer for judgment continued into a final judgment, subject to no further action by the trial court; conditions that do not amount to punishment leave the door open for imposition of additional sanctions by the trial court. A condition that the defendant "obey the law" or pay the costs of court is not a condition amounting to punishment, but imprisonment or payment of a fine, or a condition that the defendant continue psychiatric treatment, is a punishment which makes the sentence final and bars the trial court from acting further. State v. Brown, 110 N.C. App. 658, 659-60 (1993).

Subsection (c) of G.S. 15A-1334, the sentencing statute, specifically authorizes a judge who orders a pre-sentence report to direct that the sentencing hearing be before the same judge in another county or district at a later session. State v. Fuller, 48 N.C. App. 418, 419-20 (1980).

C. Statutes Authorizing Other Actions Out-of-Session in Criminal Cases.

Several statutes specifically authorize a judge to act on a criminal case after a session has ended. G.S. 17-6 specifies that an application for a writ of habeas corpus may be made to any appellate judge or any superior court judge "either during a session or in vacation."[4] A motion for appropriate relief under G.S. 15A-1414 may be made within ten days after an entry of judgment, which usually would be after the end of the session in which the judgment was entered, and G.S. 15A-1413 states that it may be heard by the judge who presided at the trial

[4] Rule 25(5) of the General Rules of Practice for the Superior and District Courts requires that when the application for habeas corpus in a capital case raises a meritorious challenge (other than the jurisdiction of the sentencing court) the judge who receives the application is to refer it to the senior resident superior court judge for the district where the defendant was sentenced.

> even if that judge is assigned to another district at the time or the judge's commission has expired.

VII. Civil Cases. The out-of-session rule has had little effect in civil cases since the supreme court's decision in *Capital Outdoor Advertising, Inc., v. City of Raleigh*, 337 N.C. 150, 159 (1994). There the court held that G.S. 7A-47.1 and Rule 6(c) of the Rules of Civil Procedure authorize a judge to decide a matter and sign an order in a civil case after the session has concluded, provided that the hearing was held in session. When acting pursuant to that statute or rule, a judge does not need the parties' consent.

G.S. 7A-47.1, the statute on in chambers jurisdiction, was discussed above. Rule 6(c) is broader than the statute and provides:

> The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a session of court. The continued existence or expiration of a session of court in no way affects the power of a court to do any act or take any proceeding, but no issue of fact shall be submitted to a jury out of session.

In addition, Rule 58 was amended subsequent to *Capital Outdoor Advertising* to say: "Subject to the provisions of Rule 7(b)(4) [the rule allowing a motion in superior court to be heard in any county in the district, with the permission of the senior resident] consent for the signing and entry of a judgment out of term, session, county, and district shall be deemed to have been given unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard."

Taken together, G.S. 7A-47.1, Rule 6(c), and Rule 58 effectively eliminate questions about a judge entering an order in a civil case after a session has expired, so long as the hearing was held during the session. A party who wants to contest the jurisdiction of the court to act after the session expires must object on the record before the session is over.

A. Clarification of Order Entered During Session. In *Minton v. Lowe's Food Stores, Inc.*, 121 N.C. App. 675, 679 (1996), the court of appeals held that Rule 6(c) allows a hearing out of the county and after the end of the session when the original hearing was conducted during a regularly scheduled session and the subsequent hearing is only for the purpose of clarifying or filling out the original decision.

VIII. Where the Hearing is Held and Order Signed. A hearing in a criminal case must be in the county in which the action arose unless the state and defense agree otherwise, and in a civil case it must be within the district. See the discussion about "Where The Hearing May Be Held" in Section III.D., above.

A more complicated question has been whether a judge's signing of an order while out of the county or district makes it void even though the hearing was properly held within the county or district and was held in session or pursuant to in chambers jurisdiction. That question appears to be answered in *State v. Collins*, ___ N.C. App. ___, ___, 761 S.E.2d 914, 919-20 (2014), where the court held that the fact the judge was sitting in another county when the order was signed did not matter if the hearing was held in the correct county.

As noted in *Collins* and various other cases, an order is not entered and has no effect until it is put in writing and filed with the clerk of court. An announcement of the decision in open court is a mere rendering of the judgment and is not binding until reduced to writing and filed. *See* In re Thompson, ___ N.C. App. ___, ___, 754 S.E.2d 168, 171-72

(2014); In re Pittman, 151 N.C. App. 112, 114 (2002); Worsham v. Richbourg's Sales and Rentals, 124 N.C. App. 782, 784 (1996); N.C. R. CIV. P. 58.

It still is the better practice for a judge to sign an order in the district or county where a matter arose and was heard or to have the parties consent to the signing at a different location.

IX. ***Ex Parte*** **Show Cause Orders.** As stated earlier, the out-of-session rule applies only when the order substantially affects the rights of the parties. The North Carolina Supreme Court has held that a show cause order does not substantially affect the party's rights and, consequently, a resident superior court judge may issue a show cause order *ex parte* for the judge's home district even when the judge is assigned and holding court out of the district. A previous ruling in the same case by the court of appeals creates some confusion, however.

The court of appeals held in *In re License of Delk*, 103 N.C. App. 659, 661 (1991), that a superior court judge who was neither a resident of nor assigned to the district could not order a lawyer to appear in Graham County to show cause why he should not be disbarred. The judge had presided over the lawyer's trial in Graham County the previous year but had imposed no discipline and was not assigned to the district when she issued the show cause order.

Subsequently, the senior resident judge for Graham County, while holding court in Mecklenburg, ordered the lawyer to appear in Graham to show why he should not be disciplined. The supreme court held in *In re License of Delk*, 336 N.C. 543, 547-48 (1994), that a show cause order does not substantially affect the rights of a party and, therefore, is not subject to the general rule about a judge acting out-of-district. So long as the hearing on discipline was to be decided in Graham County, it did not matter where the show cause order was issued.

The supreme court stated explicitly that its decision did not depend on the show cause order being issued by a resident judge of the district. Unless the judge's residency in the district matters, however, it is difficult to understand why the order issued by the resident judge was valid, as held by the supreme court, but the same type order issued by the nonresident judge was invalid, as the court of appeals determined.

X. **Remands.** When an appellate court remands a case to the trial court to enter findings of fact sufficient to allow meaningful appellate review, the case may and should be heard by the original trial judge even if not presently assigned to the district nor a resident judge there. No other judge could enter the findings and it would not make sense to say that the judge could not comply with the remand until reassigned to the district. Andrews v. Peters, 89 N.C. App. 315, 317-18 (1988).

XI. **Attempting to Solve the Problem with a Later Order.** If a judge has issued an order out of session without authority, having the judge sign and re-issue the order during a later session does not fix the problem, even if it is the same judge. The judge's authority expired with the end of the session, and actions at a later session have no effect. See *State v. Trent,* 359 N.C. 583, 585 (2005) for example. Likewise, entering a new order *nunc pro tunc*, backdating it to the time of the original session, has no effect. A *nunc pro tunc* order is proper only when the order originally was signed on the prior date but was not entered due to accident, mistake or neglect of the clerk. Whitworth v. Whitworth, 222 N.C. App. 771, 777-78 (2012). *Nunc pro tunc* may not be used to correct an error of law or to cause an order that was never previously entered to be placed on the record. State v. Mandina, 91 N.C. App. 686, 693 (1988); Elmore v. Elmore, 67 N.C. App. 661, 666-67 (1984).

XII. The Need for a Commission. When a judge is required to act in session, the crucial question is whether the judge has been properly assigned to that session—not whether a commission has been issued. The commission is evidence of the assignment, but a proper assignment may occur even if there is a defect in the issuance of the commission. State v. Eley, 326 N.C. 759, 761-62 (1990) (judge was properly assigned to murder trial, had jurisdiction, although the judge's commission was never received, when the chief justice's administrative assistant testified that he followed his normal procedure, marking the new session on his master calendar and issuing a commission).

The *Eley* court made several broad pronouncements about commissions, including that the trial judge's "jurisdiction, power, and authority as a superior court judge flowed from the Constitution of North Carolina and his appointment and commission by the Governor as a superior court judge," and that a commission from the chief justice to hold a session of court does not grant jurisdiction but "merely manifests that such judge has been duly assigned pursuant to our Constitution to preside over such session of court." 326 N.C. at 764. In relying upon *Eley*, however, it is important to note that there was strong and uncontested evidence about the assignment of the trial judge and the routine issuance of the commission, even though it was not received. Therefore, it is recommended to be cautious about relying on the more general proposition that jurisdiction is conferred by the constitution regardless of the issuance of a commission. When a judge is required to act in session, the judge has to be properly assigned to that session, and the commission is the strongest evidence of the assignment.

XIII. Consent. When the parties' agreement is required to hear or decide a matter out-of-session or out-of-district, "the consent must appear on [the] face of [the] record." Patterson v. Patterson, 230 N.C. 481, 484 (1949). A party consents by appearing in a hearing out of the county and not objecting to the judge's authority. Griffin v. Griffin, 237 N.C. 404, 407-08 (1953). Consent is not to be implied, however, from a party's submission of a proposed order to the judge, at the judge's request, after a session has concluded. Turner v. Hatchett, 104 N.C. App. 487, 490 (1991).

XIV. Parties Cannot Grant Jurisdiction. Jurisdiction may not be conferred by consent. Thus the parties cannot give a judge authority to hear a matter that has been filed in a county outside the district in which the judge resides or to which the judge is assigned. Vance Construction Company, Inc., v. Duane White Land Corporation, 127 N.C. App. 493, 495-96 (1997) (the judge who presided when a consent order was entered had no authority to hear a later dispute over the terms of the order, even though the parties agreed, since the judge was no longer assigned to nor a resident judge for the district).

XV. Summary. The out-of-session, out-of-district rule is not very important anymore for civil cases, but it still can be a trap for an unsuspecting judge in criminal cases. In civil cases a judge may decide a matter and enter an order after the session has expired and while the judge is out of the district, provided that the hearing was held during the session. The parties' consent is not needed, but a party can stop the judge from acting out-of-session or out-of-district by objecting before the session concludes.

For criminal cases, though, there is no rule implying that the parties have consented to an order being entered out-of-session and out-of-district. By case law, if a judge announces a ruling during session, there is no legal problem with submitting the ruling to writing later. Also, sentencing may be delayed until after the session without creating a legal problem. For other situations, however, the parties must consent to a judge acting after the session has ended. Thus, when a judge wishes to take a matter under

advisement and is not likely to decide during that session of court, the judge should be sure that the record shows the consent of the prosecutor and defense to act out-of-session and, if appropriate, out-of-district. When that is not done, the judge sometimes still can rely on in chambers jurisdiction to act, if the judge is resident in the district or still assigned there.

ONE TRIAL JUDGE OVERRULING ANOTHER

Michael Crowell, UNC School of Government (Jan. 2015)

Contents

I. General Rule. The general rule is that one trial judge may not modify or overrule an order entered by another trial judge on a matter of law. If the order is about a matter of discretion rather than a matter of law, the second judge may modify it, but only if there has been a substantial change in circumstances.

There are exceptions to the general rule. In a few circumstances a statute or rule specifically authorizes modification of an earlier order. Also, some matters of trial procedure are left to the discretion of the trial judge regardless of any earlier rulings by other judges. Those exceptions are discussed below.

II. Typical Statements of the Rule:

> "'The power of one judge of the superior court is equal to and coordinate with another.' *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1960). Accordingly, it is well established in our jurisprudence 'that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.' *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)." State v. Woodridge, 357 N.C. 544, 549 (2003).

> "One superior court judge may only modify, overrule or change the order of another superior court judge where the original order was (1) interlocutory, (2) discretionary, and (3) there has been a substantial change of circumstances since the entry of the prior order. *Stone v. Martin*, 69 N.C. App. 650, 652, 318 S.E.2d 108, 110 (1984). A substantial change in circumstances exists if since the entry of the prior order, there has been an 'intervention of new facts which bear upon the propriety' of the previous order. *See Calloway v. Motor Co.*, 281 N.C. 496, 505, 189 S.E.2d 484, 490 (1972)." First Fin. Ins. Co. v. Commercial Coverage Inc., 154 N.C. App. 504, 507 (2002).

III. The Rule is Relevant Only to Interlocutory Orders.

A. Generally. Because final orders are subject to appeal and the trial judge loses jurisdiction once the matter is appealed, the rule about one trial judge overruling another generally is relevant only when the order is interlocutory and still subject to trial court jurisdiction. An interlocutory order is an order that does not finally resolve all issues in controversy. There are still matters to be decided by the trial court.

B. Loss of Trial Court Jurisdiction When an Interlocutory Order is Appealed. Although interlocutory orders generally are not subject to appeal, if an interlocutory order affects a substantial right, it may be appealed immediately. G.S. 1-277, 7A-27(d); Lovelace v. City of Shelby, 133 N.C. App. 408 (1999), *rev'd on other grounds*, 351 N.C. 458 (2000). Upon appeal, the trial court loses jurisdiction to act further, just as with a final order, and therefore a second trial judge would have no opportunity to modify the order.

C. Modification of Final Order by Trial Court. There are instances in which a trial court may modify a final order.

1. Civil Procedure Rule 60(b). In a civil case, the court may relieve a party from a final judgment or order for the reasons stated in Rule 60(b) of the Rules of Civil Procedure. The motion under Rule 60(b) may be heard by a different judge than the one who entered the judgment or order. Duplin County DSS ex rel. Pulley v. Frazier, ___ N.C. App. ___, 751 S.E.2d 621, 623 (2013).

2. Civil Procedure Rule 59(a). In a civil case tried without a jury a judgment may be later modified by the trial court through a motion under Rule 59(a) of the Rules of Civil Procedure for a new trial. However, motion under Rule 59 must be heard by the same judge who entered the original judgment. Sisk v. Sisk, ___ N.C. App. ___, 729 S.E.2d 68, 70 (2012); Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co., 192 N.C. App. 376 (2008).

3. Motion for Appropriate Relief in Criminal Case. In a criminal case, G.S. 15A-1420 provides for a motion for appropriate relief.

IV. Applicability to Various Courts. The Rule is Applicable to District Court and the Court of Appeals as well as Superior Court.

A. District Court. A district court judge may not overrule another district judge. In re Royster, 361 N.C. 560, 563 (2007); Town of Sylva v. Gibson, 51 N.C. App. 545 (1981). Nor may a district court judge modify an order of the Court of Appeals. Ross v. Ross (now Osborne), 194 N.C. App. 365, 369 (2008).

B. Court of Appeals. One panel of the Court of Appeals may not overrule another panel. North Carolina Nat'l Bank v. Virginia Carolina Builders, 307 N.C. 563 (1983).

V. The Same Legal Issue. If the legal issue is the same, it does not matter that the motion heard by the second judge is different than the one decided by the first judge, the second judge still is barred from overruling the first.

A. Examples Regarding Same Legal Issue.

- The second judge's decision on summary judgment was void because it was based on the same legal issue as the first judge's decision denying a motion to dismiss. Adkins v. Stanly County Board of Education, 203 N.C. App. 642, 647-48 (2010). Although the two motions differed, the linchpin legal issue for each was whether the dismissed public employee had been speaking on a matter of public concern so as to raise First Amendment protections.

- A second judge's order of summary judgment in a medical malpractice case was void because, even though the judge said he was not overruling the first judge, the legal issue being determined — whether negligence might be established by *res ipsa loquitur* and thus avoid the need to have the pleadings reviewed by an expert — was the same as decided by the first judge in denying a motion to dismiss. Robinson v. Duke University Health Systems, Inc., ___ N.C. App. ___, 747 S.E.2d 321, 327-28 (2013).

VI. Examples Where Second Judge Could Not Overrule. Examples of matters of law on which a second trial judge could not overrule or modify an order of a previous judge:

- Motion to suppress evidence (although the prosecutor presented a different legal theory for admission of the evidence in the second hearing the legal issue was the same). State v. Woolridge, 357 N.C. 544 (2003).

- Decision on whether a statute authorizes an award of attorney's fees. Able Outdoor Inc. v. Harrelson, 341 N.C. 167 (1995).

- Exclusion of time from calculation for Speedy Trial Act. State v. Sams, 317 N.C. 230 (1986).

- Dismissal of case for failure to complete service. Bumgardner v. Bumgardner, 113 N.C. App. 314 (1994).

VII. Examples Where Second Judge Could Overrule. Examples of matters of law in which the legal issue presented to the second judge was different than the issue decided by the first judge, and thus the second judge was free to act:

- A motion for permissive intervention was proper following the first judge's decision to dismiss the parties from the lawsuit for lack of standing. Bruggeman v. Meditrust Co., LLC, 165 N.C. App. 790 (2004).

- A motion for summary judgment on the issue of punitive damages in a medical malpractice case was proper following the first judge's denial of summary judgment on negligence, because the damages issues had not been presented in the first motion. Fox v. Green, 161 N.C. App. 460 (2003).

VIII. Examples of Matters of Discretion. Examples of matters of discretion for which a second trial judge could overrule or modify the order of a previous judge upon a showing of a substantial change in circumstances:

- Motion for special jury venire. State v. Duvall, 304 N.C. 557 (1981) (but the prosecutor failed to show a substantial change in circumstances from the time of the earlier ruling).

- Motion to amend answer. Madry v. Madry, 106 N.C. App. 34 (1992) (summary judgment should not have been allowed when the motion was based on the same facts as the previously denied motion to amend and there was no change in circumstances shown).

- Class certification. Dublin v. UCR, Inc., 115 N.C. App 209 (1994).

- Sealing of documents in domestic case. France v. France, ___ N.C. App. ___, 738 S.E.2d 180, 186 (2012) (change in circumstance justifying second judge's unsealing of documents was appellate ruling that courtroom had to be opened for proceedings in case).

IX. Second Motions for Summary Judgment. A decision on summary judgment is a decision on a matter of law and may not be overruled by a second trial judge on the same legal issue. Taylorsville Fed. Sav. & Loan Ass'n v. Keen, 110 N.C. App. 784 (1993).

- A second motion for summary judgment on punitive damages could not be considered because the same legal issue was presented in the first motion. Carr v. Great Lakes Carbon Corp., 49 N.C. App. 631 (1980).

- A motion for summary judgment under G.S. 99B-3, the statute exempting manufacturers from liability when the product was improperly modified or used, could not be considered by a second judge after the first judge had denied the manufacturer' summary judgment based on contributory negligence. The manufacturer had asserted that the child victim was contributorily negligent for engaging in "horseplay" in use of the gate and fence. The contributory negligence legal argument thus was essentially the same as the legal argument in the second motion. Hastings ex rel. Pratt v. Seegars Fence Co., 128 N.C. App. 166 (1997).

A. Forecast of Additional Evidence Does Not Change Rule. An additional forecast of evidence does not entitle a party to a second motion for summary judgment. Metts v. Piver, 102 N.C. App. 98 (1991). The presentation of additional affidavits and depositions transcripts does not allow consideration of a second motion for summary judgment on the same legal issue. Great Lakes Carbon Corp., 49 N.C. App. 631 (1980).

B. Motion by a Different Party Does Not Change Rule. The rule is the same even if the second motion for summary judgment is made by a different party. If the legal issue in the second motion for summary judgment is essentially the same as in the first motion, the second judge may not consider the motion, regardless of who made each motion. Cail v. Cerwin, 185 N.C. App. 176 (2007).

C. Second Judge May Act When Second Motion Presents Different Legal Issue. A second motion for summary judgment, however, may involve a different legal issue and if it does, it may be considered by a second judge.

- Denial of summary judgment on the issue of absence of negligence in a medical malpractice case could not be reconsidered in a second motion for summary judgment, but the issue of punitive damages could be

considered because it was not presented in the first motion. Fox v. Green, 161 N.C. App. 460 (2003).

X. Example Statutes and Rules Authorizing Second Judge to Act. Examples of statutes and rules authorizing a second judge to modify a previous order or action include:

- Rule 55(d) of the Rules of Civil Procedure specifically authorizes the setting aside of an entry of default "for good cause shown." *See Stone v. Martin*, 69 N.C. App. 650, 653 (1984).

- As mentioned above, Rule 60(b) of the Rules of Civil Procedure authorizes a grant of relief from a judgment for the reasons stated in the rule.

- G.S. 84-4.2 authorizes the summary revocation of a *pro hac vice* admission of an out-of-state lawyer on the court's own motion and in its discretion. Thus a second judge could revoke an admission allowed by an earlier judge. Smith v. Beaufort County Hosp. Ass'n, Inc., 141 N.C. App. 203 (2000).

- As mentioned above, G.S. 15A-1420 provides for motions for appropriate relief in criminal cases.

XI. The Second Judge May Control Certain Procedural Matters. Some procedural decisions are within the discretion of the trial judge regardless of previous orders by another judge.

- The judge presiding at trial could decide to deny individual voir dire of prospective jurors in a capital case even though another judge had earlier stated in a pretrial order that individual voir dire would be allowed. The rule of one judge overruling another does not apply to interlocutory orders which affect the procedure and conduct of trial; those remain subject to the discretion of the trial judge. State v. Stokes, 308 N.C. 634 (1983).

- It is within the discretion of the judge presiding at trial whether to consolidate for trial actions that involve common questions of law and fact. Oxendine v. Catawba County Dep't of Soc. Servs., 303 N.C. 699 (1981).

XII. A Second Judge is Not Bound by an Earlier Judge's Order that is Void. If the first judge's order is void ab initio because the first judge did not have jurisdiction to enter the order, then the order is a nullity and may be ignored by a second judge. State v. Sams, 317 N.C. 230 (1986). If the first judge had jurisdiction to enter an order, even though it is incorrect as a matter of law, the order is merely voidable and remains in effect and must be honored by the second judge until voided by direct challenge to its validity. Able Outdoor Inc. v. Harrelson, 341 N.C. 167 (1995); State v. Sams, 317 N.C. 230 (1986).

INHERENT AUTHORITY

Michael Crowell, UNC School of Government (Jan. 2015)

Contents

I. Introduction. Judges have broad inherent authority to see that courts are run efficiently and properly and that litigants are treated fairly. "Through its inherent power the court has authority to do all things that are reasonably necessary for the proper administration of justice." Beard v. North Carolina State Bar, 320 N.C. 126, 129 (1987). Despite such sweeping statements, inherent authority is limited. While it may be used by a judge to fill in gaps not addressed by the statutes or rules, inherent authority does not empower a court to override legislative decisions.

II. Source of Inherent Authority.

A. Separation of Powers. Sometimes inherent judicial authority is said to derive from the separation of powers. The North Carolina Constitution specifies that "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const., Art. I, § 6. It also says that "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a coordinate department of the government . . . . " *Id.*, Art. IV, § 1. "A court's inherent power is that belonging to it by virtue of being one of three separate, coordinate branches of the government." *In re* Alamance County Court Facilities, 329 N.C. 84, 93 (1991).

B. Derived From the Nature of a Court. Sometimes the source of inherent authority is stated differently; it is described as power that is derived from the nature of a court, power that is essential to function as a court. "'It is a power not derived from any statute but arising from necessity; implied, because it is necessary to the exercise of all other powers. It is indispensable to the proper transaction of business.'" *Ex parte* McCown, 139 N.C. 95, 103 (1905) (quoting Cooper's Case, 32 Vt. 257 (1859)). "Inherent power is essential to the existence of the court and the orderly and efficient exercise of the administration of justice." *Beard*, at 129.

III. Limitations on Inherent Authority.

A. Control Over Judicial Matters Given to the Legislature by the Constitution. The North Carolina Constitution itself gives the General Assembly considerable control over the courts. Various provisions of Article IV provide for the legislature to establish the administrative office of the courts; decide where sessions of the supreme court will be held; determine the size and organization and jurisdiction of the court of appeals; set trial court districts; set the rules of procedure for trial courts; set the rotation of superior court judges; and so forth.

B. Separation of Powers. In exercising its inherent power, the judiciary must not unduly interfere with the proper authority of the other branches. "Just as the inherent power of the judiciary is plenary within its branch, it is curtailed by the constitutional definition of the judicial branch and the other branches of government." *In re* Alamance County Court Facilities, 329 N.C. 84, 94 (1991). In the Alamance County case the supreme court recognized the inherent authority of the trial court to address inadequate court facilities but also held that the court overstepped its bounds in trying to dictate the specific fixes to be made rather than giving the county commissioners (the local legislative body) the opportunity to determine how to best meet the court's needs.

The court could not order the state to create an adolescent sex offender treatment program; that was a decision for the legislature. *In re* Swindell, 326 N.C. 473, 475 (1990).

C. Legislative Control Over Finances. The constitution reserves to the legislature the authority to draw money from the treasury (Art. V, § 7) and the power to tax (Art. V, § 2). "These constitutional provisions do not curtail the inherent authority of the judiciary, plenary within its branch, but serve to delineate the boundary between the branches, beyond which each is powerless to act." *In re* Alamance County Court Facilities, at 95.

A judge could not order the state to pay a lawyer even though the court had inherent authority to order the lawyer to represent an indigent defendant. State v. Davis, 270 N.C. 1, 13-14 (1967).

D. Due Process. The exercise of inherent authority, of course, is limited by due process. Thus a judge may discipline a lawyer, even disbar the lawyer, but not without providing proper notice and an opportunity to be heard. *In re* Burton, 257 N.C. 534, 543-44 (1962).

E. The Legislature Already has Acted. When the legislature has addressed a subject, the court does not have inherent authority to act just because the court concludes that the legislative act is inadequate.

The court could not order probation officers to supervise a defendant found incompetent to stand trial, even though no other good alternative existed, since the legislature had limited probation officers to supervision to defendants convicted of crimes. State v. Gravette, 327 N.C. 114, 124 (1990).

A district judge could not order a county to develop a new program for juveniles just because the alternatives approved by the General Assembly were inadequate. *In re* Wharton, 305 N.C. 565, 573 (1982).

Although the court may have inherent authority to order pretrial discovery when the issue is not addressed by legislation, the court did not have authority to order discovery of a witness' statement in a criminal case when disclosure was specifically prohibited by statute. State v. Hardy, 293 N.C. 105, 125 (1977).

IV. The Court Must Have Jurisdiction in Order to Exercise Inherent Authority. The court must have jurisdiction over a matter before it can exercise any authority, including inherent authority. The court may not create jurisdiction on its own motion, and may not adjudicate a controversy on its own motion. Thus a district court did not have authority on its own, with no pending case, to order a sheriff to transport juveniles. *In re* Transportation of Juveniles, 102 N.C. App. 806, 808 (1991). And thus a court could not order delivery of town personnel files to the court when no proceeding had been commenced and there was no pending action before the court. *In re* Kill Devil Hills Police Department, __ N.C. App. __, 733 S.E.2d 582, 586 (2012).

V. Extraordinary Circumstances. In some extraordinary circumstances, however, a court may assume jurisdiction and act upon a motion even though there is no statute or rule providing for such a procedure.

A. Determining Application of Attorney/Client Privilege after Client's Death, on Petition of DA. Although no statute authorized such a procedure, the court could exercise its inherent authority to hear a petition from the district attorney to decide whether the attorney/client privilege still existed after the client's death. *In re* Miller, 357 N.C. 316 (2003). "This flexibility [of the common law], as a virtual rule of necessity, will permit the superior court to assume jurisdiction in proceedings of an extraordinary nature that do not fit neatly into statutory parameters." *Id*. at 322.

B. Determining Whether Bank Should Release Customer's Records, on Petition of DA. The superior court has inherent authority, when requested by the district attorney, to order a bank to disclose to the DA a customer's bank account records, but the DA's petition must present by affidavit or other evidence sufficient facts to show reasonable grounds to believe a crime has been committed and that the records bear on investigation of the crime. *In re* Superior Court Order Dated April 8, 1983, 315 N.C. 378, 380-82 (1986) (the DA's petition did not provide an adequate basis for the court order).

C. Determining Release of Personnel Records, on Petition of DA. When a statute allowed release of personnel records by court order but did not set a procedure for doing so, the court could exercise its inherent authority to decide such a petition from the district attorney. *In re* Brooks, 143 N.C. App. 601, 608-10 (2001) (but the petition was inadequate).

D. Determining Whether Mental Health Officials Have Knowledge of Homicide, on Petition of DA. The superior court had inherent authority, as requested by the district attorney, to order mental health officials to appear for an in camera examination to determine whether they had knowledge of a homicide and whether a physician/patient privilege allowed disclosure of their information, even

though no criminal proceeding had been initiated and the DA did not know the name of the alleged victim or alleged perpetrator nor know when and where the alleged homicide occurred. *In re* Albemarle Mental Health Center, 42 N.C. App. 292, 298-99 (1979).

> "Within the guidelines of our Constitution, the legislature is charged with the responsibility of providing the necessary procedures for the proper commencement of a matter before the courts. Occasionally, however, the proscribed procedures of a statutory scheme fail to embrace the unanticipated and extraordinary proceeding such as that disclosed by the record before us. In similar situations, it has long been held that courts have the inherent power to assume jurisdiction and issue necessary process in order to fulfill their assigned mission of administering justice efficiently and promptly." *Id*. at 296.

VI. Inherent Authority to Correct Court Records. A court has inherent authority to correct its records, at any time, to assure that they accurately reflect the court's actions. State v. Cannon, 244 N.C. 399, 406 (1956).

> "'It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth. It has the power to amend its records, correct the mistakes of its clerk or other officers of the court, or to supply defects or omissions in the record, and no lapse of time will debar the court of the power to discharge this duty.'" State v. Old, 271 N.C. 341, 343 (1967) (quoting 14 Am. Jur., Courts, §§ 141, 142, 143).

This power is to be exercised with great caution and may not be used to correct judicial errors. Shaver v. Shaver, 248 N.C. 113, 119 (1958) (court could not reopen ten-year old divorce judgment on its own to vacate judgment because of fraud); State v. Stafford, 166 N.C. App. 118, 121-23 (2004) (court could not amend sentences after entry of final judgment to correct court's error in application of structured sentencing). Once a case has been appealed, the record may be corrected only on directive of the appellate court. State v. Dixon, 139 N.C. App. 332 (2000).

VII. Authority to Discipline Lawyers.

A. Recognition of Authority. A court's authority to discipline lawyers is one of the most well established inherent powers of a court. "This power is based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them from, and punish them for, acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice." *In re* Northwestern Bonding Co., 16 N.C. App. 272, 275 (1972).

B. Not Superseded or Limited by State Bar's Disciplinary Authority. G.S. 84-36 declares: "Nothing contained in this Article [North Carolina State Bar] shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys." Although questions of propriety and ethics ordinarily should be referred to the State Bar, because it was created by the legislature for that purpose, "nevertheless the power to regulate the conduct of attorneys is held concurrently by the Bar and the court." Gardner v. North Carolina State Bar, 316 N.C. 285, 288 (1986). It appears that the State Bar and court could both

discipline a lawyer for the same conduct. By § .0102 of its Discipline and Disability Rules the State Bar stays its own proceedings pending completion of the court's action.

C. Discipline Not Limited to Violations of Rules of Professional Conduct. The grounds on which a court may impose discipline are not limited to violations of the State Bar's Rules of Professional Conduct. Sisk v. Transylvania Community Hospital, Inc., 364 N.C. 172, 182 (2010) ("[T]his authority is not limited by the rules of the State Bar.").

D. Court May Not Dismiss State Bar Proceeding. Because the State Bar and the court have concurrent jurisdiction over discipline of lawyers the court does not have authority to order that a grievance filed with the State Bar be dismissed. North Carolina State Bar v. Randolph, 325 N.C. 699, 701-02 (1989).

E. Procedural Requirements for Court Discipline. When the lawyer's misconduct occurs in a matter then pending before the court and the material facts are not in dispute, the court may act summarily. *In re* Hunoval, 294 N.C. 740, 744 (1970).

When the misconduct occurs otherwise, due process requires that the disciplinary proceeding be initiated by a sworn written complaint; that the court issue an order advising the lawyer of the charges and directing the lawyer to show cause why discipline should not be imposed; that the lawyer be given a reasonable time to respond; and that the lawyer be allowed to have counsel. *In re* Burton, 257 N.C. 534, 544 (1962). No written complaint is required when the judge initiating the proceeding is acting on records from the judge's own court. *In re* Robinson, 37 N.C. App. 671, 677 (1978). The show cause order or notice should not be written in conclusory terms that may indicate bias on the part of the judge. *Id*. (order that said "you have negligently and willfully failed to perfect the appeal" suggested that the judge had mind made up and should have disqualified self). The judge may designate the DA or another lawyer to prosecute the discipline case. *Id*.

F. Proceeding May be Initiated by Complaint. Although a disciplinary proceeding usually is initiated by the court itself, it may be triggered by a complaint from a party. *In re Northwestern Bonding Co*., *supra*. Or the State Bar may request the court to commence a disciplinary proceeding. *In re* Delk, 336 N.C. 543, 546 (1994).

G. Appointment of Committee to Investigate. When the factual issues are in dispute the court may appoint a committee of lawyers to investigate. *In re* Burton, 257 N.C. at 544. And the court may ask a committee to review the lawyer's conduct and recommend whether disbarment is warranted. Brummitt v. Winburn, 206 N.C. 923 (1934).

H. No Right to Jury Trial. There is no right to a jury trial in a court proceeding for discipline of a lawyer. *In re Northwestern Bonding Co*., 16 N.C. App. at 278.

I. Standard of Proof. The standard of proof for disbarment by the court, and presumably for other discipline, is clear and convincing evidence. *In re* Palmer, 296 N.C. 638, 648 (1979).

J. Court Does Not Need Pending Case to Impose Discipline. The court's authority to impose discipline applies to any lawyer practicing before the court, even if the case which gives rise to the discipline is not currently pending. Thus the trial court may sanction of lawyer even though the case creating the disciplinary issue has been appealed and no longer is before the court. *In re* Robinson, 37 N.C. App. at 677.

K. Action May be Taken at any Session of Court. Disciplinary action may be taken against a lawyer at any session of court, it does not matter whether it is a civil or criminal session. *Id*. at 678.

L. Sanctions. A court using its inherent authority to discipline lawyers is not limited to the sanctions that the State Bar might impose. "Sanctions available include citations for contempt, censure, informing the North Carolina State Bar of the misconduct, imposition of costs, suspension for a limited time of the right to practice before the court, suspension for a limited time of the right to practice law in the State, and disbarment." *Id*. at 676. The court may order the misbehaving lawyer to pay the other side's attorney's fees. Couch v. Private Diagnostic Clinic,146 N.C. App. 658, 667 (2001). The court also may order the lawyer to pay a fine. *In re* Small, 201 N.C. App. 390, 395 (2009). And the court may suspend the lawyer's right to represent indigents. *In re* Hunoval, 294 N.C. at 745.

M. Discipline of Attorneys Admitted Pro Hac Vice. By statute a judge may revoke an out-of-state lawyer's *pro hac vice* admission to practice in North Carolina summarily and on the court's own motion. G.S. 84-4.2. The statute applies even if the admission was granted by a different judge. Smith v. Beaufort County Hosp. Ass'n, Inc., 141 N.C. App. 203, 210 (2000). Disciplinary action against a pro hac vice lawyer may include removal from other cases in North Carolina, requiring the lawyer to report the disciplinary action to other state bars, and requiring the lawyer to attend continuing education classes in North Carolina before seeking to represent clients here. Couch v. Private Diagnostic Clinic, 146 N.C. App. at 662.

N. Appeal. The standard of review for the appellate court is abuse of discretion. *Couch v. Private Diagnostic Clinic*, 146 N.C. App. at 662-63. Unlike the State Bar, the trial court is not required to make findings concerning the potential harm of the lawyer's misconduct and a demonstrable need to protect the public. In re Key, 182 N.C. App. 714, 720 (2007). The State may use certiorari to appeal the trial court's failure to discipline. *In re Palmer*, 296 N.C. at 646.

VIII. Authority to Require Lawyers to Represent Indigents. A court has authority to require lawyers admitted to practice before it to represent indigents and, if necessary, to do so without being paid. It is an obligation lawyers accept as part of the privilege of practicing law.

> "'The majority of jurisdictions hold that an attorney is an officer of the court with many rights and privileges, and must accept his office *cum onere*. One of the burdens incident to the office, recognized by custom of the courts for many years, is the duty of the attorney to render his services gratuitously to indigent defendants at the suggestion of the

> court.'" State v. Davis, 270 N.C. 1, 10 (1967) (quoting Ruckenbrod v. Mullins, 133 P.2d 325 (Utah 1943)).

The court, however, may not order that the lawyer be paid from state funds unless authorized by statute. The legislature has exclusive control over expenditure of funds from the state treasury. *Id*. at 13-14. The absence of payment, though, does not relieve the lawyer of the obligation:

> "That there was no provision for Mr. Hunoval to be compensated for filing the application for the writ in no way relieved him of his duty to file it, nor does it mitigate his failure to perform his duty. '[A]n attorney appointed by the court to defend cannot recover compensation from the public for his services in the absence of an enabling statute. The reason is that the attorney, being an officer of the Court . . . takes his office *Cum onere*, and one of the burdens of office which custom has recognized is the gratuitous service rendered to a poor person at the suggestion of the court.'" *In re* Hunoval, 294 N.C. 740, 743 (1977) (citing *State v. Davis*, *supra*, which in turn was quoting 7 Am.Jur.2d, Attorneys at Law, § 207).

Discipline of a lawyer by the court may include removal of the lawyer from the approved list for representation of indigents for a specified period of time. *Hunoval*, 294 at 745; *In re* Robinson, 39 N.C. App. 345, 349 (1979).

IX. Authority to Control Courtroom Behavior, Dress.

A. Inherent Authority to Control Courtroom. Courts rarely have relied on their inherent authority to maintain order since the enactment by the legislature in the 1970s of statutes, discussed below, on maintenance of order in criminal cases. Consequently there is little case law on the court's inherent authority in this area. Nevertheless this authority clearly exists, as noted nearly 200 years ago by the United States Supreme Court:

> "[C]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution." Anderson v. Dunn, 19 U.S. 204, 227 (1821).

The North Carolina Supreme Court recognized the same concept before the authority to maintain order was codified:

> "It is the duty of the trial judge, in the exercise of his discretion, to regulate the conduct and the course of business during trial. [citation omitted] Thus it is within the judge's discretion, when necessary, to order armed guards stationed in and about the courtroom and courthouse to preserve order and for the protection of the defendant and other participants in the trial. [citations omitted] Similarly, the trial judge, having the responsibility of preserving proper decorum and appropriate atmosphere in the courtroom during a trial, has the inherent power to take whatever legitimate steps are necessary to deal with an unruly, disruptive or

> contemptuous defendant. [citations omitted]". State v. Tolley, 290 N.C. 349, 363 (1976).

Two other cases recognizing the court's inherent authority to maintain order, and predating the statutes on that subject, are State v. Spaulding, 288 N.C. 397, 415 (1975), vacated on other grounds, 428 U.S. 904 (1976) (use of armed guards in courthouse and in presence of the jury in murder trial) and State v. Grant, 19 N.C. App. 401, 414 (1973) (requiring spectators to submit to search for weapons and prohibiting picketing and parading around courthouse).

B. Codification of Authority to Maintain Order in Criminal Trials. Several statutes recognize the court's authority to maintain order in the courtroom in criminal cases in addition to the inherent authority of the court to do so in all proceedings. The statutes addressing control in criminal cases are summarized below. Because this paper is about inherent authority it will not discuss the case law based on those statutes. The statutes are:

G.S. 15A-1031 — The trial judge may order restraint of a defendant or witness when necessary to maintain order, prevent escape or provide for safety. The reasons for restraint are to be entered in the record outside the jury's presence; the person being restrained is to be given an opportunity to object; and the jury is to be instructed that restraint of a defendant is not to be considered in deciding the case.

G.S. 15A-1032 — The trial judge may remove a disruptive defendant after a warning. The warning and reasons for removal are to be given outside the jury's presence, if possible, and entered on the record. The jury is to be instructed not to consider the removal in deciding the case.

G.S. 15A-1033 — The court may order the removal of any person other than the defendant when the person's conduct disrupts the trial.

G.S. 15A-1034 — The court may limit access to the courtroom to assure orderliness and safety. The court may also order searches for weapons or devices that could be used to disrupt the proceedings. The order must be entered on the record.

G.S. 15A-1035 — In addition to the statutes above the court may use its contempt power and inherent authority to maintain order.

C. Contempt. A common means of dealing with disruptive defendants, lawyers and spectators is contempt. Contempt long has been viewed as an inherent authority of the court and necessary for maintaining order and respect. "'It is a power not derived from any statute but arising from necessity: implied, because it is necessary to the exercise of all other powers. It is indispensable to the proper transaction of business.'" *Ex Parte* McCown, 139 N.C. 95, 103 (1905) (quoting Cooper's case, 32 Vt. 257 (1859)). The contempt authority has been codified in G.S. Chapter 5A. The statutes specify that direct criminal contempt includes disruption of court, disrespect to the court, failing to comply with court schedules, and disobedience of court orders. Because this is a paper about inherent authority, it will not review the case law concerning those contempt statutes.

D. Control of Dress. Rule 12 of the General Rules of Practice for Superior and District Courts provides: "Business attire shall be appropriate dress for counsel while in the courtroom." There does not appear to be any case law in North Carolina concerning that rule nor the court's inherent authority to impose standards of dress and appearance on parties, witnesses and spectators. There is considerable case law from other jurisdictions, however, and it clearly recognizes such authority. The standards should be reasonable and not rigid and not based on the judge's own taste; the standards must be communicated clearly before any discipline may be imposed for failing to comply; the court should recognize that society's standards change over time; and accommodation should be made for religious garb.

Note that G.S. 5A-12(b) specifies that a person may not be held in criminal contempt until the person's act is willfully contemptuous or has been preceded by a warning from the court that the conduct is improper. Given the varying standards of dress acceptable in today's world, the court should give a warning and a chance to comply before anyone is held in contempt based on their appearance.

Here is a sampling of cases from other jurisdictions concerning regulation of courtroom dress, in no particular order: Sandstrom v. State, 309 So.2d 17 (Fla. Dist. Ct. App. 1975); Friedman v. District Court, 611 P.2d 77 (Alaska 1980); Bly v. Henry, 624 P.2d 717 (Wash. 1981); Peck v. Stone, 32 A.D.2d 506 (NY App. Div. 1969); Kersevich v. Jeffrey Dist. Court, 330 A.2d 446 (N.H. 1974); Doyle v. Aison, 216 A.D.2d 634 (NY App. Div. 1995). There also are numerous cases from other jurisdictions on religious symbols and garb; for a useful article see Samuel J. Levine, *Religious Symbols and Religious Garb in the Courtroom: Personal Values and Public Judgments*, 66 FORDHAM L. REV. 1505 (1998).

X. Authority to Control the Course of the Trial.

A. Recognition of Authority. Case law consistently has recognized the authority, and responsibility, of the court to control the course of the trial or other proceeding to see that justice is administered fairly and efficiently and without undue burden on witnesses and jurors. In doing so, the court is to follow the procedures enacted by the General Assembly, to the extent applicable. A court may not ignore or act contrary to those statutes just because the court considers them inappropriate, but there will be any number of circumstances which the legislative enactments do not address. General statements of the court's authority include:

"The presiding judge is something more than an umpire. It is his duty to see that each side has a fair and impartial trial. It is within his discretion to take any action to this end within the law and so long as he does not impinge upon the restrictions contained in [the statute]." Miller v. Greenwood, 218 N.C. 146, 150 (1940).

"At trial the major concern is the 'search for truth' as it is revealed through the presentation and development of all relevant facts. To ensure that truth is ascertained and justice served, the judiciary must have the power to compel

disclosure of relevant facts, not otherwise privileged, within the framework of the rules of evidence." State v. Hardy, 293 N.C. 105, 125 (1977).

"This Court has all the power inherent in courts to regulate the practical methods of conducting their business and hearing cases, after they come within its jurisdiction and control." Rencher v. Anderson, 93 N.C. 105, 107 (1885).

"The judge conducting a jury trial is the governor of the trial for the purpose of assuring its proper conduct and it is his right and duty, Inter alia, to control the course of the trial to the end that the court's time be conserved and the witnesses be protected from over-prolonged examination." State v. Arnold, 284 N.C. 41, 47 (1973).

"[T]he power of the trial judge to maintain absolute control of his courtroom is essential to the maintenance of proper decorum and the effective administration of justice." Roberson v. Roberson, 40 N.C. App. 193, 194 (1979).

"It is impractical and would be almost impossible to have legislation or rules governing all questions that may arise on the trial of a case. Unexpected developments, especially in the field of procedure, frequently occur. When there is no statutory provision or well recognized rule applicable, the presiding judge is empowered to exercise his discretion in the interest of efficiency, practicality and justice." Shute v. Fisher, 270 N.C. 247, 253 (1967).

B. Specific Kinds of Control. Examples of control exercised pursuant to the inherent authority of the court include:

- Reopening the case, allowing additional testimony — A judge may reopen a case and admit additional testimony after the conclusion of evidence and argument of counsel, when necessary to assure justice. *Miller v. Greenwood*, *supra*.

- Instructing lawyers to speed up — Part of the judge's duty is to conserve the court's time and protect witnesses and jurors from undue delays. *State v. Arnold*, *supra*.

- When a party is represented by multiple lawyers, allow only one to object — State v. Smith, 320 N.C. 404, 415-16 (1987).

- Appoint a referee to conduct an accounting — *Shute v. Fisher*, *supra*.

- Deny a lawyer a chance to argue — There is no right of a lawyer to argue in a civil non-jury trial, it is a privilege and may be denied by the judge. *Roberson v. Roberson*, *supra*.

- Stop defendant from handling weapon — A trial judge may prohibit a defendant in a murder trial from using the murder weapon to demonstrate his testimony, because of safety concerns. State v. Ford, 323 N.C. 466, 469-70 (1988).

- Order bank to disclose records — The court has authority to order a bank to disclose a customer's records to the district attorney when there is no applicable statutory provision but the disclosure is in the best interest of justice. The order must describe the circumstances fully and state the reason for its issuance. *In re* Superior Court Order, 315 N.C. 378 (1986).

- Impose a lesser sanction for failure to comply with order — The court has the authority to impose a lesser sanction of payment of costs, including attorney's fees, as an alternative to the authority in Rule 41(b) of the Rules of Civil Procedure to dismiss an action for failure to comply with a court order. Daniels v. Montgomery Mutual Insurance Company, 320 N.C. 669, 674-75 (1987).

- Sanction party for failure to execute agreed settlement — The court may strike defendants' answer as a sanction for failure to file a consent judgment as required by a local rule. Lomax v. Shaw, 101 N.C. App. 560, 563 (1991).

- Order discovery — The court has inherent authority to order discovery in motions for appropriate relief. State v. Taylor, 327 N.C. 147, 154 (1990) ("our judiciary also must and does have the inherent power to compel disclosure of relevant facts regarding a post-trial motion and may order such disclosure prior to a hearing on such motion"). The passage of G.S. 15A-1415(e) concerning discovery related to motions for appropriate relief, enacted after the Taylor decision, does not limit the court's authority to decide on its own the extent of discovery in MARs. State v. Buckner, 351 N.C. 401, 410 (2000) ("Determining the extent of discovery is ultimately for the court to decide pursuant to its inherent power.").

  Although the court may have inherent authority to order pretrial discovery in a criminal case in the absence of a statute prohibiting discovery, it does not have such authority when a statute specifically bars such discovery. *State v. Hardy*, *supra*.

  Even when the statutes restrict the trial court's authority to require pretrial discovery the court retains its inherent authority to compel discovery of the same documents later in the proceeding. State v. Warren, 347 N.C. 309, 325 (1997).

  [Note that in recent years the General Assembly has significantly altered the statutes on discovery in criminal cases; any case law on inherent authority should be read with those changes in mind.]

- Order sanctions for discovery abuses — The court has authority to order sanctions for discovery abuses in addition to those listed in Rule 37 of the Rules of Civil Procedure. The court may order a party to pay the cost of a deposition based on the lawyer's disruption of the deposition and refusal to allow the client to answer questions. Cloer v. Smith, 132 N.C. App. 569, 573-74 (1999).

- Order physician to disclose information about possible homicide — A court has authority to order physicians and psychologists to appear and be examined about a possible homicide and whether their information is privileged, even though there is no pending criminal proceeding nor certainty that a homicide occurred. *In re* Albemarle Mental Health Center, 42 N.C. App. 292, 298-99 (1979).

- Order disclosure of lawyer's conversation with physician — The court may order a lawyer to disclose the substance of a private conversation with the physician for the other party, upon finding that the conversation was improper and that the disclosure is needed to enable the other party to prepare for evidence likely to be offered as a result of the ex parte discovery. Crist v. Moffatt, 326 N.C. 326, 337 (1990).

- Dismiss habitual offender petition — The court has inherent authority to dismiss a prosecutor's petition to have the defendant declared an habitual offender under the motor vehicle law when the prosecutor failed to bring the petition "forthwith" as required by the statute. State v. Ward, 31 N.C. App. 104 (1976).

XI. Authority to Issue Gatekeeper Orders. A pre-filing injunction (also known as a gatekeeper order) prohibits a person from filing complaints or other documents without prior approval of the court. It is used as a last resort against someone who has engaged in protracted frivolous and vexatious litigation. Although there are no North Carolina decisions explicitly authorizing the issuance of gatekeeper orders or discussing the procedure and requirements for such orders, court actions based on gatekeeper orders have been upheld in several appellate cases, thus implicitly acknowledging the trial court's authority. The appellate courts themselves sometimes issue such orders. One reason for such little appellate law is that the gatekeeper orders typically are issued against self-represented litigants who are no more adept at filing proper appeals than they are at following the rules in the trial court. Consequently, the appeals are dismissed on procedural grounds and the appellate court does not address the substantive issues concerning such orders.

Some cases that recognize trial court gatekeeper orders include Dalenko v. Wake Cnty. Dep't of Human Servs., 157 N.C. App. 49, 53 (2003); Estate of Dalenko v. Monroe, 197 N.C. App. 231, *2 (2009) (unpublished); Smith v. Noble, 155 N.C. App. 649, 650 (2002); Lee v. O'Brien, 151 N.C. App. 748, *4 (2002) (unpublished); Wendt v. Tolson, 172 N.C. App. 594, *1 (2005) (unpublished); State v. Rowe, 175 N.C. App. 249, *2 (2005) (unpublished).

XII. Authority to Require Adequate Facilities. By statute counties are required to provide adequate facilities for the courts. When a county fails to do so the court has inherent authority to direct local officials to perform that duty. Such authority is necessary to safeguard the constitutional and statutory rights of parties. *In re* Alamance County Court Facilities, 329 N.C. 84 (1991).

In exercising its authority to assure that it has adequate facilities the court must recognize the constitutional limitations on the spending and taxing authority and not encroach on legislative and executive authority in those areas. Thus, a court should avoid ex parte orders and specific directives as to the improvements to be made and

instead should offer the responsible officials an opportunity to correct the problem on their own:

> "A more reasonable, less intrusive procedure would have been for the court, in the exercise of its inherent power, to summon the commissioners under an order to show cause why a writ of mandamus should not issue, which order would call attention to their statutory duty and their apparent failure to perform that duty. If after hearing it was determined that the commissioners had indeed failed to perform their duty, as the court determined in the case before us, the court could order the commissioners to respond with a plan — perhaps in consultation with such judicial personnel as the senior resident superior court judge, the chief district judge, the district attorney, the clerk, or other judicial officials with administrative authority — to submit to the court within a reasonable time. Such a directive would be a judicious use of the court's inherent power without either seizing the unexercised discretion of a political subdivision of the legislative branch or obtruding into the constitutional hegemony of that branch." *In re Alamance County*, 329 N.C. at 106-107.

CORRECTING ERRORS SUA SPONTE AFTER ENTRY OF JUDGMENT

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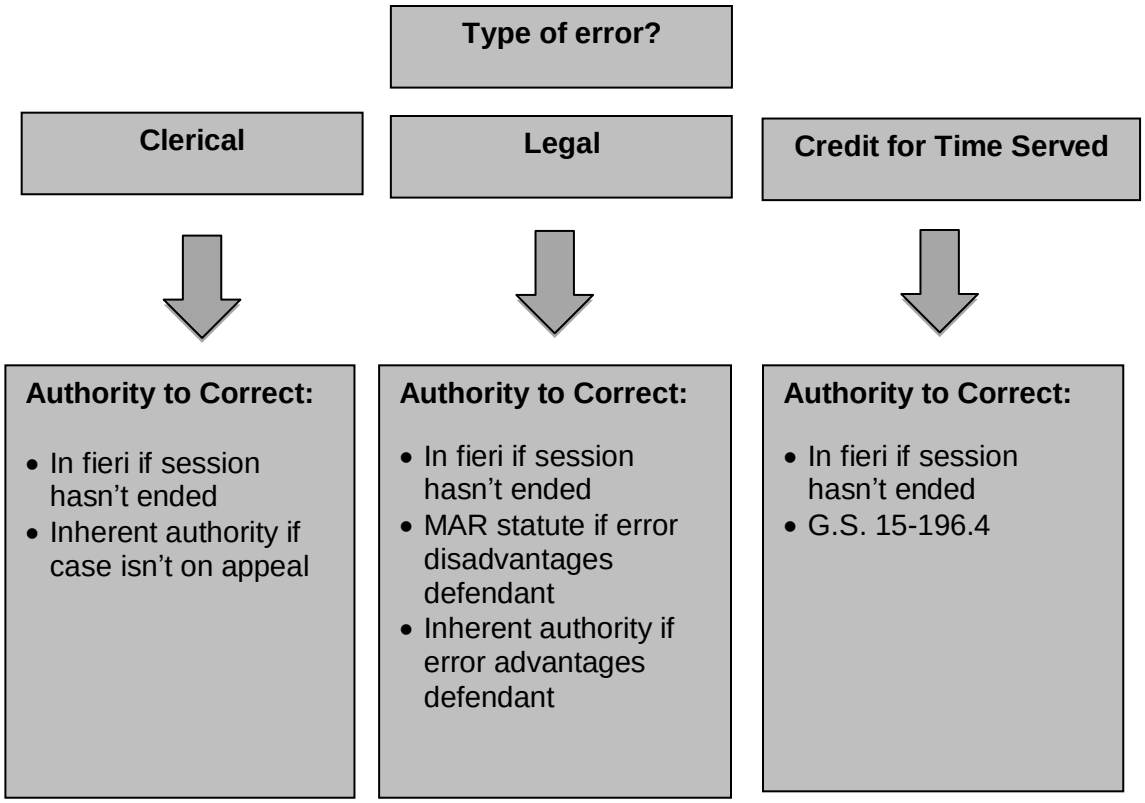
Contents

I. Generally. The trial judge's authority to correct an error on its own motion after entry of judgment in a criminal case depends on what type of error occurred, when it is discovered, and who benefits from the error. This section discusses the relevant authority.

Table 1: Analytical flowchart



II. Clerical Errors.

A. Inherent Authority. The trial judge has inherent authority to correct the record to make it "speak the truth." State v. Dixon, 139 N.C. App. 332, 337–38 (2000); State v. Linemann, 135 N.C. App. 734, 738 (1999) (quoting State v. Cannon, 244 N.C. 399, 403 (1956)); State v. Davis, 123 N.C. App. 240, 242 (1996). Put another way, the court may amend its records "to correct clerical mistakes or supply defects or omissions therein." *Davis,* 123 N.C. App. at 242–43; *Dixon*, 139 N.C. App. at 337.For example, suppose a judge announces in open court that the defendant is to receive consecutive sentences. Suppose further that the clerk erroneously omits this pronouncement from the judgment and the trial judge does not spot the error when she signs the judgment. In this example, the error is a clerical one and the judge has inherent authority to correct the judgment.

1. Case Must Be in the Trial Division. The only limitation on the court's inherent authority to correct clerical errors is that the case must be in the trial division in order for the trial court to act sua sponte. Once an appeal has been docketed, the trial judge cannot exercise this authority to correct the clerical error. *See Dixon*, 139 N.C. App. at 338 (after the record on appeal has been filed with the appellate court, the trial court only may amend or correct the record upon a directive from the appellate court). However, in these circumstances, a motion to correct or amend a judgment to make it "speak the truth" may be made in the appellate division. *See id.* When this occurs, or when the appellate court discovers a clerical error on its own, the court typically remands with instructions to correct the record. *See, e.g.,* State v. Sellers, 155 N.C. App. 51, 59 (2002) (directing trial court to correct error on remand); State v. Brooks, 148 N.C. App. 191, 194–95 (2001) (same); State v. Hendricks, 138 N.C. App. 668, 672–73 (2000) (same).

2. Determining Whether the Error is Clerical or Legal. Because this authority only applies to clerical errors it is important to understand the difference between clerical errors and legal errors. In general, clerical errors involve an incorrect recording of what actually happened. By contrast, legal errors involve mistakes in "judicial reasoning or determination." State v. Jarman, 140 N.C. App. 198, 202 (2000).

a. Uncertainty May Be Resolved in Defendant's Favor. When there is uncertainty regarding whether an error is clerical or legal, some decisions indicate that they "err on the side of caution" and resolve in the defendant's favor discrepancies between what is said in open court and what is stated in the case file. State v. Morston, 336 N.C. 381, 410 (1994); *see also Jarman,* 140 N.C. App. at 203 (quoting *Morston*). For example, in *Morston*, the defendant argued that the trial court improperly employed the same evidence to find the aggravating factors that the offense was committed to disrupt the lawful exercise of a governmental function or enforcement of laws and that it was committed to hinder the lawful exercise of a governmental function or enforcement of laws. The sentencing form indicated that the trial judge found both of these factors. However, the transcript revealed that the trial judge found the following aggravating factors in open court: the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of the law; the offense was committed against a present or former law enforcement officer; and the defendant had prior convictions for criminal offenses punishable by more than sixty days confinement. Relying on the transcript, the State contended that the error was clerical. Acknowledging that this assertion may be correct, the Supreme Court

determined "that the better course is to err on the side of caution and resolve in the defendant's favor the discrepancy between the trial court's statement in open court, as revealed by the transcript, and the sentencing form." *Morston*, 336 N.C. at 410. The court concluded that the trial court improperly found two factors in aggravation on the basis of the same evidence and remanded for resentencing. *See id.* Although some cases adhere strictly to this rules, as evidenced by the cases listed in the very next section, many do not.

b. Examples of Clerical Errors. Cases have found the following types of errors to be clerical and thus capable of correction by inherent authority:

- The judgment listed the wrong case or file number. State v. Mohamed, __ N.C. App. __, 696 S.E.2d 724, 735 (2010); State v. Barber, 9 N.C. App. 210, 212–13 (1970).
- The judgment listed an erroneous offense date. State v. Murray, 154 N.C. App. 631, 639 (2002).
- The judgment incorrectly listed the defendant's race. State v. Linemann, 135 N.C. App. 734, 736–738 (1999).
- The judgment contained an incorrect statutory citation. State v. McKinnon, 35 N.C. App. 741, 743 (1978).
- The judgment contained an erroneous statement regarding the crime of conviction. State v. Ellison, __ N.C. App. __, 713 S.E.2d 228, 246 (2011); State v. Jamerson, 64 N.C. App. 301, 306 (1983).
- The judgment listed the wrong offense as the one for which the trial court arrested judgment. State v. Hendricks, 138 N.C. App. 668, 672–73 (2000).
- The judgment listed the wrong offense as having been dismissed. State v. McGill, 296 N.C. 564, 569 (1979).
- The judgment contained a sentence of imprisonment that did not correspond to what was announced in open court. State v. Lawing, 12 N.C. App. 21, 23 (1971); State v. Brown, 7 N.C. App. 372, 375 (1970).
- The judgment contained a typographical error regarding the sentence. State v. Spooner, 28 N.C. App. 203, 204 (1975).
- The judgment listed the wrong offense class for the offense of conviction. State v. Hammond, 307 N.C. 662, 669 (1983); State v. Eaton, __ N.C. App. __, 707 S.E.2d 642, 651 (2011); State v. Dobbs, __ N.C. App. __, 702 S.E.2d 349, 350-51 (2010); State v. Linemann, 135 N.C. App. 734, 737–38 (1999).
- The box on the judgment form indicating that the sentence was in the presumptive range erroneously was left unchecked. State v. Moore, __ N.C. App. __, 705 S.E.2d 797, 804, *rev'd in part on other grounds*, __ N.C. __, 715 S.E.2d 847 (2011).
- The box on the judgment form indicating that aggravating factors outweighed mitigating factors erroneously was left unchecked. State v. Sellers, 155 N.C. App. 51, 59 (2002) (judge made such a finding); State v. Murphy, 152 N.C. App. 335, 338 n.3 (2002).
- The judgment incorrectly indicated that the judge found that mitigating factors outweighed aggravating factors. State v. Brooks, 148 N.C. App. 191, 194–95 (2001) (transcript indicated that judge found aggravating factor outweighed mitigating factors).
- The judgment incorrectly indicated that aggravating and mitigating factors were found. State v. Hilbert, 145 N.C. App. 440, 446 (2001) (transcript

contained no such findings; defendant was sentenced in the presumptive range).

- The wrong aggravating factor was checked on the judgment form or an aggravating factor was erroneously not checked on that form. State v. Gell, 351 N.C. 192, 218 (2000); State v. Thomas, 153 N.C. App. 326, 341 (2002) (trial court found the aggravating factor); *Murphy*, 152 N.C. App. at 337 n.1, 338 n.2.; State v. Pimental, 153 N.C. App. 69, 80 (2002) (judgment indicated that trial court found a non-statutory aggravating factor that the murder was committed with malice, premeditation, and deliberation; although malice was an element of the substantive offense and could not be used as an aggravating factor, trial court's use of that term in open court was a *lapsus linguae*).
- The judgment stated that the trial judge made no written findings of fact because the prison term was imposed pursuant to a plea arrangement, when written findings were unnecessary since the defendant received the minimum sentence possible. State v. Leonard, 87 N.C. App. 448, 451–52 (1987).
- Listing the victim on the restitution worksheet as an "aggrieved party." State v. Blount, __ N.C. App. __, 703 S.E.2d 921, 927 (2011).
- The judgment granted the defendant credit for time served while under house arrest and the error resulted from inaccurate information inadvertently provided by the deputy clerk. State v. Jarman, 140 N.C. App. 198, 203 (2000) (finding that the judge "did not exercise any judicial discretion or undertake any judicial reasoning" when signing an order providing credit against the defendant's sentence, when the order was prepared by a deputy clerk and the judge was required to give the defendant credit for time spent in custody pending trial; the "judge's action in signing the order giving defendant credit to which he believed she was legally entitled was a mechanical and routine, though mistaken, application of a statutory mandate").
- An order revoking probation and finding that the conditions violated and the facts of each violation were set forth in a violation report, but giving the wrong date of that report. State v. Kerrin, __ N.C. App. __, 703 S.E.2d 816, 821 (2011).
- On the judicial findings and order for sex offender form, listing the incorrect offense of conviction. State v. Treadway, __ N.C. App. __, 702 S.E.2d 335, 347 (2010).
- Checking the wrong box on the judicial findings and order for sex offender form. State v. May, __ N.C. App. __, 700 S.E.2d 42, 44 (2010).

c. Examples of Judicial Errors. Although the trial court has inherent authority to correct clerical errors to make the record speak the truth, this authority only allows it to "make the record correspond to the actual facts." State v. Cannon, 244 N.C. 399, 404 (1956)); *see also* State v. Davis, 123 N.C. App. 240, 243 (1996) (quoting *Cannon*). The court cannot, "under the guise of an amendment of its records, correct a judicial error or incorporate anything in the minutes except a recital of what actually occurred." *Cannon*, 244 N.C. at 404; *see also Davis,* 123 N.C. App. at 243 (quoting *Cannon)*; State v. Jarman, 140 N.C. App. 198, 203 (2000) (same).

Legal errors include actions such as:

- Imposing a sentence above what is permissible by law. State v. Ransom, 74 N.C. App. 716, 718-19 (1985) (trial court committed a legal error when it consolidated offenses and sentenced the defendant to a term of imprisonment that was greater than that prescribed for the most serious offense consolidated).
- Sentencing a defendant to an aggravated term without finding that an aggravating factor existed and that an aggravated sentence was appropriate. State v. Rico, __ N.C. App. __, __ S.E.2d __ (Jan. 17, 2012).
- Dismissing the substantive offenses and sentencing the defendant to a term of imprisonment as a habitual felon. *Davis,* 123 N.C. App. at 243-44 (1996) (legal error was failing to recognize that habitual felon status is not a crime and, standing alone, cannot support a sentence); State v. Taylor*,* 156 N.C. App. 172, 176 (2003) ("Most assuredly, a trial court's entry of judgment and sentence on a 'non- crime' is not a clerical error.").
- Ordering satellite based monitoring for a period of ten years (instead of lifetime registration) after finding that the defendant was a recidivist. State v. Yow, 204 N.C. App. 203 (2010).

3. **Suggested Procedure.** It would be prudent for the trial court to provide notice and an opportunity to be heard before correcting a clerical error.
4. **Correction is Nuc Pro Tunc.** When the court amends its records to correct a clerical error, the amended record "stands as if it had never been defective, or as if the entry had been made at the proper time." State v. Dixon*,* 139 N.C. App. 332, 338 (citation omitted); *see also* State v. Linemann, 135 N.C. App. 734, 738 (1999). That is, the amended order is a *nunc pro tunc* entry. *See Dixon,* 139 N.C. App. at 338.

B. Authority to Correct "In Fieri" Judgment Before the Session Ends. If an error is brought to the court's attention before the session is adjourned, the court may correct it. Until the expiration of the session, the court's judgment is *in fieri,* and the judge has the power, in his or her discretion, to amend it or set it aside. *See* State v. Godwin, 210 N.C. 447 (1936) (modification of sentence); State v. Sammartino, 120 N.C. App. 597, 599-600 (1995) (same); State v. Quick, 106 N.C. App. 548, 561 (1992) (same); State v. Brown, 59 N.C. App. 411, 417 (1982) (same); State v. Edmonds, 19 N.C. App. 105, 106 (1973) (same); State v. Davis, 58 N.C. App. 330, 332–33 (1982) (deletion of finding in aggravation); State v. Oakley, 75 N.C. App. 99, 102 (1985) (vacating the judgment); State v. Carrouthers, __ N.C. App. __, 714 S.E.2d 460, 463 n.3 (2011) (dicta; modification of ruling on suppression motion); *see generally* BLACK'S LAW DICTIONARY 848 (9th ed. 2009) (the term *in fieri* means "([o]f a legal proceeding) that is pending or in the course of being completed").

1. **Authority Continues After Notice of Appeal.** Unlike the inherent authority discussed in section II.A., above, the court retains this authority to correct the judgment even if notice of appeal has been filed. *See Davis*, 58 N.C. App. at 333 (upholding the trial judge's amendment to the judgment deleting one of its findings in aggravation although notice of appeal had been filed; noting that "[c]ontrary to defendant's argument, there is no evidence that the court changed the judgment because defendant had given notice of appeal").
2. **Procedure.** When exercising this authority, the judge may hear further evidence in open court. *See* State v. Godwin, 210 N.C. 447 (1936); State v. Quick, 106

N.C. App. 548, 561 (1992); State v. Brown, 59 N.C. App. 411, 417 (1982). Both parties must be present when the evidence is taken. *Quick*, 106 N.C. App. at 561; *Brown*, 59 N.C. App. at 417.

3. **Authority Ends When Session Ends.** Unlike the court's inherent authority to make the record speak the truth, this discretionary authority to modify the judgment terminates when the session ends. State v. Jones, 27 N.C. App. 636, 638–39 (1975) (trial court not authorized to modify sentence after it had adjourned *sine die*); *see also* State v. Kelly, 5 N.C. App. 209, 211–12 (1969) (because the judge who imposes a sentence cannot modify it after expiration of the session, neither can a second judge).
   a. **What is a "Session"?** A session is the time during which a court sits for business and refers to a typical one-week assignment of superior court. State v. Sammartino, 120 N.C. App. 597, 599 (1995). A trial session ends when the time set for it by the Chief Justice expires, unless extended by order. *Jones*, 27 N.C. App. at 638; *Sammartino*, 120 N.C. App. at 599-600 (quoting *Jones*). A session can end earlier if, before this time, "the judge finally leaves the bench." *Jones*, 27 N.C. App. at 638; *Sammartino*, 120 N.C. App. at 599–600 (quoting *Jones*). A judge finally leaves the bench when there is an announcement in open court that the court is adjourned *sine die. Jones*, 27 N.C. App. at 639; *Sammartino*, 120 N.C. App. at 600 (quoting *Jones*). *Sine die* means "[w]ith no day being assigned (as for resumption of a meeting or hearing)." BLACK'S LAW DICTIONARY 1511 (9th ed. 2009); *see also Sammartino,* 120 N.C. App. at 600 (same); *Jones,* 27 N.C. App. at 639 (same).

III. Legal Errors.

A. Determining Whether the Error is Clerical or Legal. See section II.A.2 above for a discussion of this issue.

B. Authority to Correct "In Fieri" Judgment Before the Session Ends. As noted in Section II.B., above, when an error is brought to the court's attention before the session is adjourned, the court may correct it. Until the expiration of the session, the court's judgment is *in fieri,* and the judge has the power, in his or her discretion, to amend it or set it aside. This rule applies to clerical errors and to legal errors. See section II.B., above for detail regarding the scope and exercise of this authority. This authority, of course, ends when the session ends. The sections below explore the trial court's authority to sua sponte correct errors after the session ends.

C. Errors that Disadvantage the Defendant. If the legal error is one that works to the defendant's disadvantage—such as a sentence that is too severe—the trial judge has authority to sua sponte correct it under the motion for appropriate relief (MAR) statute. *See generally* G.S. 15A-1411 to -1422 (MAR statutes). Specifically, G.S. 15A-1420(d) provides that "[a]t any time that a defendant would be entitled to relief by motion for appropriate relief, the court may grant such relief upon its own motion." Thus, for example, if after the session has ended, the trial court learns that it erroneously sentenced the defendant to a term of imprisonment in excess of the statutory maximum, the court need not await a defense MAR to correct its sentencing error. Because the defendant would be entitled to relief, *see* G.S. 15A-1415(b)(8) (providing that one ground for a MAR is that the sentence is unauthorized by law), the trial court may exercise its authority under G.S. 15A- 1420(d) and *sua sponte* correct the error.

This authority under the MAR statute does not extend to errors that work to the defendant's advantage, such as a sentence that is too lenient. *State v. Oakley,* 75 N.C. App. 99 (1985), makes this distinction. In *Oakley,* the defendant pleaded guilty to assault with a deadly weapon inflicting serious injury. The trial judge accepted the plea and held a sentencing hearing. The judge imposed a suspended sentence, placed the defendant on supervised probation, and ordered him to pay $10,380.06 in restitution to the victim for her medical bills. The victim was not present when the State presented evidence that her medical bills totaled over $10,000. The following day, the victim appeared before the court expressing dissatisfaction with the proceedings and indicating that her medical bills totaled over $40,000. When the State made a MAR to set aside the judgment, the trial responded by setting aside the judgment, striking the guilty plea, and setting the case for trial. The defendant appealed. The court of appeals began noting that the State had no authority under the MAR statute to move to set aside the judgment based on the victim's new evidence. It went on to note, however, that because the session had not ended and the judgment was *in fieri*, the court had authority to set it aside. But as to the trial court's action of striking the guilty plea and setting the case for trial, the court found it unauthorized. It noted that G.S. 15A-1420(d) authorizes the trial court to grant relief on its own motion only if the defendant would be entitled to such relief on a MAR. *Id.* 103–04. It continued: "It follows that the trial court does not have the authority to grant appropriate relief which benefits the State. In this case, striking the guilty plea . . . and setting the case for trial on the original charge benefited the State exclusively." *Id.* at 104. Thus, under *Oakley,* and consistent with the language of the statute, the court has no authority under G.S. 15A-1420(d) to grant relief which benefits the State.

D. Errors That Advantage The Defendant. As noted above, the MAR statute does not authorize the trial judge to sua sponte correct legal errors that advantage the defendant, such as a sentence that is too lenient. However, the trial court has inherent authority to correct such errors. *State v. Branch* 134 N.C. App. 637 (1999), is the best authority on this point.

1. The *Branch* Rule. In *Branch,* the defendant pleaded guilty to several offenses, some committed on September 19, 1994, and some committed on October 4, 1994. The trial court combined the offenses and sentenced the defendant to twelve to fifteen months in jail under Structured Sentencing. After the session ended, the Department of Correction notified the trial court that offenses committed before October 1, 1994, could not be combined with offenses committed after that date. The trial judge then resentenced the defendant to twelve to fifteen months for the offenses committed on October 4, 1994 under Structured Sentencing, and ten years for the offenses committed on September 19, 1994 under Fair Sentencing. The defendant then filed a MAR, which was denied.

On appeal, the defendant argued, in part, that the resentencing hearing was unlawful because the trial court had no jurisdiction over the matter once the term ended. The court of appeals disagreed, stating that trial courts have authority to correct invalid sentences. It stated: "If a judgment is invalid as a matter of law, North Carolina Courts have the authority to vacate the invalid sentence and resentence the defendant accordingly, even if the term has ended." *Branch,* 134 N.C. App. at 641; *see also* State v. Petty, __ N.C. App. __, 711 S.E.2d 509, 513-14 & n.1 (2011) (having erroneously arrested judgment on a DWI charge to which the defendant had pleaded guilty, the trial court had authority to correct the

invalid judgment and sentence the defendant even after the session ended; citing *Branch*, the court noted in dicta that the trial court's authority to correct invalid sentences includes sentences that exceed the statutory maximum). *Cf.* State v. Roberts, 351 N.C. 325 (2000) (the trial court had the authority to resentence the defendant after learning that the original sentence was invalid because it did not fall within the Structured Sentencing Act; the defendant was sentenced to 8 to 10 months but the Act required a sentence of 29 to 44 months; "[t]rial courts are required to enter criminal judgments consistent with the provisions of the [Act]").

2. **Pragmatic Considerations.** Although not explored by *Branch*, a strong pragmatic argument supports its holding. If the trial court has no inherent authority to correct, out of session, illegal sentences that benefit defendants, there are certain situations when the errors will remain uncorrected. As noted above, the court has no authority under G.S. 15A-1420(d) to correct an error that works to the defendant's advantage through a *sua sponte* MAR. Thus, the court cannot exercise authority under the MAR statute to correct an illegal sentence that benefits the defendant. If the error is immediately detected, the State can seek to have it corrected through an appeal or a MAR filed within ten days of entry of judgment. *See* G.S. 15A-1416(a) (within ten days of entry of judgment, the State may file a MAR asserting any error which it may assert on appeal); *see generally* G.S. 15A-1445 (appeal by the State). If, however, the error is not immediately detected, the State will be foreclosed from pursuing these options. G.S. 15A-1416(b) provides that after the ten-day period has expired, the State may make a MAR only for: (1) the imposition of sentence when prayer for judgment has been continued and grounds for the imposition of sentence are asserted and (2) the initiation of any proceeding authorized under Article 82, Probation; Article 83, Imprisonment, and Article 84, Fines, with regard to modification of sentences. Thus, absent a post conviction action by the defendant or inherent authority of the court to act *sua sponte,* the illegal sentence will remain uncorrected.

IV. Errors Regarding Credit for Time Served. Occasionally a judgment fails to give the defendant proper credit against his or her sentence for time served in confinement as a result of the charge that culminated in the sentence. G.S. 15-196.4 authorizes the court, pursuant to a petition seeking credits not previously allowed, to determine the credits due and forward an order setting forth the allowable credit to the defendant's custodian.

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Functus Officio

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General rule

Functus officio is the rule that once an appeal has been filed the trial court no longer has jurisdiction over the case, at least as to the issues being appealed, and may not enter any further orders as to those matters.

"As a general rule, once a party gives notice of appeal, such appeal divests the trial court of its jurisdiction, and the trial judge becomes *functus officio*. [citations omitted] *Functus officio*, which translates from the Latin as 'having performed his or her office,' is defined as being 'without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.' *Black's Law Dictionary* 682 (7th ed. 1999)." RPR Assocs. v. Univ. of N.C.-Chapel Hill, 153 N.C. App. 342, 346–47 (2002).

The rule also is codified in G.S. 1-294: "When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from."

When trial court jurisdiction ends

As provided in G.S. 1-294, the trial court's jurisdiction ends when the appeal is perfected. An appeal is perfected when it is actually docketed in the appellate court. Under Rule 12 of the Rules of Appellate Procedure, an appeal is docketed when the record on appeal is filed and the docket fee paid.

Once an appeal is perfected, however, G.S. 1-294 and the rule of *functus officio* date back to the time of the notice of appeal. "While an appeal is not perfected until it is actually docketed

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in the appellate division, a proper perfection relates back to the time of the giving of the notice of appeal, rendering any later orders or proceedings upon the judgment appealed from void for want of jurisdiction." Swilling v. Swilling, 329 N.C. 219, 225 (1991). "[F]or purposes of the stay imposed by G.S. § 1-294, the proper perfection of the appeal relates back to the time notice of the appeal was given." Reid v. Town of Madison, 145 N.C. App. 146, 149 (2001).

Accordingly, an order entered by the trial court after the notice of appeal is given, but before the appeal is perfected, becomes void once the appeal is perfected. For an example of the application of this rule, see *Marshall v. Marshall*, ___ N.C. App. ___, 757 S.E.2d 319 (2014).

Continuing jurisdiction until expiration of the session

Even if notice of appeal has been given, orders and judgments of a trial court remain *in fieri* and subject to further action until the expiration of the session of court. "It has long been settled law in this State that 'until the expiration of the term the orders and judgments of the court are in fieri, and the judge has the power, in his discretion, to make such changes and modifications in them as he may deem wise and appropriate for the administration of justice.' [quoting *State v. Hill*, 294 N.C. 320, 329 (1978)] This is true notwithstanding notice of appeal has been given." *In re* Tuttle, 36 N.C. App. 222, 225 (1978).

Although the cases speak of orders and judgments remaining *in fieri* until expiration of the "term" of court, the facts and context establish that the appellate courts really are referring to the "session" of court rather than the "term." For superior court, the "term" of court is commonly understood to meet the typical six-month rotation assignment and "session" is understood as the typical one-week assignment within the term to a particular county. State v. Trent, 359 N.C. 583 (2005).

For examples of the recitation and application of this exception to the *functus officio* rule, see *Sink v. Easter*, 288 N.C. 183 (1975), and *State v. Grundler*, 251 N.C. 177 (1959).

Hearing matters unrelated to the appeal

As stated in G.S. 1-294, after an appeal has been filed the trial court still "may proceed upon any other matter included in the action and not affected by the judgment appealed from." Two examples:

Jenkins v. Wheeler, 72 N.C. App. 363 (1985)—In an action by the plaintiff against several defendants for conspiracy in denying insurance coverage the trial court dismissed the claim against the defendant lawyer. The plaintiff appealed the decision. While that appeal was pending, the trial court heard and granted a motion to dismiss the claim against the insurance company for failure to state a claim. That was a separate issue from dismissal of the claim against the lawyer and thus was within the trial court's jurisdiction while the appeal was pending.

McKyer v. McKyer, 179 N.C. App. 132 (2006)—The father's appeal of a child custody order did not deprive the trial court of jurisdiction to consider and enter orders related to child support as those were separate issues.

Actions authorized by the Rules of Appellate Procedure

The Rules of Appellate Procedure authorize the trial court to take certain actions concerning the perfection of the appeal. These include:

Settling the record on appeal—Under Rule 11 of the Rules of Appellate Procedure the judge whose order or judgment is being appealed resolves issues about the record on appeal when the parties are unable to agree.

Extending the time for preparing the transcript for appeal—Under Rule 7(b)(1) of the Rules of Appellate Procedure the trial court may extend for good cause for one time, for thirty days, the time in which the trial transcript must be produced. The trial court may not extend the time in death penalty cases, however; such motions must be made to the supreme court.

Extending the time for serving the proposed record on appeal—Under Rule 27(c)(1) of the Rules of Appellate Procedure a trial judge may extend for one time, for not more than thirty days, the time for the appellant to serve the proposed record on appeal. The judge granting the extension need not be the judge who heard the case.

Dismissing an appeal for failure to comply with the rules—Under Rule 25 of the Rules of Appellate Procedure the trial court may dismiss an appeal after notice of appeal has been given but before the appeal is filed in the appellate court. Farm Credit Bank of Columbia v. Edwards, 121 N.C. App. 72 (1995). The judge granting the motion to dismiss the appeal need not be the judge who heard the case. The trial court may dismiss the appeal only for failure to comply with the Rules of Appellate Procedure or court orders relating to perfection of the appeal. Estrada v. Jaques, 70 N.C. App. 627 (1984).

Post-judgment motions in the trial court

Several statutes specifically provide for different kinds of post-judgment motions to be filed with the trial court. In some instances a notice of appeal will deprive the trial court of authority to proceed on the motion, but in other situations the court may move ahead regardless of the appeal. These motions include:

Rule 50 motion for judgment notwithstanding the verdict—Under Rule 50 of the Rules of Civil Procedure a motion for judgment notwithstanding the verdict may be made within ten days of the entry of judgment. The filing of such a motion tolls the time for filing the notice of appeal under Rule 3(c)(3) of the Rules of Appellate Procedure. Once notice of appeal is filed, however, the trial court loses jurisdiction to hear the motion under Rule 50. American Aluminum Prods., Inc. v. Pollard, 97 N.C. App. 541 (1990) (citing Wiggins v. Bunch, 280 N.C. 106 (1971)). To allow the trial court to hear the motion for judgment notwithstanding the verdict the party should first file that motion and wait for it to be decided before filing the notice of appeal.

Rule 52 motion to amend findings of fact—Under Rule 52(b) of the Rules of Civil Procedure a motion to amend the court's findings of fact or to make additional findings may be made within ten days of the entry of judgment. The trial court may hear such a motion even if notice of appeal has been given. Parrish v. Cole, 38 N.C. App. 691 (1978). And pursuant to

the same rule the trial court may alter its conclusions of law as well as the findings of fact. Spoon v. Spoon, ___ N.C. App. ___, 755 S.E.2d 66 (2014).

Rule 59 motion for a new trial—Under Rule 59 of the Rules of Civil Procedure notice of a motion for a new trial may be made if served within ten days of the entry of judgment. Notice of appeal removes from the trial court jurisdiction to hear such a motion, however. Am. Aluminum Prods., Inc. v. Pollard, 97 N.C. App. 541 (1990) (citing Wiggins v. Bunch, 280 N.C. 106 (1971)). The trial court loses jurisdiction even if the Rule 59 motion is filed simultaneously with the notice of appeal. Seafare Corp. v. Trenor Corp., 88 N.C. App. 404 (1988).

As with a Rule 50 motion for judgment notwithstanding the verdict, Rule 3(c)(3) of the Rules of Appellate Procedure provides that the time for filing a notice of appeal is tolled if a Rule 59 motion is filed. To allow the trial court to hear the motion for a new trial, therefore, the party should first file that motion and wait for it to be decided before filing the notice of appeal.

Rule 60(b) motion for relief from the judgment—Notice of appeal removes from the trial court jurisdiction to hear a motion for relief from the judgment under Rule 60(b) of the Rules of Civil Procedure. Wiggins v. Bunch, 280 N.C. 106 (1971). If a Rule 60(b) motion is filed simultaneously with the notice of appeal, however, it may be heard by the trial court. York v. Taylor, 79 N.C. App. 653 (1986).

Although a notice of appeal generally removes the case from the trial court's jurisdiction and from deciding a Rule 60(b) motion, the trial court may hear and consider the Rule 60(b) motion to indicate what action it would be inclined to take if it had jurisdiction. The party moving for relief should notify the appellate court so that it may delay consideration of the appeal until the trial court has issued its advisory opinion. If the trial court indicates it would be inclined to grant the motion, the party then may move for the appellate court to remand the case for judgment on the motion. Bell v. Martin, 43 N.C. App. 134 (1979), *rev'd on other grounds*, 299 N.C. 715 (1980). This procedure recognizes that the decision on a Rule 60(b) motion usually will require resolution of contested facts which the trial court is in a better position to assess. Swygert v. Swygert, 46 N.C. App. 173 (1980).

Motion for appropriate relief (MAR)—Under G.S. 15A-1414(c) a motion for appropriate relief that is required to be made within ten days of entry of judgment may be heard in the trial division, even if notice of appeal has been given. A separate statute, G.S. 15A-1448(a)(2), provides that when such a motion has been filed appropriately in the trial court, the deadline for giving notice of appeal does not start to run until the MAR is decided. A motion for appropriate relief made by a defendant pursuant to G.S. 15A-1415 more than ten days after judgment may be heard in the trial court as provided in G.S. 15A-1413 if there is no appeal pending, but G.S. 15A-1418(a) requires that such a motion be made in the appellate court "[w]hen the case is in the appellate division for review"—presumably meaning that the appeal has been perfected. The appellate court then decides whether to remand the MAR to the trial court.

Determining conditions of release—Under G.S. 15A-1453(a) the trial court in which the defendant was convicted retains authority to determine conditions of release during the appeal.

Correcting court records

Generally a court has the inherent authority and duty to correct its records, at any time, to assure that they accurately reflect the court's actions. State v. Cannon, 244 N.C. 399 (1956). The authority to correct records is also codified as Rule 60(a) of the Rules of Civil Procedure. The authority to correct records does not authorize a trial court to make substantive changes in an order after notice of appeal has been given. *In re* C.N.C.B., 197 N.C. App. 553 (2009).

Moreover, once a case has been docketed in an appellate court that court has jurisdiction over the record and the trial court may amend or correct the record only upon a directive from the appellate court. State v. Dixon, 139 N.C. App. 332 (2000); G.S. 1A-1, Rule 60(a).

Deciding whether the appeal has been abandoned

The trial court may determine whether an appeal has been abandoned and, if it has, resume jurisdiction of the case. Before making such a determination the trial court must give notice and conduct a hearing. Sink v. Easter, 288 N.C. 183 (1975). Abandonment of the appeal is not established merely by the party filing a motion for voluntary dismissal of the case, however. A trial court may not declare an appeal abandoned and resume jurisdiction based on that fact alone. Bowen v. Hodge Motor Co., 292 N.C. 633 (1977). The trial court did properly determine that the appeal had been abandoned and that it still had jurisdiction when the appealing party did nothing to perfect the appeal for nearly ninety days and during that time requested and participated in an evidentiary hearing in the trial court. McGinnis v. McGinnis, 44 N.C. App. 381 (1980).

The trial court cannot extend its jurisdiction by reserving decision

The trial court may not grant jurisdiction to itself by stating that it "reserves jurisdiction" to decide an issue; the notice of appeal ends the trial court's jurisdiction regardless of what it has said about reserving jurisdiction. McClure v. Cnty. of Jackson, 185 N.C. App. 462 (2007). The result is the same if the trial court says it is "deferring" an issue. *In re* Johnson, 212 N.C. App. 535 (2011). Nor does backdating orders *nunc pro tunc* to a date before the appeal make them valid. If the order was actually entered after appeal was taken, the court was without jurisdiction, regardless of its use of *nunc pro tunc*. McKyer v. McKyer, 223 N.C. App. 210, (2012) (unpublished). A *nunc pro tunc* order is supposed to be a correcting order only; it is to be used only to correct the record to reflect that a ruling was made earlier but defectively recorded. Rockingham Cnty. DSS *ex rel*. Walker v. Tate, 202 N.C. App. 747 (2010).

Examples of the application of *functus officio*

A sampling of cases applying the rule of *functus officio* includes:

> **Holding a trial**—Once the defendant had appealed to the state supreme court the trial court's refusal to remove the case to federal court, the trial court could not proceed to trial. The trial was void. Pruett v. Charlotte Power Co., 167 N.C. 598 (1914). Once the defendant had appealed the trial court's decision to move the trial to a different county,

the court could not proceed to holding the trial in the new county. The trial court had no jurisdiction once the appeal was filed, and the trial was a nullity. Patrick v. Hurdle, 7 N.C. App. 44 (1969).

Awarding attorney fees—Once the notice of appeal had been entered the trial court had no jurisdiction to consider an award of attorney fees. A trial court should delay the entry of judgment when it anticipates a motion for attorney fees, so that all matters can be addressed while the trial court still has jurisdiction. The trial court's order "reserving jurisdiction" to decide attorney fees was ineffective; a court cannot give itself jurisdiction. McClure v. Cnty. of Jackson, 185 N.C. App. 462 (2007).

The fact that the trial court has reserved for later determination a motion for attorney fees and costs does not make the appeal on the substantive issues in the case interlocutory. While further proceedings may be needed in the trial court on the attorney fees issue, the judgment on the merits of the case is considered final. Once the appellate court has decided the substantive appeal the case may be remanded to the trial court to resolve the outstanding fees question. Duncan v. Duncan, 366 N.C. 544 (2013).

Holding a party in contempt—Once a witness had appealed the trial court's order to appear for a deposition the trial court no longer had jurisdiction and could not hold that person in contempt for failing to comply with the order. Wilson v. Wilson, 124 N.C. App. 371 (1996).

Note, however, that statutes specify that appeal does not stop the trial court's use of contempt to enforce orders in cases of child support (G.S. 50-13.4(f)(9)), child custody (G.S. 50-13.3), and alimony (G.S. 50-16.7(j)).

Although an appeal stays contempt proceedings—except in those domestic cases just noted—it does not authorize a violation of the trial court order. If the order is upheld on appeal, upon remand the trial court may consider contempt for the violation that occurred during the appeal. Upton v. Upton, 14 N.C. App. 107 (1972).

Reducing an appeal bond—At the direction of the Court of Appeals the trial court set a $250,000 supersedeas bond for the husband's appeal of a divorce judgment. Once the husband appealed the amount of the bond the trial court had no jurisdiction to reconsider and reduce the bond to $25,000. Ross v. Ross, 194 N.C. App. 365 (2008).

Determining the amount due under a distributive order—Once notice of appeal was given the trial court had no jurisdiction to determine the amount due under an equitable distribution order providing for payments to be made over time. Romulus v. Romulus, 216 N.C. App. 28 (2011).

Deciding a motion to intervene—Once the defendant gave notice of appeal of the trial court's decision to not certify as a final judgment its order dismissing the plaintiffs for lack of standing, the court could not then consider the same parties' motion to intervene. An appellate decision on the appeal could have affected the trial court's decision on intervention; thus it was not a separate matter from the subject of the appeal. Bruggeman v. Meditrust Co., LLC, 165 N.C. App. 790 (2004).

Dismissing a petition for adoption—The trial court had no jurisdiction to dismiss an adoption petition after the petitioners appealed the court's decision that the father's consent was required. The error was harmless, however, because the Court of Appeals upheld the

decision that consent was required which had the same effect as dismissing the petition. *In re* Adoption of K.A.R., 205 N.C. App. 611 (2010).

Hearing a second bond forfeiture—Once the school board appealed the trial court's order denying forfeiture of the surety's bond the court had no jurisdiction to order forfeiture again after defendant was again called and failed to appear. Although the second forfeiture was for a new failure to appear, the forfeiture was for the same bond, the surety had posted only the single bond, and the issue of that bond was before the appellate court. State v. Cortez, 215 N.C. App. 576 (2011).

Enjoining enforcement of the order being appealed—Once the defendant appealed the trial court's decision to award custody to the plaintiff the court was without jurisdiction to issue an injunction requiring the custody to remain unchanged pending appeal. Although the statutes allow a trial court to use contempt to enforce a child custody order during appeal, the court could not enjoin the plaintiff from taking custody and leaving the child with the defendant during the appeal. The essence of the injunction was to alter the custody order, and the trial court had no jurisdiction to enter an order addressing the issue that was on appeal. Rosero v. Blake, 150 N.C. App. 250 (2002).

Effect of interlocutory appeals

Generally a party may appeal only a final order or judgment of the trial court, and may not appeal an interlocutory order. An interlocutory order is one that is not a final resolution of the case, leaving other matters still to be decided. Interlocutory orders that affect a substantial right may be appealed immediately, however. For example, a trial court's order resolving a discovery dispute is interlocutory and usually may not be appealed immediately because it does not affect a substantial right. The dissatisfied party must wait until final judgment in the case and then raise that discovery question on appeal along with other issues. On the other hand, the trial court's decision to not dismiss a case based on immunity usually is immediately appealable. The invocation of immunity is a substantial right, and the party is entitled to appeal if it is not recognized.

Trial court determination of whether the order is appealable—In applying the rule of *functus officio* the trial court sometimes will have to determine whether the appealing party actually has a right to appeal an interlocutory order and thereby take jurisdiction from the trial court. Although the appellate court may dismiss the appeal eventually, the trial court needs to make its own determination so it can decide whether to proceed during the unwarranted appeal. If the trial court determines that the appeal is of an interlocutory order which does not affect a substantial right, and therefore is not immediately appealable, the trial court may disregard the appeal and proceed to try the case while the interlocutory appeal is pending. Otherwise a party could paralyze the proceedings indefinitely by appealing orders that are not appealable. Veazey v. City of Durham, 231 N.C. 357 (1950).

Trial court error on whether a substantial right is affected—In some circumstances the trial court continues to have jurisdiction even if it has decided incorrectly that the appeal is interlocutory and does not affect a substantial right. If case law is not clear that the issue

on appeal affects a substantial right, and the trial court's determination that it does not affect a substantial right is reasonable under the current state of the law, the trial court's continued exercise of jurisdiction is valid even though its decision on the interlocutory appeal ultimately turns out to be wrong. RPR & Assocs. v. Univ. of N.C.-Chapel Hill, 153 N.C. App. 342 (2002).

In *RPR Associates* the defendant university moved to dismiss the case based on sovereign immunity. The trial court denied the motion and the university appealed but the trial court proceeded to trial after deciding that its decision on immunity was not immediately appealable. Although the appellate court held that the trial court was incorrect and that the denial of immunity was subject to immediate appeal, the trial court's decision was reasonable under the case law at the time and, consequently, the trial court had jurisdiction to try the case while the appeal was pending.

Recent decisions on interlocutory appeals—The most recent appellate decisions concerning this issue are almost all unpublished opinions, including:

1. *North Carolina State Bar v. Gilbert*, 176 N.C. App. 408 (2006) (unpublished)—The defendant in a State Bar disciplinary proceeding deliberately attempted to avoid a trial court decision by appealing a series of interlocutory orders. The trial court properly proceeded to trial after determining that the appeals were interlocutory and not immediately appealable.
2. *Capps v. NW Sign Industries of North Carolina, Inc.*, 185 N.C. App. 543 (2007) (unpublished)—The trial court retained jurisdiction upon determining that its decision to deny dismissal on the basis of a forum-selection clause was not immediately appealable. Although the supreme court eventually held that the forum-selection clause issue was appealable, that holding was not a foregone conclusion and the trial court retained jurisdiction to proceed with the case.
3. *In re Fifth Third Bank*, 213 N.C. App. 423 (2011) (unpublished)—The trial court's order allowing a deposition was a non-appealable interlocutory order concerning discovery and, therefore, the trial court retained jurisdiction to proceed in the case despite the appeal of that order.
4. *Fields v. City of Goldsboro*, 223 N.C. App. 210, (2012) (unpublished)—The trial court had jurisdiction to continue to trial after the defendant city appealed the denial of its motion to dismiss based on sovereign immunity. Although the law was well established that the plaintiff's failure to allege a waiver of immunity was fatal to the claim, and that thus the city was entitled to an interlocutory appeal of a decision affecting a substantial right, the city never perfected its appeal and did not seek a stay from the appellate court. Additionally, the city moved for summary judgment in the trial court and requested the case be calendared and failed to mention its appeal at the summary judgment hearing.

Perspectives from the Bench

Judge Jim Ammons January 26, 2024

School of Government Chapel Hill, NC

Welcome

Best job in our System of justice. And it is a full-time job!

Disclaimer

I do not want to disrespect, embarrass or offend anyone. I want to comment on the responsibilities that you have undertaken, and what is expected of you. I do not know everything. I may well be wrong about some things that I say today. I have made scores of mistakes in my career. I apologize if some of this material is repetitive of what other speakers have presented, or something you already know, or information that you find not to be useful.

Goal is to help you be the best Superior Court judge you can be and avoid some of the pitfalls and problems I have encountered.

Duties

Not an easy job. Job is both rewarding and enjoyable. We are circuit riding judges. Most of the work is in the courtroom, but for all of us, a good amount of out of court work will be required.

If you have a prior commitment that prevents you from holding court for the whole week, either ask for vacation, or arrange with the court personnel to be out of court for that day or half of that day or change your commitment.

I don't want to discourage anyone. Great job. Important job. How you do this job effects many other people, every day. You chose to accept the job, the rights, the privileges, and the responsibilities of this job.

After hours emergencies: search warrants, TRO's, pin register, trap and trace orders, tracker orders, hostage or barricaded subject scenarios. Availability after hours may save a life or prevent irreparable injury or damage.

Dangers

Black robe fever. Don't get caught up in your own importance.

Everything you say and most of what you do is going to be taken down by the court reporter. Often, the less said, the better.

You are **merely** filling one role in the system.

Traveling

Resident Superior Court Judge, commission for six months. Maybe multiple sites of court that you must go to during those six months. Special Superior Court Judges may be somewhere different every week.

When you get your Commission, please make sure you know where you're supposed to be.

Don't change the plan of Salvation!

Don't try to change the way they do things. Know and obey the local rules of court. Respect and follow the local customs. Be respectful of other people's time.

Don't be in a hurry to leave. Check with the other judges and with the staff before you leave. May be the only Superior Court Judge in the county and maybe even in the district.

Don't adjourn sine die. Once you do, your power is over. If you think you are done for the week, ask Bailiff to adjourn pending further court proceedings.

Getting started

Show up for the court session early. Meet the staff. Find out what time they go to lunch. Adhere to the local custom.

Protect the record. Make your court reporter's job easier.

Take care of the staff. Observe regular starting, stopping, and break times. Give the staff at least an hour for lunch. Always be on time.

Sentencing

90% of pleas will already be negotiated by the parties. The transcript of plea will very often be incorrect.

Five different sentencing sheets for felony purposes.

Different maximum punishment chart sex offenses.

Double check transcripts.

Check jail credit. Do not give less time than the defendant has credit for and then put on probation.

If probationary term is 60 months, may extend up to 8 years.

Give defendant time to make full restitution while on probation.

Correcting a judgment versus amending a judgment

Changing a clerical error is a correction. Changing a mistake based on anything other than a clerical correction is an amendment.

Have clerk write at the top of the page or on the side of the page, "Corrected Judgment" or "Amended Judgment".

Find the correction or the amendment in the body of the judgment, initial it and then signed the judgment.

Trials

Be prepared. Read the file. Check the pleadings if a civil case. Check the indictment if a criminal case. Check to see if there are any motions pending. Check to see if there are any motions that have already been heard by another judge, and how they will affect the trial of your case.

Your main focus needs to be the jury.

Try not to waste time on hearing motions if the jury is waiting.

Try to hear dispositive motions before the jury arrives.

Remind witnesses and parties and lawyers to speak up.

Give the jury plenty of breaks.

A mistrial should be your last resort.

If jury deadlocks, did they reach verdict on any of the charges.

Trial Motions

Check Index to motions.

Some must be granted: Complete recordation. Reveal the deal. No comment on defendant's silence.

Some should be denied based on current caselaw. Only made to preserve issue.

Some require a lengthier hearing, presentation of evidence.

Suggestion: Rule on simple motions, reserve ruling on motions that require evidentiary hearing, until after the jury is picked. Prohibit the lawyers from mentioning the disputed evidence in voir dire and opening statement. When jury selection is complete, release the jury to leave for whatever period of time you need to hear motions. Make your ruling and start back with the jury when they return.

What do you do when you don't know what to do?

Take a break. Research. Call for help. Call a colleague.

Go to the conferences. Talk with other judges. Make friends and get phone numbers of experienced judges.

Nobody truly understands this job better than those who have done it.

Reputation

You **will** develop a reputation as a judge. May be based on single event.

Recuse if there is a case that you feel you should not hear.

It is our jobs to handle the tough cases.

Accept feedback from lawyers, staff and other judges.

You will make mistakes. Nobody is perfect. Don't let fear keep you from making the hard decisions that we all have to make. If you make a mistake, correct the mistake if you can, and learn from the mistake.

Security

I leave this for last because although it is extremely important that you take responsibility for your own security, I know that this is an extremely sensitive and personal issue to a lot of judges.

The way things are today, we all must take an active role in protecting ourselves and the folks in our courtrooms.

The Judge may be in charge of the courtroom, but I almost always defer to the bailiffs on questions of security. If my bailiff asks me to step off the bench, I step off. If the bailiff suggests that a defendant be restrained, I will find a way to do it without prejudicing the defendant. If the bailiff asks me to stop court, I stop. Bailiffs often have information that you do not have. They are often connected by radio earpieces to

other court security, courtrooms and dispatch. They often will know whether the defendant has a history of disrupting proceedings.

Over the last 50 years, I have seen varying degrees of security in courthouses across the state. For those who are comfortable with firearms and want to carry in the course of their jobs, I suggest complying fully with all the statutes, following safe gun handling principles, being proficient in your gun handling skills, and informing the bailiffs of whether you are armed or not. Different courthouses have different local rules and customs about judges being armed.

See NCGS 14-415.11c and 14-415.27.

Thank you for your willingness to serve our Great State and its citizens. If I can ever assist you, please contact me. 910 322-7350

Questions:

Bench Trials: Be Careful. Misdemeanor appeals and lower level felonies.

Race of jurors for Batson: Juror Questionnaires.

Sovereign citizens: Be patient, stay calm, don't argue with them, be polite and professional, always maintain control of the courtroom.

Taking care of yourself mentally, physically, and emotionally: Have at least one member of your staff, one person in your court family, one attorney, and one other judge who can be trusted confidants.

Always personally check any firearm introduced into evidence to make sure it is safe. (Believe me on this!)

You have an important job with lots of responsibilities. If you are the SRSCJ, you may be asked to fix many problems that are beyond your control. You need to work with the Chief District Court Judge, the District Attorney, the elected Clerk, the Chief Public Defender and your Bar to find collaborative solutions. You cannot fix every problem!

Jurisdiction and Judicial Authority

Professor Shea Denning, UNC School of Government
Senior Resident Superior Court Judge James Ammons
January 2025

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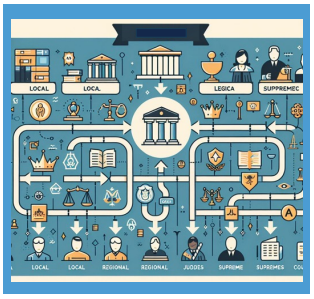
Roadmap

- What is your jurisdiction?
- When may you overrule another judge?
- When may you correct an error in a criminal judgment?
- What are some practical considerations?



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Jurisdiction

- Unless a statute provides otherwise, **the superior court has original general jurisdiction throughout the state**. N.C. Const. Art. IV, § 12(3).

3

Jurisdiction

- The Chief Justice **assigns superior court judges to terms (six-month assignments) and sessions (one-week assignment within term) of court** . . .
- and the "principle of rotating Superior Court Judges among the various districts of a division . . . shall be observed." N.C. Const. Art. IV, § 11.
- While assigned, a judge has the same powers in the county as a resident judge – until the session expires. G.S. 7A-45.1(c); 7A-47.

Common statement of out-of-session, out-of-county rule

"A superior court order must be entered during the term, during the session, and in the county where the hearing is held."

- The rule is more complicated and nuanced than that.
  - Sometimes an order may be entered after the session and outside of the county or district.
  - Resident and assigned judges have in-chambers jurisdiction that allows them to hear nonjury matters outside of a session of court.

What you need to know

- **Civil cases.** A judge may decide a matter and enter an order after the session has expired and while the judge is out of district if the hearing was held during the session and the judge's term has not expired.
  - The parties do not have to consent, but they can stop the judge from acting out of session or out of district by objecting before the session concludes.
  - If the term has expired, the parties must consent.

What you need to know

- **Criminal cases.** A judge may not enter an order affecting substantial rights after the **session** of court has ended unless (1) the decision was announced during the session, or (2) the parties consent to the judge deciding the matter and entering the order after the session is over.
  - G.S. 15-167 authorizes a judge to extend a criminal session if a trial cannot be completed by the end of the week.
  - If the judge's term has expired, the parties must consent to entry of the out-of-session order.

Continuing jurisdiction until end of session

- Orders and judgments of the trial court remain *in fieri* and subject to further action until the end of a session of court
  - Even if the parties have given notice of appeal

In-Chambers Jurisdiction (G.S. 7A-47.1)

- A superior court judge may hear and decide at any time non-jury matters (civil and criminal) arising from the judge's home district, regardless of where the judge is assigned.
  - For **criminal** matters, the **hearing must be in the county** where the matter arose (unless a statute or rule applies otherwise or the parties consent)
  - In **civil** cases, the **hearing may be in any county within the district**.

(Assigned judges also have in-chambers jurisdiction in the district where they are assigned.)

One Trial Judge May Not Overrule Another

- A superior court judge may only modify, overrule, or change the order of another superior court judge if it is
  (1) interlocutory,
  (2) discretionary, and
  (3) there has been a substantial change of circumstances since then entry of the prior order.

Correcting Errors after Entry of Judgment in a Criminal Case

Before the session ends

- A judge may correct a **clerical or legal error** before the session ends.
  - A judgment is *in fieri* until the session ends; thus a judge may amend it or set it aside (even if the defendant already has filed notice of appeal).

After the session ends

- A judge may correct **a clerical error** if the case is still in the trial division.
- A judge may correct **a legal error** in sentencing.
  - Note that the defendant must be present for resentencing.

What do you do if you don't know what authority you have — or whether or how you should exercise it?


Thank you.
Comments? Questions?