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THE GENERAL STATUTES OF NORTH CAROLINA

1974 CUMULATIVE SUPPLEMENT

Completely Annotated, under the Supervision of the
Department of Justice, by the Editorial Staff of the
Publishers

UNDER THE DIRECTION OF
W. M. WILLSON, J. H. VAUGHAN AND SYLVIA FAULKNER

Volume 4A

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Preface

This Cumulative Supplement to Replacement Volume 4A contains amendments and supplementary annotations to the Constitutions of North Carolina and the United States, to the rules of practice in the General Court of Justice of the State and in the United States District Courts for the Middle District, the Eastern District and the Western District of North Carolina and to other matters within the scope of the volume, the new Extradition Manual and the new Code of Judicial Conduct and rules governing the practical training of law students. It also contains a table of the Session Laws of 1971 and the First and Second Sessions of 1973. At the First 1973 Session, the General Assembly enacted Session Laws 1973, Chapters 1 to 826. At the Second 1973 Session, which was held in 1974, the General Assembly enacted Session Laws 1973, Chapters 827 to 1482.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement, and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

Scope of Volume

Constitutions:

Amendments to the Constitution of North Carolina adopted in 1972 and 1974.

Amendment to the Constitution of the United States ratified in 1971.

Rules:

Amendments to rules of practice in the Court of Appeals of North Carolina, to rules of practice in the United States District Courts for the Middle District, the Eastern District and the Western District of North Carolina, to rules governing admission to the practice of law, to the Canons of Ethics of the North Carolina State Bar and to the Supreme Court Library Rules, the Extradition Manual, the Code of Judicial Conduct and the rules governing the practical training of law students.

Annotations:

Sources of the annotations to the North Carolina Constitution and to the rules of practice in the State courts:

North Carolina Reports volumes 276 (p. 728)-285 (p. 597).

North Carolina Court of Appeals Reports volumes 9 (p. 172)-22 (p. 508).

Federal Reporter 2nd Series volumes 429 (p. 993)-498 (p. 912).

Federal Supplement volumes 315 (p. 321)-377 (p. 192).

Federal Rules Decisions volumes 56 (p. 663)-63 (p. 229).

United States Reports volumes 399 (p. 527)-415 (p. 604).

Supreme Court Reporter volumes 90 (p. 2355)-94 (p. 3234).

North Carolina Law Review volume 49 (pp. 1-1006).

Wake Forest Intramural Law Review volumes 6, 7 (p. 697).

Opinions of the Attorney General.

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The General Statutes of North Carolina 1974 Cumulative Supplement

VOLUME 4A

Constitution of North Carolina

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ARTICLE I

DECLARATION OF RIGHTS

Section 1. *The equality and rights of persons.*

Section 1A-1, Rule 26(b) is not unconstitutional on the grounds that it deprives property without due process of law, authorizes an unreasonable search and seizure, denies equal protection of the laws, or that it impairs the right to contract. *Marks v. Thompson*, 282 N.C. 174, 192 S.E.2d 311 (1972).

Sec. 6. *Separation of powers.*

Generally.—

The legislature may not abdicate its power to make laws nor delegate its supreme legislative power to any other co-ordinate branch or to any agency which it may create. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Classification of Departments Is Not Exact.—Although this State is firmly committed to the doctrine of separation of

Quoted in *In re Certificate of Need for Aston Park Hosp.*, 282 N.C. 542, 193 S.E.2d 729 (1973).

Cited in *In re Reddy*, 16 N.C. App. 520, 192 S.E.2d 621 (1972).

powers, the classification cannot be very exact, and there are many officers whose duties cannot be exclusively arranged under the duties of either of the judicial, legislative or executive heads. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Power May Be Delegated to Municipalities.—Ordinary restrictions with respect to the delegation of power to an agency of the State, which exercises no function

of government, do not apply to cities, towns, or counties. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1972).

When Legislature May Delegate Legislative Power to Administrative Agency.—

As to some specific subject matter, the legislature may delegate a limited portion of its legislative power to an administrative agency if it prescribes the standards under which the agency is to exercise the delegated powers. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Judicial Functions in Criminal Cases.—

The functions of the court in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination be one of guilt, then to pronounce the punishment or penalty prescribed by law. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Manner and Mitigation of Punishment Are Legislative Functions.—

The manner of executing a sentence and the mitigation of punishment are determined by the legislative department, and what the legislature has determined in that regard must be put in force and effect by administrative officers. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Legislature May Establish Parole System.—

In the division of governmental authority the legislature has exclusive power to determine the penological system of the State. It alone can prescribe the punishment for crime. It may therefore establish a parole system. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

And Administration of Parole System May Be Delegated.—

The granting of parole and the supervision of parolees are purely administrative functions, and accordingly may be entrusted by the legislature to nonjudicial agencies. *Jernigan v.*

State, 279 N.C. 556, 184 S.E.2d 259 (1971).

Petitioner's contention, that the legislature has provided no standards to guide the Board of Paroles in determining whether a parole violator shall serve his original sentence concurrently with his new sentence or at the completion of it and that this failure nullifies the purported grant of authority under § 148-62, cannot be sustained. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Assignment of Discretionary Power to Board of Paroles.—

Section 148-62, insofar as it grants discretionary power to the Board of Paroles, is not an assignment of judicial power to the Board of Paroles in contravention of N.C. Const., Art. IV, § 1 and this section. *Jernigan v. State*, 10 N.C. App. 562, 179 S.E.2d 788 (1971).

Discretionary Right to Enlarge Corporate Limits.—

In delegating to the town commissioners the discretionary right to decide whether to enlarge the corporate limits as specified in a special act, Session Laws 1971, c. 801, the General Assembly did not delegate legislative authority in violation of N.C. Const., Art. II, § 1, or this section. In authorizing the annexation, the General Assembly determined that the annexation was suitable and proper. Except for approval by the town's board of commissioners, the act was complete in every respect at the time of its ratification. The only discretion given the commissioners was to decide whether or not to annex the territory specified in the act. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1972).

Quoted in *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Cited in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971).

Sec. 8. Representation and taxation.

Editor's Note.—

For note on taxation and revenue bonds

to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

Sec. 11. Property qualifications.

Cited in *State v. Davis*, 282 N.C. 107, 191 S.E.2d 664 (1972).

Sec. 12. Right of assembly and petition.

City Parade Ordinance Constitutional.—

Where a city's parade ordinance was codified under the general heading of traffic, its language was directed to the time, place and manner of parades, and it neither imposed restraint upon speech concerning political

matters or matters of public concern nor contained any inkling of discrimination against defendant, who was arrested for participating in a parade without a permit, the ordinance was constitutionally valid. *State v. Frinks*, 284 N.C. 472, 201 S.E.2d 858 (1974).

Sec. 13. *Religious liberty.*

The legal tribunals of the State, etc. —

In accord with original. See *Atkins v. Walker*, 19 N.C. App. 119, 198 S.E.2d 101 (1973).

How Civil Courts Must Decide Church Property Disputes. — Civil courts must decide church property disputes without inquiring into underlying controversies over religious doctrines and without in any way basing decision upon any determination made upon such an inquiry. *Atkins v. Walker*, 19 N.C. App. 119, 198 S.E.2d 101 (1973).

Sec. 14. *Freedom of speech and press.*

Right to Comment on Matters of Public Interest.—Every one has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

Such Comments Not Libelous Unless Written Maliciously.—Such comments or criticisms are not libelous, however severe in their terms, unless they are written maliciously. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

This section is viewed in the light of the doctrine of "qualified privilege." *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

The basis of privilege is the public interest in the free expression and communication of ideas. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

Recovery for Defamation Not Allowed Where Public Interest Outweighs State's Interest. — Where this public interest is sufficient to outweigh the interest of the State in protecting the individual or corporate plaintiff from damage to his or its reputation, social or business relationships, the law does not allow recovery of damages, actual or punitive, occasioned by the defamatory speech or publication. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

When Qualified Privilege Is Applicable. — Qualified privilege will apply to a statement made or article written in good faith, without actual malice, (as defined by the law of North Carolina), touching upon a topic in which the speaker or publisher has an interest, or in respect to which he has a duty, public, personal, or private, either legal, judicial, political, moral, or social. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

Is Question of Law.—Whether a publication is privileged is a question of law to be determined by the court. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

Separation of Church and State; Health; Mental Health; Community Pastoral Counseling Program. — See opinion of Attorney General to Mr. Patrick Guyton, Community Development Specialist, Department of Human Resources, 43 N.C.A.G. 189 (1973).

Cited in *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Qualified Privilege Not Extended to Sports Reporting. — The North Carolina courts have not, as of yet, extended the doctrine of qualified privilege to the field of sports reporting, nor is there any indication that they will do so in the future. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

Malice Necessary to Overcome Qualified Privilege Distinguished from "Actual Malice". — The malice necessary under North Carolina law to overcome the shield of qualified privilege should not be confused with the "actual malice" standard which has been developed from the First Amendment, freedom of the press, decisions under the United States Constitution. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

North Carolina equates actual malice with reckless or careless publication. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

Falsehood of Statement Not Sufficient to Establish Malice.—In cases of qualified privilege, the falsehood of the statement will not of itself be sufficient to establish malice, for there is a presumption that the publication was made bona fide. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

City Parade Ordinance Constitutional. — Where a city's parade ordinance was codified under the general heading of traffic, its language was directed to the time, place and manner of parades, and it neither imposed restraint upon speech concerning political matters or matters of public concern nor contained any inkling of discrimination against defendant, who was arrested for participating in a parade without a permit, the ordinance was constitutionally valid. *State v. Frinks*, 284 N.C. 472, 201 S.E.2d 858 (1974).

Cited in *Sparrow v. Goodman*, 376 F. Supp. 1268 (W.D.N.C. 1974).

Sec. 15. *Education.*

Quoted in *Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972); *Webster v. Perry*, 367 F. Supp. 666 (M.D.N.C. 1973).

Sec. 16. *Ex post facto laws.*

An upward change of criminal penalty by legislative action cannot constitutionally be applied retroactively. *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973).

Where the punishment at the time of the offense was death or life imprisonment in the discretion of the jury, a change by the legislature to death alone would be *ex post facto* as to such offenses committed prior to the change. *State v.*

Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Neither Can Increase by Judicial Action.

—While the letter of the *ex post facto* clause is addressed to legislative action, the constitutional ban against the retroactive increase of punishment for a crime applies as well against judicial action having the same effect. *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973).

Sec. 17. *Slavery and involuntary servitude.*

Cited in *State v. Mems*, 281 N.C. 658, 190 S.E.2d 164 (1972); *State v. Davis*, 282 N.C. 107, 191 S.E.2d 664 (1972); *State v.*

Underwood, 283 N.C. 154, 195 S.E.2d 489 (1973); *Williams v. Town of Grifton*, 19 N.C. App. 462, 199 S.E.2d 288 (1973).

Sec. 19. *Law of the land; equal protection of the laws.*

I. GENERAL CONSIDERATION.

Editor's Note.—

For note on statutory requirement of safety helmets for motorcyclists, see 6 *Wake Forest Intra. L. Rev.* 349 (1970). For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 *N.C.L. Rev.* 262 (1971).

"**Liberty**". — The term "liberty" is as extensive as is the same term used in the Fourteenth Amendment to the Constitution of the United States. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

"**Law of the Land**" Has Same Meaning as "Due Process of Law".—The expression "the law of the land," has the same meaning as the expression "due process of law." *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970); *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

The law of the land and due process of law are interchangeable terms. *Smith v. Keator*, 285 N.C. 530, 206 S.E.2d 203 (1974).

A decision of the Supreme Court of the United States construing the due process clause of the Fourteenth Amendment to the federal Constitution, though persuasive, does not control an interpretation by the Supreme Court of North Carolina of the law of the land clause in the Constitution of North Carolina. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970); *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

Principle of Equal Protection Expressly Incorporated.—The principle of the equal protection of the law, made explicit in the

Fourteenth Amendment to the Constitution of the United States has now been expressly incorporated in this section of the Constitution of North Carolina. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

Scope of Police Power of State and Liberty of Individual.—The police power of the State extends to all the compelling needs of the public health, safety, morals and general welfare. Likewise, the liberty protected by the law of the land clause of the State Constitution extends to all fundamental rights of the individual. It is the function of the courts to establish the location of the dividing line between the two. *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971).

Any exercise by the State of its police power is a deprivation of liberty. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

The limit of the police power is the reasonable necessity for the action in order to protect the public. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

Whether a statute is a violation of the law of the land clause or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it. *North Carolina Ass'n of Licensed Detectives v. Morgan*, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare. In brief, it must be reasonably necessary to promote

the accomplishment of a public good, or to prevent the infliction of a public harm. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973); North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

The police power does not include power arbitrarily to invade property rights. Horton v. Gullledge, 277 N.C. 353, 177 S.E.2d 885 (1970).

The legislature may make classifications, etc.—

Neither, the equal protection clause of the Fourteenth Amendment to the United States Constitution nor the similar language in this section takes from the State the power to classify persons or activities when there is reasonable basis for such classification and for the consequent difference in treatment under the law. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

To withstand an equal protection claim a statute's classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

Social Welfare Classifications Need Not Be Exact.—In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. Glusman v. Trustees of Univ. of N.C., 281 N.C. 629, 190 S.E.2d 213 (1972).

Validity Depends upon Reasonable Relation, etc.—

The test required by this section is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

The traditional equal-protection test does not require the very best classification in the light of a legislative or regulatory purpose; it does require that such classification in relation to such purpose attain a minimum (undefined and undefinable) level

of rationality. Glusman v. Trustees of Univ. of N.C., 281 N.C. 629, 190 S.E.2d 213 (1972).

The equal protection clauses of the United States and North Carolina Constitutions impose upon law-making bodies the requirement that any legislative classification be based on differences that are reasonably related to the purposes of the act in which it is found. State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972); North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

The validity of a Sunday closing statute or ordinance depends upon its reasonable relation to the accomplishment of the State's legitimate objective, which, in this instance, is the promotion of the public health, safety, morals and welfare by the establishment of a day of rest and relaxation. Legislation for this purpose, like other legislation, may not discriminate arbitrarily either as between persons, or groups of persons, or as between activities which are prohibited and those which are permitted. State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972).

When a special class of persons, such as indigents, is singled out by the legislature for special treatment, there must be a reasonable relation between the classification and the object of the statute. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Protection against Unreasonable Discrimination Extends to Administration and Execution of Laws. — The constitutional protection in this section against unreasonable discrimination under color of law is not limited to the enactment of legislation. It extends also to the administration and the execution of laws valid on their face. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

Application and Administration of Law with Unjust and Illegal Discrimination Is within Prohibitions of Constitution. — Though a law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

Discriminatory administration of an ordinance is a denial of the equal protection of the law. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

But Mere Laxity in Enforcement Does Not Render Law Invalid.—Mere laxity, delay or inefficiency of the police department, or of the prosecutor, in the enforcement of a statute or ordinance, otherwise valid, does not destroy the law or render it invalid and unenforceable. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

Even selective enforcement does not have that effect if it has a reasonable relation to the purpose of the legislation, such as making efficient use of police manpower by concentrating upon the major sources of the criminal activity. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

Unless There Is Intentional or Purposeful Discrimination.—The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. Such discriminatory purpose is not presumed. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

The good faith of the enforcing officers is presumed. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

And Burden Is on Complainant to Show Intentional Discrimination. — The burden is upon the complainant to show the intentional, purposeful discrimination upon which he relies. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

And It Is Not Sufficient to Show That Numerous Other Violators Have Not Been Prosecuted.—One who violates a law, valid upon its face, does not bring himself within the protection of the discriminatory administration rule merely by showing that numerous other persons have also violated the law and have not been arrested and prosecuted therefor. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

The right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Right to Engage in Lawful Business. — When the State's exercise of its police power works to deny a person, association or corporation the right to engage in a business, otherwise lawful, such deprivation of liberty requires a substantially greater likelihood of benefit to the public in order

to enable it to survive an attack based upon this section. *North Carolina Ass'n of Licensed Detectives v. Morgan*, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

To deny a person, association or corporation the right to engage in a business, otherwise lawful, is a far greater restriction upon his or its liberty than to deny the right to charge in that business whatever prices the owner sees fit to charge for service. Consequently, such a deprivation of his liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive his attack based upon this section. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Freedom to contract, etc.—

In accord with 2nd paragraph in original. See *Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973).

The right to travel is a part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment, but it can be restricted with due process of law. *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971).

Quarantine of Disaster Areas.—The constitutional protection of the freedom of travel does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area. *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971).

Due Process in Juvenile Proceedings.—In order to comply with due process in a juvenile proceeding, the right of the juvenile to be represented by an attorney must be considered and an attorney provided or there must be a proper waiver of this right. In re Walker, 14 N.C. App. 356, 188 S.E.2d 731 (1972).

Where the district court held a preliminary hearing, determined whether there was probable cause to believe the juveniles guilty, and transferred the case to the superior court, in substance, though not in form, the court complied with the requirements of this section. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305 (1974).

Notice and Opportunity to Be Heard, etc.—

Notice and hearing are essential to due process of law. In re Wilson, 13 N.C. App. 151, 185 S.E.2d 323 (1971).

In order that there be a valid adjudication of a party's rights, he must be given notice of the action and an opportunity to assert his defense, and he must be a party to such proceeding. In re Wilson, 13 N.C.

App. 151, 185 S.E.2d 323 (1971).

Both the law of the land and due process of law import notice and an opportunity to be heard or defend in a regular proceeding before a competent tribunal. *Smith v. Keator*, 285 N.C. 530, 206 S.E.2d 203 (1974).

Notice is not a prerequisite to the determination of questions of a political nature, such as the necessity and expediency of a taking, but is only necessary prior to the determination of the issue of just compensation. *City of Durham v. Manson*, 21 N.C. App. 161, 204 S.E.2d 41 (1974).

Eligibility for In-State Tuition Is Not Basic Constitutional Right. — A person's right to eligibility for in-state tuition is quite different from his basic constitutional right to travel freely from one state to another or his basic constitutional right to vote. The regulations of the Board of Trustees of the University of North Carolina do not impede interstate travel. *Glusman v. Trustees of Univ. of N.C.*, 281 N.C. 629, 190 S.E.2d 213 (1972).

And Less Stringent Equal Protection Standard Applies. — The regulations of the Board of Trustees of the University of North Carolina concerning eligibility for in-state tuition do not impede interstate travel. Since they do not relate to basic constitutional rights, the regulations are to be tested by the less stringent traditional equal-protection standards. The constitutional test is whether the regulations have tended in general to assure that only North Carolina citizens get the benefit of in-state tuition, which the regulations have done. *Glusman v. Trustees of Univ. of N.C.*, 281 N.C. 629, 190 S.E.2d 213 (1972).

Prohibiting Certain Activities on Sunday. —

The general rule is that the enactment of Sunday regulations is a legitimate exercise of the police power, and that the classification on which a Sunday law is based is within the discretion of the legislative branch of the government or within the discretion of the governing body of a municipality clothed with power to enact and enforce ordinances for the observance of Sunday, and will be upheld, provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination, and has some reasonable relation to the public peace, welfare and safety. *State v. Greenwood*, 280 N.C. 651, 187 S.E.2d 8 (1972).

In determining whether a Sunday ban on the operation of billiard halls, but on no other businesses which provide facilities and opportunities for recreation, amuse-

ments and sports, denies equal protection to the operators of billiard halls, consideration must be given to the purpose of the ordinance and to the classification involved. *State v. Greenwood*, 280 N.C. 651, 187 S.E.2d 8 (1972).

Utilities Commission Intended to Set Rates as Low as Constitutionally Possible. — The origin of § 62-133 supports the inference that the legislature intended for the Utilities Commission to fix rates as low as may be reasonably consistent with the requirements of the due process clause of the Fourteenth Amendment to the Constitution of the United States, those of this section being the same in this respect. *State ex rel. Utilities Comm'n v. Duke Power Co.*, 285 N.C. 377, 206 S.E.2d 269 (1974).

Applied in *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971); *In re Hawkins*, 17 N.C. App. 378, 194 S.E.2d 540 (1973).

Cited in *McKinney v. Board of Comm'rs*, 278 N.C. 295, 179 S.E.2d 313 (1971); *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1972); *In re Reddy*, 16 N.C. App. 520, 192 S.E.2d 621 (1972); *Taylor v. Tri-County Elec. Membership Corp.*, 17 N.C. App. 143, 193 S.E.2d 402 (1972); *State v. Watkins*, 283 N.C. 17, 194 S.E.2d 800 (1973); *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973); *State v. Foster*, 284 N.C. 259, 200 S.E.2d 782 (1973); *Sparrow v. Goodman*, 376 F. Supp. 1268 (W.D.N.C. 1974).

II. RIGHTS OF DEFENDANTS IN CRIMINAL CASES.

Exclusion of Negroes from Grand Jury. —

Where the defendant's evidence related to the racial composition of only one grand jury and one list of petit jurors, it did not show a course of conduct over a period of time resulting in an apparent systematic exclusion of the members of the negro race from the grand juries or list of petit jurors and thus failed to establish a prima facie case of systematic exclusion of the members of the negro race from either the grand jury which indicted the defendant or the petit jury which convicted him. *State v. Newkirk*, 14 N.C. App. 53, 187 S.E.2d 394 (1972).

Burden upon Defendant to Establish Exclusion. — If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon the defendant to establish it, but once he establishes a prima facie case of racial discrimination, the burden of going forward with rebuttal evidence is upon the State. *State v. Cor-*

nell, 281 N.C. 20, 187 S.E.2d 768 (1972).

The burden is upon the defendant to establish racial discrimination in the composition of the jury. *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974).

Representation on juries in proportion to racial population, etc.—

A defendant is not entitled to demand a proportionate number of his race on the jury which tries him nor on the venire from which petit jurors are drawn. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

A defendant has no right to be tried by a jury containing members of his own race or even to have representative of his own race to serve on the jury. *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974).

But Indictment and Trial, etc.—

In accord with 1st paragraph in original. See *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

If the conviction of a negro is based on an indictment of a grand jury or the verdict of a petit jury from which negroes were excluded by reason of their race, the conviction cannot stand. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

Defendant does have the right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded. *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974).

Denial Does Not Overcome Prima Facie Discrimination.—The mere denial by officials charged with the duty of listing and summoning jurors that there was no intentional, arbitrary or systematic discrimination on the ground of race is not sufficient to overcome a prima facie case of racial discrimination. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

Evidence Insufficient to Establish Prima Facie Discrimination.—Evidence that the black adult population of a county amounted to 20% of the total county population and that during the biennium beginning January 1970 approximately 10% of the petit jurors appearing for service in the court room were negro, was held insufficient to make out a prima facie case of racial discrimination. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

Testimony by jury commissioners that, in some instances, they could determine from the address shown on the raw jury list card that the person named lived in a predominantly black or predominantly white neighborhood did not show an opportunity for discrimination sufficient to make out a prima facie case of racial discrimination. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

Where defendant has failed to make out a prima facie case of arbitrary or systematic exclusion of negroes from the jury, he has failed to show any violation of his constitutional rights as guaranteed by this section. *State v. Shaw*, 284 N.C. 366, 200 S.E.2d 585 (1973).

Defendant's mere showing that all negroes were challenged by the solicitor is not sufficient to establish a prima facie case of an arbitrary and systematic exclusion of negroes. *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974).

A jury list is not discriminatory, etc. —

A jury list is not discriminatory or unlawful because it is drawn from the tax list of the county. Nor is a jury commission limited to the sources specifically designated by § 9-2. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

Exclusion of Age Group from Jury List.

—The absence from the jury list of the names of persons between the ages of 18 and 21 during the period from July, 1971, the effective date of the amendment of § 9-3 lowering the age requirement for jurors from 21 years to 18 years, and September, 1971, the date of defendants' trial, was not unreasonable and did not constitute systematic exclusion of this age group from jury service. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

Section Prohibits Double Jeopardy.—

In accord with 2nd paragraph in original. See *State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972); *State v. Cameron*, 283 N.C. 191, 195 S.E.2d 481 (1973).

It is a fundamental principle of the common law, now guaranteed by the federal and state constitutions, that no person can be twice put in jeopardy of life or limb for the same offense. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971).

The sacred principle of the common law that no person can be twice put in jeopardy of life or limb for the same offense has always been an integral part of the law of North Carolina, therefore, the decision in *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969), which made the double jeopardy provision of the Fifth Amendment applicable to the several states through the Fourteenth Amendment, added nothing to the law of this State. *State v. Battle*, 279 N.C. 484, 183 S.E.2d 641 (1971).

The common-law principle that no person can be twice put in jeopardy of life or limb for the same offense is now guaranteed by both the federal and the State Constitutions. *State v. Allen*, 16 N.C. App. 159, 191 S.E.2d 403 (1972).

The constitutional prohibition against double jeopardy applies only to criminal

cases. *State v. Carlisle*, 20 N.C. App. 358, 201 S.E.2d 704 (1973).

When Defendant Is Placed in Double Jeopardy. — A defendant is placed in double jeopardy when he is tried twice or punished twice for the same crime. *State v. Carlisle*, 20 N.C. App. 358, 201 S.E.2d 704 (1973).

Double jeopardy is a personal defense. *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971).

The burden is upon defendant to sustain his plea of double jeopardy. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971).

Abandonment of Plea of Double Jeopardy.—Where the defendant fails to plead double jeopardy and to offer supporting evidence thereon, he is therefore deemed to have abandoned the plea of double jeopardy. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971).

Test of Double Jeopardy. — The double jeopardy tests are whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment, or whether the same evidence would support a conviction in each case. *State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972).

A plea of former jeopardy, etc. —

To support the plea of double jeopardy, it is of no consequence that the earlier prosecution grew out of the same transaction. It must have been the same offense both in fact and in law. *State v. Wiggins*, 21 N.C. App. 441, 204 S.E.2d 692 (1974).

When Jeopardy Attaches. — Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971); *State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972); *State v. Allen*, 16 N.C. App. 159, 191 S.E.2d 403 (1972).

Double Jeopardy Provision Not Violated by Mistrial Order and Another Trial. — Both federal decisions, applying the Fifth Amendment, and State decisions, applying common law and State constitutional principles, have recognized that, in certain situations arising in criminal prosecutions, the court may order a mistrial before verdict and again place defendant on trial without violating the double jeopardy prohibition. *State v. Preston*, 9 N.C. App. 71, 175 S.E.2d 705 (1971).

An order of mistrial in a criminal case when the jurors declare their inability to agree must be left to the trial judge, in the exercise of his judicial discretion, and will not support a plea of former jeopardy.

State v. Battle, 279 N.C. 484, 183 S.E.2d 641 (1971).

Where Mistrial Was Ordered for Physical Necessity or Necessity of Doing Justice. — Even where all the elements of jeopardy appear, a plea of former jeopardy will not prevail where the order of mistrial was properly entered for "physical necessity or for necessity of doing justice." *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971).

"Physical necessity" is illustrated where a juror by a sudden attack of illness is wholly disqualified from proceeding with the trial, or where the prisoner becomes insane during the trial, or where a female defendant is taken in labor during the trial. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971).

"Necessity of doing justice" is not an expression connoting a vague generality but one that relates to a limited subject, namely, the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971).

"Necessity of doing justice" arises from the duty of the court to guard the administration of justice from fraudulent practices; as in the case of tampering with the jury, or keeping back the witnesses on the part of the prosecution. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971).

Duty of Judge Ordering Mistrial in Capital Cases.—In all cases, capital included, the court may discharge a jury and order a mistrial when it is necessary to attain the ends of justice. It is a matter resting in the sound discretion of the trial judge, but in capital cases he is required to find the facts fully and place them upon record so that upon a plea of former jeopardy, the action of the court may be reviewed. *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971).

Plea of Double Jeopardy May Be Waived.—The constitutional right not to be placed in jeopardy twice for the same offense, like other constitutional rights, may be waived by a defendant. *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971).

And Waiver May Be Implied.—A waiver of the constitutional right not to be placed in jeopardy twice for the same offense is usually implied from the action or inaction of a defendant when brought to trial in the subsequent proceeding. *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971).

A plea of guilty constitutes a waiver of the plea of former jeopardy. *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971).

If double jeopardy is raised as a defense it is abandoned by a subsequent plea of guilty. *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971).

When defendant entered a plea of guilty to a charge after his previously entered plea of former jeopardy was overruled he thereby waived his right, if any, to dismissal of the charge on the ground of former jeopardy. *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971).

Two Offenses Arising Out of Same Transaction.—Since possession and sale of heroin are separate offenses, defendant was not subjected to double jeopardy where he was tried for both offenses arising out of the same transaction, found guilty of such and given consecutive sentences. *State v. Cameron*, 283 N.C. 191, 195 S.E.2d 481 (1973).

Possession and distribution of heroin are separate and distinct offenses, and a defendant may be prosecuted for both without violating the constitutional prohibition against double jeopardy. *State v. Patterson*, 21 N.C. App. 443, 204 S.E.2d 709 (1974).

Since illegal possession of a controlled substance is not a lesser included offense of illegal sale, there is no violation of the constitutional proscription against double jeopardy in the punishment of defendant for both crimes growing out of a single transaction. *State v. Aikens*, 22 N.C. App. 310, 206 S.E.2d 348 (1974).

Defendant may be convicted for both conspiracy to commit robbery and the commission of the same robbery without being subject to double jeopardy. *State v. Wiggins*, 21 N.C. App. 441, 204 S.E.2d 692 (1974).

Plea of Former Jeopardy Upheld.—Where judgment of nonsuit on the ground of variance was entered in a defendant's trial upon an indictment charging armed robbery of a store in which the life of a named employee was endangered and in which money belonging to the store was taken from the named employee and where defendant was subsequently prosecuted upon another armed robbery indictment for the same occurrence which alleged that the lives of two other employees were endangered and that the money was taken from the two other employees, and where the evidence in both trials showed that the robbery was perpetrated by endangering and threatening all employees then present in the store, including those named in both indictments, but that the money was removed from the immediate presence of the two employees named in the second indictment, the Supreme Court held that the same evidence would support a conviction

in both trials, and therefore defendant's plea of former jeopardy prior to his second trial should have been allowed. *State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972).

Revocation of Driver's License Cannot Constitute Double Jeopardy.—Since the revocation of a driver's license is not a form of criminal punishment, it cannot constitute double jeopardy. *State v. Carlisle*, 20 N.C. App. 358, 201 S.E.2d 704 (1973).

Sustaining State's Challenges of Jurors.—Where it was perfectly clear from their answers that each of the prospective jurors, before hearing any of the evidence, had already made up his mind that he would not return a verdict pursuant to which the defendant might lawfully be executed whatever the evidence might be, the State's challenges for cause were properly sustained. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

Section Preserves Right of Confrontation and Cross-Examination.—"The law of the land" guaranteed by this section of the Constitution, synonymous with "due process," preserves the right of confrontation and cross-examination to an accused in a criminal action. By cross-examination a witness may be questioned as to prior inconsistent statements or as to any act inconsistent with his testimony in order to impeach him or cast doubt upon his credibility. *State v. Gaiten*, 277 N.C. 236, 176 S.E.2d 778 (1970).

The right to the assistance of counsel and the right to face one's accusers and witnesses with other testimony are guaranteed by the Sixth Amendment to the federal Constitution which is made applicable to the states by the Fourteenth Amendment, and by this section and N.C. Const., Art. I, § 23. *State v. Cradle*, 281 N.C. 198, 188 S.E.2d 296 (1972).

Showups.—Although the practice of showing suspects singly for identification purposes has been recognized as suggestive and widely condemned, whether such a confrontation violates due process depends upon the totality of the circumstances. *State v. Shore*, 285 N.C. 328, 204 S.E.2d 682 (1974).

In-Court Identification Held Competent.—When the trial court found and concluded that the in-court identification of defendant by the witnesses was not tainted by any outside confrontation but was based upon the identification during the course of the alleged robbery, and this finding is supported by competent evidence, it alone renders the in-court identification competent even if it be conceded arguendo that the showup procedure was improper. *State v. Shore*, 285 N.C. 328, 204 S.E.2d 682 (1974).

Finding of Competency Conclusive when Supported by Competent Evidence. — A finding that an in-court identification of defendant was not tainted or rendered incompetent as evidence by the subsequent unconstitutional showup, when supported by competent evidence, is conclusive on appellate courts, both State and federal. *State v. Odom*, 18 N.C. App. 478, 197 S.E.2d 35 (1973).

Indigent Defendant Can Waive Counsel.

—The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny, or to restrict the right of the indigent to waive counsel, i.e., to represent himself, while permitting the affluent defendant to exercise such right, has no reasonable relation to the objective of equal opportunity to prevail at the trial of the case. Such classification is beyond the power of the legislature. *State v. Mems*, 281 N.C. 658, 190 S.E.2d 164 (1972).

Indigency is obviously a sufficient basis for classification with reference to the right to court-appointed, publicly paid counsel, but it is not a reasonable basis for classification as to the right to represent one's self. *State v. Mems*, 281 N.C. 658, 190 S.E.2d 164 (1972).

The privilege against disclosure of an informant's identity, etc.—

In accord with 1st paragraph in original. See *State v. Cameron*, 283 N.C. 191, 195 S.E.2d 481 (1973).

Inculpatory Statements. — Cases dealing with a defendant's inculpatory statements project two predominant concerns: (1) that the circumstances surrounding defendant's interrogation do not render his statement inherently unreliable because involuntary; and (2) that overzealous officers be deterred from the use of unconstitutional and illegal practices in obtaining a statement from the accused. *State v. Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972).

Admissibility of Death Certificate. — Defendant's right to confrontation and his right to fundamental fairness in a criminal trial guaranteed by due process were violated by the admission in evidence of the hearsay and conclusory statement in the victim's death certificate. *State v. Watson*, 281 N.C. 221, 188 S.E.2d 289 (1972).

Acquittal on Basis of Insanity.—A verdict of not guilty due to insanity constitutes a full acquittal, and one thus acquitted is entitled to all the protection and constitutional rights as if acquitted upon any other ground. In *re Tew*, 280 N.C. 612, 187

S.E.2d 13 (1972).

Restoration to Sanity Procedure Is Unconstitutional. — Since the absolute certification requirement of § 122-86 would not permit a petitioner to establish his restoration to sanity by the testimony of qualified psychiatrists, and provides no remedy or procedure whatever to determine a charge that a superintendent arbitrarily withheld a certificate, acted in bad faith, or was honestly mistaken in judgment, but rather merely decrees that no judge shall discharge a person acquitted of crime because of insanity until the superintendents of the several State hospitals have certified to his sanity and safety, it does not meet the requirements of due process and is therefore unconstitutional. In *re Tew*, 280 N.C. 612, 187 S.E.2d 13 (1972).

Mandatory Death Penalty for First-Degree Murder Not Unconstitutional. —

Mandatory death penalty for murder in the first degree is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States and this section and §§ 24 and 27 of this Article. *State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803 (1974).

Imposition of Punishment, etc.—

Upon appeal from an inferior court for a trial de novo in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided the punishment imposed does not exceed the statutory maximum. *State v. Harrell*, 281 N.C. 111, 187 S.E.2d 789 (1972).

Enjoining Enforcement of Ordinance by Criminal Prosecution. —

Nothing else appearing, the enforcement of an ordinance, by the criminal prosecution of those who violate it, will not be enjoined in a suit brought by an acknowledged violator, whose contention is that the ordinance is invalid or that it is administered or enforced in a discriminatory manner in violation of the equal protection of the laws. His right to present this defense at his trial on the criminal charge, or to maintain a civil action for damages, is deemed to constitute an adequate remedy at law. Where, however, a plaintiff's legitimate business is threatened with destruction, through an announced purpose of making repeated arrests of his employees or customers and charging them with the violation of an allegedly invalid law, a suit for injunctive relief is an appropriate procedure for testing the equal protection constitutionality of the law, or of the contemplated enforcement program. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971).

III. TAKING OF PRIVATE PROPERTY FOR PUBLIC USE.

Property May Be Taken Only for Public Use.—

Private property can be taken by the exercise of the power of eminent domain only where the taking is for a public use. *North Carolina State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

Due process of law requires that private property be taken under the power of eminent domain only for a public use. *North Carolina State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

Prohibition of Use of Property.—It is quite true that the police power of the State, which it may delegate to its municipal corporation, extends to the prohibition of a use of private property which may reasonably be deemed to threaten the public health, safety, or morals or the general welfare and that, when necessary to safeguard such public interest, it may be exercised, without payment of compensation to the owner, even though the property is thereby rendered substantially worthless. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970); *Harrell v. City of Winston-Salem*, 22 N.C. App. 386, 206 S.E.2d 802 (1974).

Police Regulation Can Only Be Justified by Presence of Public Interest. — Police regulation of the use or enjoyment of property rights can only be justified by the presence of a public interest, and such rights may be limited only to the extent necessary to subserve the public interest. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

The lawmaking authorities may not, under the guise of police power, impose restrictions which are unnecessary and unreasonable upon the use of private property. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

The only warrant for public interference with a person's building is to secure public safety and protect health of those occupying the building. Desirable as it might be from an aesthetic point of view to have public control of private building, the law does not permit an invasion of private rights on such grounds. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

State May Not Regulate Use of Property for Aesthetic Reasons.—The State, itself, may not, under the guise of the police

power, regulate the use of property for aesthetic reasons which have no real or substantial relation to the public health, safety or morals, or to the general welfare. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

Public necessity is the limit of the right to destroy property which is a menace to public safety or health and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 825 (1970).

Land to Increase Highway Visibility May Not Be Taken under Guise of Police Power.—If, in the interest of public safety at an intersection of highways, greater visibility is required than is afforded by removing obstructions from existing rights-of-way, land necessary to afford such increased view of approaches to the intersection may be taken by the appropriate public authorities under the power of eminent domain, with just compensation for the land so taken paid to the property owner; but the property may not be taken for such purpose, without compensation, under the guise of a regulation of the owner's business pursuant to the police power. *State v. Vestal*, 281 N.C. 517, 189 S.E.2d 152 (1972).

Restriction on Location of Fence Is a Taking.—An ordinance that a fence must be built substantially within the boundaries of a lot in which an automobile wrecking business is located is a taking of the lot owner's property for a public use without compensation. *State v. Vestal*, 281 N.C. 517, 189 S.E.2d 152 (1972).

Retrospective statutes destroying or diminishing contingent interests in property do not, per se, deprive the holder thereof of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States or this section or violate any other constitutional limitation upon legislative power. *Peele v. Finch*, 284 N.C. 375, 200 S.E.2d 635 (1973).

Substitute condemnation is a transaction in which the State or an agency with the power of eminent domain, A, takes land under an agreement to compensate its owner, B, with land to be taken in condemnation proceedings from a third person, C, instead of with money. *North Carolina State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

There is no denial of due process or other constitutional infirmity in substitute condemnations where the owner of the land first taken with whom the ultimate

condemnee's land is to be exchanged, also has the power of condemnation and could itself have condemned the land. *North Carolina State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

Public Use and Necessity in Substitute Condemnation.—In controversies concerning substitute condemnation the questions of public use and necessity are inseparable. Whether land has been taken for a public use in a substitute condemnation will depend on whether fairness requires that B whose land has been taken for an undisputed public purpose, be compensated in land and whether there is a close factual connection between the taking of B's and C's land, taken to compensate B. Whether it is necessary to exercise the power of eminent domain will turn on whether B can be fairly compensated only in land. Whether it is necessary to take C's property depends on whether there is a close factual connection between the two takings. *North Carolina State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

Substitute condemnation of land for exchange can only be justified when the property for which it is substituted accomplishes the public purpose for which it was taken, and the cost is not disproportionate to the benefit derived. *North Carolina State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

Substitute condemnation is a valid exercise of a power of eminent domain only when the substitution of other property is the sole method by which the owner of land taken for public use can be justly compensated, and the practical problems resulting from the taking can be solved. *North Carolina State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

Ordering Demolition of House for Non-conformity with City Housing Code.—An action by a municipality, pursuant to an ordinance adopted under the authority of former § 160-182, in ordering the demolition of a dwelling house without compensation to the owner thereof, and in charging the expense of demolition to the owner upon his failure to demolish the house himself, such action being based upon findings by the city building inspector that the house was unfit for human habitation and that the repairs necessary to bring the house into conformity with the housing code would cost 60% or more of the present value of the house, is violative of the law of the land clause of the State Constitution,

where (1) the house could be repaired so as to comply with the housing code and (2) the owner was not afforded a reasonable opportunity to repair the house. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

Where it appears from the findings of a city housing commission that a house can be repaired so as to comply with the city's housing code, be suitable for human habitation and be no longer a threat to public health, safety, morals or general welfare, to require its destruction without giving the owner a reasonable opportunity thus to remove the existing threat to the public health, safety and welfare is arbitrary and unreasonable. Such power may not be delegated to or exercised by a municipal corporation of this State by reason of this section. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

A homeowner who is faced with a municipal housing inspector's order giving him no alternative but to demolish his home that was declared uninhabitable by the municipality, or to pay the expense of a demolition by the municipality, is not required to propose an alternative remedy for the condition of the house before asserting his constitutional right in the courts. *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970).

City May Compensate for Easements by Agreement to Furnish Fire Protection Outside City Limits.—A municipality has the authority to compensate landowners for a water and sewer line easement across a tract of land located outside the municipal limits by an agreement to furnish fire protection for any buildings located on such tract. *Valevais v. City of New Bern*, 10 N.C. App. 215, 178 S.E.2d 109 (1970).

IV. MATTERS RELATING TO TAXATION.

Classification for Tax Purposes.—

In accord with 2nd paragraph in original. See *Fisher v. Jones*, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

In accord with 3rd paragraph in original. See *Fisher v. Jones*, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

When Courts Will Interfere with Tax Assessments.—It is only when the actions of the State Board of Assessment are found to be arbitrary and capricious that courts will interfere with tax assessments because of asserted violations of the due process clause. *Albemarle Elec. Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E.2d 811 (1972).

A sales tax on retailers who sell merchandise through vending machines (in-

cluding items sold for less than ten cents where it is impossible to recoup the tax from the purchaser) does not violate constitutional provisions relating to due process and equal protection. *Fisher v. Jones*, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

V. ILLUSTRATIVE CASES.

The right to travel upon the public streets of a city is a part of every individual's liberty, protected by the law of the land clause of the Constitution of North Carolina. *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971).

But Curfew May Be Imposed Where Danger Is Clear and Present.—Where the danger is clear and present, the Constitution of the United States and Constitution of North Carolina do not forbid city authorities to declare a state of emergency and to proclaim and enforce a temporary, night-to-night, city-wide curfew, with specified exceptions for emergency and necessary travel. *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971).

The statutory scheme of Chapter 14, Article 36A is not unconstitutional in contravention of this section. *State v. Dobbins*, 9 N.C. App. 452, 176 S.E.2d 353 (1970).

The notice of foreclosure by sale as provided for in a deed of trust and as required under § 45-21.17 was held sufficient to meet the minimum due process requirements. *Huggins v. Dement*, 13 N.C. App. 673, 187 S.E.2d 412 (1972).

Special Use Permit.—Where a municipal ordinance required the board of adjustment to issue a special use permit when it made certain affirmative findings specified in the ordinance, the board's determination of whether to issue a special use permit was not an unlawful exercise of legislative power. *Kenan v. Board of Adjustment*, 13 N.C. App. 688, 187 S.E.2d 496 (1972).

Pretrial Discovery.—Section 1A-1, Rule 26(b), authorizing the pretrial discovery of the existence and contents of insurance, does not subject a defendant's property to unreasonable search and seizure or authorize the taking of a defendant's property without due process of law. *Marks v. Thompson*, 14 N.C. App. 272, 188 S.E.2d 22, aff'd, 282 N.C. 174, 192 S.E.2d 311 (1972).

Section 1A-1, Rule 26(b) is not unconstitutional on the grounds that it deprives property without due process of law, authorizes an unreasonable search and seizure, denies equal protection of the laws, or that it impairs the right to contract.

Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

Section 148-62 does not deprive a defendant of liberty other than by the law of the land in that it fails to provide adequate standards to guide the Board of Paroles in exercise of the discretionary power granted to it, as contended. *Jernigan v. State*, 10 N.C. App. 562, 179 S.E.2d 788, aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971).

Petitioner's contention, that the legislature has provided no standards to guide the Board of Paroles in determining whether a parole violator shall serve his original sentence concurrently with his new sentence or at the completion of it and that this failure nullifies the purported grant of authority under § 148-62, cannot be sustained. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Enjoining Expenditure of Public Funds for Corporation Not Created for Public Purpose.—If an act creating a corporation is unconstitutional as violative of N.C. Const., Art. V, § 2 and Art. I, § 19, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and is void because the purpose for which the corporation was created is not a public purpose, then taxpayer may maintain an action to restrain state officials from paying to the corporation and the corporation from using money appropriated out of the general fund. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Former § 90-291 Unconstitutional. — See *In re Certificate of Need for Aston Park Hosp.*, 282 N.C. 542, 193 S.E.2d 729 (1973).

Prohibiting Certain Activities on Sunday.—A Sunday closing ordinance which singles out and bans the operation of billiard halls on Sunday but permits other businesses which provide facilities for recreation, sports and amusements, and which potentially are equally disruptive, violates the equal protection clauses of the North Carolina and United States Constitutions. *State v. Greenwood*, 280 N.C. 651, 187 S.E.2d 8 (1972).

In order for a Sunday closing ordinance enacted by authority of former § 153-9(55) to withstand an attack upon its constitutionality as arbitrary or discriminatory, it is not necessary that the legislative body, in the same ordinance, prohibit everything which is detrimental to the public morals, health or safety. *State v. Atlas*, 283 N.C. 165, 195 S.E.2d 496 (1973).

It is sufficient that there is reasonable basis for belief that the operation on the day of rest of the excepted businesses is

necessary or conducive to the enjoyment by the public of the designated day as a day of rest, and that the activities of the defendant are not. *State v. Atlas*, 283 N.C. 165, 195 S.E.2d 496 (1973).

Unconstitutional discrimination in a county ordinance requiring businesses generally to be closed on a specified day of the week, designated by the legislative body as a day of rest, and exempting from such requirement certain types of business is not shown by the fact that the ordinance of some other county or municipality does not contain identical exemptions from its general closing requirement. *State v. Atlas*, 283 N.C. 165, 195 S.E.2d 496 (1973).

The regulation of persons eligible to become licensed private detectives and commissioned special policemen is an exercise of authority in the interest of the general public, rather than a particular class. *North Carolina Ass'n of Licensed Detectives v. Morgan*, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

Different Dismissal Procedures Do not Deny Equal Protection.—It is not a denial of equal protection for the State to prescribe one procedure for the dismissal of a school teacher during the school year on the ground of immoral or disreputable conduct or failure to perform the teacher's contract, and to prescribe a different procedure for the termination of the employment at the end of the school year under § 115-142. The vast difference in the consequences of these two actions, insofar as the future effect upon the teacher's professional standing and ability to obtain employment is concerned, is ample basis for classification within the limits of the Fourteenth Amendment and of this section. *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971).

Requirement of Teaching Certificate Renewal Is Reasonable.—A regulation of the State Board of Education which requires all teachers employed in the public school system of North Carolina to obtain a renewal of their teaching certificates every five years and prescribes for all teachers the same number of credits and the same methods for obtaining such credits does not deny equal protection of the law, notwithstanding that the regulation does not apply to employees of the Board who are not engaged in teaching whose duties are performed in the Board's offices. Since the purpose of requiring a certificate to teach is to assure good quality of performance in the classroom, there is an obvious and reasonable basis for making the

rule applicable to those who teach and omitting from its applicability those who do not. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

Nonattendance Domicile Requirement to Qualify for In-State Tuition.—The six-month nonattendance requirement to qualify for in-state tuition adds objectivity and certainty to the requirement of domicile. This is not obtained by placing an unreasonable burden on students. Petitioners are not barred by regulations of the Board of Trustees of the University of North Carolina from becoming domiciliaries of North Carolina. Nor are they barred from becoming eligible for in-state tuition. Rather, they are only required, if they want that status, to be domiciled in North Carolina for six months while not in the law school. *Glusman v. Trustees of Univ. of N.C.*, 281 N.C. 629, 190 S.E.2d 213 (1972).

That the Board of Trustees of the University of North Carolina might have chosen other objective indicators to test the domiciliary intent of applicants for in-state tuition is not to say the one chosen was unreasonable. That there may be hardship cases resulting from the enforcement of these regulations is also not to say they are unreasonable. *Glusman v. Trustees of Univ. of N.C.*, 281 N.C. 629, 190 S.E.2d 213 (1972).

Domiciliary Status of Women.—Under the regulations of the Board of Trustees of the University of North Carolina, domiciliary status is not equivalent to in-state tuition status. Although a woman is deemed a domiciliary of North Carolina from the date of her marriage, to become eligible for in-state tuition a married woman, just as any other student, has to establish actual residence in this State for six continuous months exclusive of the time spent while in attendance at an institution of higher education. The regulations place upon all students domiciled in North Carolina who wish to qualify for in-state tuition, regardless of sex, the burden of showing that they have been domiciled in North Carolina for six months while not in attendance at an institution of higher education, and did not deny to men similarly situated a benefit in violation of the equal protection clauses of the North Carolina and United States Constitutions. *Glusman v. Trustees of Univ. of N.C.*, 281 N.C. 629, 190 S.E.2d 213 (1972).

Subdivisions (a)(4) b and c of § 28-174 allowing recovery for services rendered to

decendent and for loss of society in a wrongful death action, are not unconstitutionally vague and therefore violative of this section. See *Bowen v. Constructors Equip. Rental Co.*, 283 N.C. 395, 196 S.E.2d 789 (1973).

A statute imposing criminal sanctions for the infliction of physical injury on children by their parents is not repugnant to this section. *State v. Fredell*, 283 N.C.

Sec. 20. *General warrants.*

Cross Reference.—

As to illegal searches in general, see note to § 15-27.

It does not prohibit seizure, etc.—

The constitutional and statutory guarantee against unreasonable search and seizure does not prohibit seizure of evidence and its introduction into evidence on a subsequent prosecution where no search is required. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971).

Seizure of contraband, such as burglary tools, does not require a warrant when its presence is fully disclosed without necessity of search. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971).

Protection Extends Only to Unreasonable Searches.—Constitutional protection does not extend to all searches and seizures, but only to those which are unreasonable. *State v. Turnbull*, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

The guarantees of this section protect against unreasonable searches and seizures. They are designed for the protection of the innocent. *State v. Ellington*, 284 N.C. 198, 200 S.E.2d 177 (1973).

The reasonableness of the search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the criteria laid down by the Fourth Amendment and opinions which apply that amendment. *State v. Turnbull*, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

Unreasonable Search Defined.—North Carolina has defined an unreasonable search to be an examination or inspection without authority of law of one's premises or person with a view to the discovery of some evidence of guilt to be used in the prosecution of a criminal action. *State v. Turnbull*, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

Items in Plain View.—No search warrant is needed to seize items in plain view, and they are properly admitted into evi-

242, 195 S.E.2d 300 (1973).

The "nonsigner" provision of § 66-56 is unconstitutional, insofar as it purports to extend to one not a party thereto the effect of a fair trade contract because it deprives the nonsigner of liberty, contrary to the law of the land, in violation of this section. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

dence. *State v. Thompson*, 15 N.C. App. 416, 190 S.E.2d 355 (1972).

When police officers discover evidence of a crime in plain view, without the necessity of a search, they may seize the evidence without obtaining a search warrant. *State v. Young*, 21 N.C. App. 369, 204 S.E.2d 556 (1974).

When police officers lawfully enter a person's premises and observe evidence of a crime in plain view, they may seize it without obtaining a search warrant. *State v. Carr*, 21 N.C. App. 470, 204 S.E.2d 892 (1974).

When Plain View Rule Applies.—The "plain view" rule does not apply unless the police have a right to be at the place where the evidence is discovered. *State v. Young*, 21 N.C. App. 369, 204 S.E.2d 556 (1974).

Purpose of Particular Description.—The requirement that warrants shall particularly describe the things to be seized is to prevent the seizure of one thing under a warrant describing another and to leave nothing to the discretion of the officer executing the warrant in determining what is to be taken. *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Description of Books.—The particularity requirement is to be accorded the most scrupulous exactitude when the things are books, and the basis for the seizure is the ideas which they contain. When First Amendment rights are not involved, the specificity requirement is more flexible. *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Description of Narcotics Sufficient.—A warrant empowering officers to seize a limited class of things, i.e., unlawfully possessed narcotic drugs, is not prohibited. *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

The description in the search warrant was particular enough to prevent the warrant from being a general search warrant within the prohibition of the Fourth Amendment to the Constitution of the United States and this section, and § 15-26(a), where the affidavit upon which it was based referred only to "narcotic drugs,

the possession of which is a crime" and did not describe the things to be seized with more particularity. *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

The words "illegally held narcotic drugs" described the things to be seized with sufficient particularity to prevent the warrant from being a general search warrant within the prohibition of the Fourth Amendment to the Constitution of the United States and this section. *State v. Shirley*, 12 N.C. App. 440, 183 S.E.2d 880 (1971).

Reference to Affidavit Held Sufficient Description. — Where an affidavit complied with the provisions of § 15-26 and met the constitutional standard of reasonableness and probable cause requisite to the issuance of a search warrant, the search warrant, by reference to the affidavit, which was made a part of the warrant, described with reasonable certainty the premises to be searched, sufficiently indicated the basis for the finding of probable cause, and sufficiently described the contraband for which the search was to be conducted. *State v. Murphy*, 15 N.C. App. 420, 190 S.E.2d 361 (1972).

Duty of Trial Court.—The trial court has a duty to pass upon the validity of a search and the competency of evidence procured thereunder when properly made the subject of inquiry. *State v. Thompson*, 15 N.C. App. 416, 190 S.E.2d 355 (1972).

Search of Automobiles and Other Conveyances.—Automobiles and other convey-

ances may be searched without a warrant under circumstances that would not justify the search of a house, and a police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carries contraband materials. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971).

Where the police officers are exercising proper precautionary measures, it is not error to complete the search of defendant's automobile at a scene more tranquil than that at which the arrest was made. *State v. Hardy*, 17 N.C. App. 169, 193 S.E.2d 459 (1972).

Seizure of Non-Taxpaid Liquor Held Justified.—When officers saw the liquid in containers generally used to contain and transport non-taxpaid liquor, under the circumstances then existing, they had sufficient reasonable cause to believe that the jars contained non-taxpaid liquor to justify the seizure of the contraband without a search warrant. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971).

Judge Issuing Search Warrant May Review Its Validity. — There is no statutory or constitutional proscription in North Carolina against a judge's presiding at a hearing to review the validity of a search warrant issued by that judge. *State v. Brown*, 20 N.C. App. 413, 201 S.E.2d 527 (1974).

Sec. 21. *Inquiry into restraints on liberty.*

Editor's Note.—

For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

Restraint on Court's Power to Release Inmate Acquitted on Grounds of Insanity Is Invalid.—The power of the court to discharge a person acquitted of crime because of insanity upon habeas corpus under §

122-86, cannot be made to depend solely upon certification by the superintendents of the several State hospitals that he is now sane and safe. Such a condition deprives the court of any exercise of judicial discretion and nullifies its power to release an inmate being illegally detained in a mental hospital. *In re Tew*, 280 N.C. 612, 187 S.E.2d 13 (1972).

Sec. 22. *Modes of prosecution.*

The purposes of this section and § 23 of this Article are (1) to provide certainty so as to identify the offense, (2) to protect the accused from twice being put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of guilty or nolo contendere, to pronounce sentence according to the rights of the case. *State v. Foster*, 10 N.C. App. 141, 177 S.E.2d 756 (1970).

A preliminary hearing is not a constitu-

tional requirement nor is it essential to the finding of an indictment. *State v. Hairston*, 280 N.C. 220, 185 S.E.2d 633 (1972).

Trial in Superior Court upon Original Accusation.—

In accord with 2nd paragraph in original. See *State v. Guffey*, 283 N.C. 94, 194 S.E.2d 827 (1973); *State v. Caldwell*, 21 N.C. App. 723, 205 S.E.2d 322 (1974).

Applied in *State v. Brown*, 21 N.C. App. 87, 202 S.E.2d 798 (1974).

Sec. 23. Rights of accused.**I. GENERAL CONSIDERATION.**

The purposes of this section and § 22 of this Article are (1) to provide certainty so as to identify the offense, (2) to protect the accused from twice being put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of guilty or nolo contendere, to pronounce sentence according to the rights of the case. *State v. Foster*, 10 N.C. App. 141, 177 S.E.2d 756 (1970).

To implement the constitutional rights under this section the General Assembly enacted § 15-47. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Jurisdiction of Superior Court as to Specific Misdemeanors.—The superior court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted for such misdemeanor in the inferior court and appeals to the superior court from the sentence pronounced against him by the inferior court on his conviction for such misdemeanor. *State v. Guffey*, 283 N.C. 94, 194 S.E.2d 827 (1973).

One who is detained by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights, including the rights given under N.C. Const., Art. I, § 23 and § 15-47, as any other accused. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Applied in *State v. Williams*, 18 N.C. App. 145, 196 S.E.2d 370 (1973).

Cited in *In re Reddy*, 16 N.C. App. 520, 192 S.E.2d 621 (1972); *State v. Hardy*, 17 N.C. App. 169, 193 S.E.2d 459 (1972).

II. RIGHT TO BE INFORMED OF ACCUSATION.**Purpose.**—

In accord with original. See *State v. Sutton*, 14 N.C. App. 422, 188 S.E.2d 596 (1972).

Indictment Must Allege All Essential Elements, etc.—

To implement the basic constitutional right that every person charged with crime has the right to be informed of the accusation, an indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. *State v. Sutton*, 14 N.C. App. 422, 188 S.E.2d 596 (1972).

Indictment for Larceny, etc.—

In an indictment for larceny the description "automobile parts . . . of one Furches

Motor Company" sufficiently identifies the property alleged to have been stolen and this section and § 22 of this Article and their purposes. The description identifies the type of parts and the owner from whom they were taken. *State v. Foster*, 10 N.C. App. 141, 177 S.E.2d 756 (1970).

III. RIGHT OF CONFRONTATION.**Federal Rights Applicable to States.**—

The right to the assistance of counsel and the right to face one's accusers and witnesses with other testimony are guaranteed by the Sixth Amendment to the federal Constitution which is made applicable to the states by the Fourteenth Amendment, and by this section and N.C. Const., Art. I, § 19. *State v. Cradle*, 281 N.C. 198, 188 S.E.2d 296 (1972).

The right of confrontation is an absolute right rather than a privilege, and it must be afforded an accused not only in form but in substance. *State v. Watson*, 281 N.C. 221, 188 S.E.2d 289 (1972).

Right Includes Opportunity, etc.—

A defendant has the constitutional right, in a criminal prosecution, to confront his accusers with other testimony. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

And to Prepare and Present Defense.—

Every defendant is entitled under the Constitution to have a reasonable opportunity to prepare his defense. This includes the right to consult with his counsel and to have a fair and reasonable opportunity, in the light of all attendant circumstances, to investigate, to prepare, as well as to present his defense. This right must be accorded every person charged with a crime. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

Witnesses Must Be Present.—The right of confrontation confirms the common-law rule that, in criminal trials, the witnesses must be present and subject to cross-examination. *State v. Watson*, 281 N.C. 221, 188 S.E.2d 289 (1972).

A sufficient good faith effort to obtain the witness's presence at the trial must be shown to justify use of his prior testimony. *State v. Biggerstaff*, 16 N.C. App. 140, 191 S.E.2d 426 (1972).

Disclosure of Informant Not Relevant Where Ample Independent Evidence of Guilt Exists.—Disclosure of the informant whose information led the police to the defendant would not be relevant or helpful to defendant where there is ample independent evidence of his guilt. *State v. McDougald*, 18 N.C. App. 407, 197 S.E.2d 11 (1973).

The improper admission of evidence which violates the right to confrontation

does not constitute prejudicial error unless there is a reasonable possibility that such evidence contributed to defendant's conviction. *State v. Watson*, 281 N.C. 221, 188 S.E.2d 289 (1972).

When an officer's blunder deprives a defendant of his only opportunity to obtain evidence which might prove his innocence, the State will not be heard to say that such evidence did not exist. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Introduction of Transcribed Testimony Given at Former Trial of Same Offense.—

In accord with 1st paragraph in original. See *State v. Biggerstaff*, 16 N.C. App. 140, 191 S.E.2d 426 (1972).

Admission of Death Certificate Violated Due Process.—Defendant's right to confrontation and his right to fundamental fairness in a criminal trial guaranteed by due process were violated by the admission in evidence of the hearsay and conclusory statement in the victim's death certificate. *State v. Watson*, 281 N.C. 221, 188 S.E.2d 289 (1972).

Out-of-Court Declarations of Codefendant.—Even when the right of confrontation is afforded to a defendant implicated in the out-of-court declarations of a codefendant, the prejudicial impact of testimony of the codefendant's declarations must be evaluated in the light of the competent evidence admitted against the non-declarant defendant. The gap between the impact of evidence which is not admitted against but incriminates the nondeclarant and of competent evidence of minimal probative value admitted against him in a given case may be so great as to constitute a denial of due process. *State v. Jones*, 280 N.C. 322, 185 S.E.2d 858 (1972).

Extrajudicial statements made by defendants which implicated a codefendant were not inadmissible where each declarant took the stand and testified that the substance of the statements attributed to him was false. *State v. Jones*, 280 N.C. 322, 185 S.E.2d 858 (1972).

Admission of Codefendant's Confession Inculcating Accused. — An accused's constitutional right of cross-examination is violated at his joint trial with a codefendant who does not testify, when the court admits the codefendant's confession inculcating the accused, notwithstanding jury instructions that the confession must be disregarded in determining the accused's guilt or innocence. *State v. Heard*, 285 N.C. 167, 203 S.E.2d 826 (1974).

In joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than

the declarant can be deleted without prejudice either to the State or declarant; and if such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately, assuming (1) that the confession is inadmissible as to the codefendant, and (2) that the declarant will not take the stand. *State v. Heard*, 285 N.C. 167, 203 S.E.2d 826 (1974).

Subsequent Conviction Lacks Due Process of Law.—Where the effect of a failure of the arresting officer and of the custodian of the arrested person to perform their respective duties is such as to deprive a person of the constitutional right to call for evidence in his favor, his subsequent conviction lacks the required due process of law and cannot stand. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Rights of Person Accused of Offense Involving Intoxication. — When one is taken into police custody for an offense of which intoxication is an essential element, time is of the essence. Intoxication does not last. Ordinarily a drunken man will "sleep it off" in a few hours. Thus, if one accused of driving while intoxicated is to have witnesses for his defense, he must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest. Section 15-47 says he is entitled to communicate with them immediately, and this is true whether he is arrested at 2:00 in the morning or 2:00 in the afternoon. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

IV. RIGHT TO COUNSEL.

A defendant has a constitutional right, etc.—

Both the State and federal Constitutions secure to every man the right to be defended in all criminal prosecutions by counsel whom he selects and retains. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

Best Available Counsel, etc., Not Guaranteed. — The right to counsel does not guarantee the best available counsel, errorless counsel, or satisfactory results for the accused. *State v. Sneed*, 284 N.C. 606, 201 S.E.2d 867 (1974).

Right Applies to Juvenile Proceedings.—In order to comply with due process in a juvenile proceeding, the right of the juvenile to be represented by an attorney must be considered and an attorney provided or there must be a proper waiver of this right. In re *Walker*, 14 N.C. App. 356, 188 S.E.2d 731 (1972).

Failure to Appoint Counsel in Trial for Misdemeanors. — Defendant was not denied his constitutional right to counsel by failure of the trial court to appoint counsel to represent him in the consolidated trial of two misdemeanors where neither offense was a serious offense, notwithstanding that the maximum punishment for the two offenses could have been seven months. *State v. Speights*, 12 N.C. App. 32, 182 S.E.2d 204, aff'd, 280 N.C. 137, 185 S.E.2d 152 (1971).

This right is not intended to be an empty formality. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

Counsel Must Have Opportunity to Investigate, Prepare and Present Defense. — Since the law regards substance rather than form, the constitutional guaranty of the right of counsel contemplates not only that a person charged with crime shall have the privilege of engaging counsel, but also that he and his counsel shall have a reasonable opportunity in the light of all attendant circumstances to investigate, prepare and present his defense. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

The right to the assistance of counsel includes the right of counsel to confer with witnesses, to consult with the accused and to prepare his defense. *State v. Cradle*, 281 N.C. 198, 188 S.E.2d 296 (1972).

Determining Inadequacy of Representation. — The question of constitutional inadequacy of representation cannot be determined solely upon the amount of time counsel spends with the accused or upon the intensiveness of his investigation. *State v. Sneed*, 284 N.C. 606, 201 S.E.2d 867 (1974).

Each case must be approached upon an ad hoc basis, viewing circumstances as a whole, in order to determine whether an accused has been deprived of effective assistance of counsel. *State v. Sneed*, 284 N.C. 606, 201 S.E.2d 867 (1974).

Farce and Mockery of Justice Test. — The incompetency of counsel for the defendant in a criminal prosecution is not a constitutional denial of his right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice. *State v. Sneed*, 284 N.C. 606, 201 S.E.2d 867 (1974).

The refusal of a jailer to permit the defendant's attorney to confer with him while he was in jail is a denial of a constitutional right. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

A defendant is entitled to consult with friends and relatives and to have them make observations of his person. The right to communicate with counsel and friends necessarily includes the right of access to

them. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

The rights of communication go with the man into the jail, and reasonable opportunity to exercise them must be afforded by the restraining authorities. The denial of an opportunity to exercise a right is a denial of the right. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

And Are Not Limited to Receiving Professional Advice from Attorney. — Under this section and § 15-47 a defendant's communication and contacts with the outside world are not limited to receiving professional advice from his attorney. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Appointment of Counsel for Limited Purpose of Furnishing Advice. — Defendant was not prejudiced in any respect by the appointment of counsel for the limited purpose of furnishing advice to him if so requested, even though defendant did waive counsel and conducted his own defense. *State v. Harper*, 21 N.C. App. 30, 202 S.E.2d 795 (1974).

The fact that a person is a defendant's lawyer, as well as his friend, does not impair his right to see the defendant at a critical time of the proceedings. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant is entitled to counsel at every critical stage of the proceedings against him. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

What Constitutes Critical Stage Where Offense Involves Intoxication. — A critical stage has been reached in a defendant's case when, immediately after officers have interrogated the defendant and conducted their test for sobriety, they charge him with the offense of driving while intoxicated. The denial of counsel at this point makes it impossible for a defendant to have disinterested witnesses observe his condition and to obtain a blood test by a doctor — the only means by which defendant might prove his innocence. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant's guilt or innocence under § 20-138 depends upon whether he is intoxicated at the time of his arrest. His condition then is the crucial and decisive fact to be proven. Permission to communicate with counsel and friends is of no avail if those who come to the jail in response to a prisoner's call are not permitted to see for themselves whether he is intoxicated. In this situation, the right of a defendant to communicate with counsel and friends implies, at the very least, the right to have them see him, observe and examine him, with reference to his alleged intoxication. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Denial of Right Resulting in Irreparable Prejudice. — The denial of a request for permission to contact counsel as soon as a person is charged with a crime involving the element of intoxication, is a denial of a constitutional right resulting in irreparable prejudice to his defense. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Defendant Entitled to Representation at Trial. — Where defendant had waived his right to have assigned counsel at the preliminary hearing, but made a specific request for a lawyer prior to the selection of the jury at his trial in the superior court, he was entitled to be represented by counsel. *State v. Haire*, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

The trial judge must make an express finding as to defendant's indigent or nonindigent condition. *State v. Pickens*, 20 N.C. App. 63, 200 S.E.2d 405 (1973).

Defendant is entitled to a detailed investigation into his economic situation. *State v. Pickens*, 20 N.C. App. 63, 200 S.E.2d 405 (1973).

When Defendant Prejudiced by Insufficient Inquiry. — Although it was incumbent upon the trial court to make a more sufficient inquiry into defendant's financial status and to determine the question of his indigency, defendant was not prejudiced unless he could show that he did not voluntarily and intelligently waive counsel. *State v. Pickens*, 20 N.C. App. 63, 200 S.E.2d 405 (1973).

Facts Insufficient to Sustain Finding of Nonindigency at Time of Trial. — The fact that the defendant was a painter capable of earning \$60.00 per week when he was able to obtain work and that he had made little, if any, effort to secure counsel, either privately or by court appointment, is not sufficient to sustain a finding that he was not indigent at the time of trial and, therefore, not entitled to a court-appointed attorney when it was requested at the trial. *State v. Haire*, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

Denial of counsel without evidence to support a finding of nonindigency entitles defendant to a new trial. *State v. Haire*, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

Indigent Defendant May Waive Right. — The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny, or to restrict the right of the indigent to waive counsel, i.e., to represent himself, while permitting the affluent defendant to exercise such right, has no reasonable relation to the objective of equal opportunity to prevail at the trial of the case. Such classification is beyond the power of the legislature. *State v.*

Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Defendant Has Right to Represent Himself. — A defendant in a criminal proceeding has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes. *State v. Mems*, 281 N.C. 658, 190 S.E.2d 164 (1972).

A defendant on the trial of a criminal case, including a coram nobis proceeding at which the defendant is present and witnesses are to be examined and cross-examined, has a right to conduct and manage his own case pro se. The right to act pro se is a right arising out of the federal Constitution and not the mere product of legislation or judicial decision. *State v. Mems*, 281 N.C. 658, 190 S.E.2d 164 (1972).

Defendant appearing pro se by his own choice does so at his peril and does not automatically become a ward of the court. *State v. McDougald*, 18 N.C. App. 407, 197 S.E.2d 11 (1973).

Rule Requiring Objection Applies to Unrepresented Defendant. — Unless necessary to obviate manifest injustice, the rule applicable to a represented defendant, that the admission of incompetent evidence alone is not ground for a new trial where there was no objection at the time the evidence was offered, applies equally to an unrepresented nonindigent defendant. *State v. Jones*, 280 N.C. 322, 185 S.E.2d 858 (1972).

Defendant May Be Required to Reimburse State for Costs of Counsel. — A condition of probation requiring the defendant to reimburse the State for cost of court-appointed counsel does not infringe upon defendant's constitutional right to counsel. *State v. Foust*, 13 N.C. App. 382, 185 S.E.2d 718 (1972).

Accused is constitutionally guaranteed counsel at an in-custody lineup identification. *State v. Ingram*, 20 N.C. App. 35, 200 S.E.2d 417 (1973).

When counsel is not present at the lineup, testimony of witnesses that they identified the accused at the lineup is rendered inadmissible, and any in-court identification is also rendered inadmissible unless the trial judge first determines on a voir dire hearing that the in-court identification is of independent origin and is untainted by the illegal lineup. *State v. Ingram*, 20 N.C. App. 35, 200 S.E.2d 417 (1973).

V. SELF-INCRIMINATION.

Scope of Protection.—

The protection against self-incrimination is not limited to admissions that would subject a witness to criminal prosecution; the privilege also extends to admissions that may only tend to incriminate. *State*

v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

The privilege afforded against self-incrimination not only extends to answers that would in themselves support a conviction under a criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

Liberal Construction.—

The constitutional guarantees against self-incrimination should be liberally construed. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

Guaranty Extends to any Proceedings, etc.—

The privilege against self-incrimination may be exercised by a witness in any proceeding. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

Defendant's failure to testify may not be considered an admission of the truth of testimony which tends to incriminate him. State v. Castor, 285 N.C. 286, 204 S.E.2d 848 (1974).

Defendant's silence in the rightful exercise of his privilege against self-incrimination may not be considered an admission of the truth of incriminating statements made in defendant's presence by a prospective State's witness in response to an officer's questions. State v. Castor, 285 N.C. 286, 204 S.E.2d 848 (1974).

Defendant Testifying May Be Cross-Examined on In-Custody Statements.—A trial court may properly allow the solicitor to cross-examine defendant with reference to in-custody statements for the purpose of impeaching defendant's trial testimony, notwithstanding the fact that defendant was not represented by counsel and had not waived the right to counsel when the statements were made. State v. Nobles, 14 N.C. App. 340, 188 S.E.2d 600 (1972).

Identifying Physical Characteristics.—Handwriting samples, blood samples, fingerprints, clothing, hair, voice demonstrations, even the body itself, are identifying physical characteristics and are outside the protection of the privilege against self-incrimination. State v. Greene, 12 N.C. App. 687, 184 S.E.2d 523 (1971).

Confessions.—

Where a defendant pleads drunkenness as a bar to the admissibility of his confession, unless defendant's intoxication amounts to mania—that is, unless he is so drunk as to be unconscious of the meaning of his words—his intoxication does not render inadmissible his confession of facts

tending to incriminate him. The extent of his intoxication when the confession was made, however, is a relevant circumstance bearing upon its credibility, and is a question exclusively for the jury's determination. State v. McClure, 280 N.C. 288, 185 S.E.2d 693 (1972).

Admission of Confession Not Violative of Right against Self-Incrimination.—When a defendant has been given all warnings required by the State and federal rules of evidence, and he understands them, freely and voluntarily waives the right to have right to counsel, and freely and voluntarily makes a confession, then the admission of this confession in evidence at a jury trial does not violate defendant's right against self-incrimination. State v. Thompson, 285 N.C. 181, 203 S.E.2d 781 (1974).

The privilege against self-incrimination can be claimed only by the witness, and when it is claimed, it is guaranteed by the Fifth Amendment to the Constitution of the United States, as well as by this section. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

Plea of Guilty.—If a plea of guilty or nolo contendere is sustained, it must appear affirmatively that it was entered voluntarily and understandingly. State v. Ford, 281 N.C. 62, 187 S.E.2d 741 (1972).

A plea of guilty or of nolo contendere, unaccompanied by evidence that the plea was entered voluntarily and understandingly, and a judgment entered thereon, must be vacated. State v. Ford, 281 N.C. 62, 187 S.E.2d 741 (1972).

Evidence to the effect that a plea of nolo contendere was entered voluntarily and understandingly should have been developed fully and a finding to that effect made in order to safeguard defendant's rights, to protect his counsel from charges of unauthorized action, and generally to protect the plea and judgment from collateral attack in State post-conviction and federal habeas corpus proceedings. State v. Ford, 281 N.C. 62, 187 S.E.2d 741 (1972).

Testimony Cured Failure to Inquire as to Voluntariness of Plea.—When the entire record was considered, a deficiency in the court's inquiries and in defendant's responses in determining whether the defendant's plea of nolo contendere was entered voluntarily and understandingly was cured by defendant's testimony on the occasion of his arraignment and plea which disclosed affirmatively that he had no defense to the crime for which he was indicted. State v. Ford, 281 N.C. 62, 187 S.E.2d 741 (1972).

Court Determines Applicability of Immunity.—The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself. His say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified and to require him to answer if it clearly appears to the court that he is mistaken. *State v. Smith*, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

And Applicability Depends upon Peculiarities of the Case.—If the witness, upon interposing his claim of immunity, were required to prove the hazard in the sense in which a claim is usually required to be

established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evidence from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence. *State v. Smith*, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

Sec. 24. *Right of jury trial in criminal cases.*

Editor's Note.—

For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

Common-Law Principle.—It is a fundamental principle of the common law, declared in Magna Charta and incorporated in this section, that no person shall be convicted of any crime but by the unanimous verdict of a jury in open court. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971).

Jury Must Have 12 Persons.—It is elementary that the jury provided by law for the trial of indictments is composed of 12 persons; a less number is not a jury. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971).

A verdict by 11 jurors is a nullity despite defendant's failure to assign his conviction by 11 jurors as error. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971).

If imprisoned under a sentence imposed after conviction by 11 jurors a defendant would be entitled to his release upon a writ of habeas corpus. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971).

Jury Trial Cannot Be Waived, etc.—

It is rudimentary that a trial by jury in a criminal action cannot be waived by the accused in the superior court as long as his plea remains "not guilty." *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971).

When a defendant pleads not guilty in cases where a trial by jury is guaranteed by the organic law, he must be tried by a jury of 12 men, and he cannot waive it. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971).

But Plea of Guilty Renders Jury Unnecessary.—A defendant may plead guilty, or nolo contendere, or autrefois convict, and the impaneling of a jury is unneces-

sary. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971).

Unanimous Verdict Required.—

No person can be finally convicted of any crime except by the unanimous consent of 12 jurors who have been duly impaneled to try his case. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971).

Poll of Jury.—

The right to have the jury polled is surely one of the best safeguards for the protection of the accused, and as an incident to jury trials would seem to be a constitutional right, and its exercise only a mode, more satisfactory to the prisoner, of ascertaining the fact that it is the verdict of the whole jury. *State v. England*, 278 N.C. 42, 178 S.E.2d 577 (1971).

By having the jury polled, a defendant can ascertain if there has been any misunderstanding of the requirement of unanimity by any juror. *State v. England*, 278 N.C. 42, 178 S.E.2d 577 (1971).

Not Required in Absence of Request.—

In the absence of a request, a trial judge is not required to charge the jury that its verdict must be unanimous. *State v. England*, 278 N.C. 42, 178 S.E.2d 577 (1971).

Failure to Charge Jury That Verdict Must Be Unanimous.—Since the defendant has the right to have the jury polled, there is no apparent reason why the trial judge should be required in every case to instruct the jury that its verdict must be unanimous. *State v. England*, 278 N.C. 42, 178 S.E.2d 577 (1971).

A holding that failure of the trial judge to instruct the jury that its verdict must be unanimous is prejudicial error is unnecessary because in North Carolina a defendant has an absolute right to have the jury polled. *State v. England*, 278 N.C. 42, 178 S.E.2d 577 (1971).

Where the jury was polled and all jurors assented to the verdict in open court, de-

fendant was assured that all jurors agreed with the verdict rendered, and the omission of the charge on unanimity was entirely harmless. *State v. Ingland*, 278 N.C. 42, 178 S.E.2d 577 (1971).

Exclusion of Age Group from Jury List.

—The absence from the jury list of the names of persons between the ages of 18 and 21 during the period from July, 1971, the effective date of the amendment of § 9-3 lowering the age requirement for jurors from 21 years to 18 years, and September, 1971, the date of defendants' trial, was not unreasonable and did not constitute systematic exclusion of this age group from jury service. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

Death Penalty and Right to Jury Trial. —

Mandatory death penalty for murder in the first degree is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States and this section and §§ 19 and 27 of this Article. *State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803 (1974).

Separate Provisions for Petty Misdemeanors.—

The only exception to the rule that

Sec. 25. Right of jury trial in civil cases.

Right to a jury trial is guaranteed, etc.—

This section guarantees to every person the "sacred and inviolable" right to demand a jury trial of issues of fact arising in all controversies at law respecting property. *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971).

This section has been construed to guarantee trial by jury in all civil actions where the parties have not waived the right. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

Application of Right.—The right to jury trial preserved under this section applies only in cases in which the prerogative existed at common law or by statute at the time the State Constitution was adopted. In re *Northwestern Bonding Co.*, 16 N.C. App. 272, 192 S.E.2d 33 (1972).

Similarity to First Sentence of Art. I, § 19 of Constitution of 1868. — The provisions of this section are similar to the provisions of the first sentence of Art. I, § 19 of the Constitution of 1868. In re *Annexation Ordinance*, 284 N.C. 442, 202 S.E.2d 143 (1974).

No Right to Jury Trial in Proceeding to Discipline Attorney.—This State has never had a statute which expressly conferred upon an attorney the right to a trial by jury in a judicial disciplining or disbarment proceeding. Since no such right existed at common law, or by statute at the time the State Constitution was

nothing can be a conviction but the verdict of a jury is the constitutional authority granted the General Assembly to provide for the initial trial of misdemeanors in inferior courts without a jury, with trial de novo by a jury upon appeal. *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971).

Appellate Court May Increase Punishment in Trial De Novo. — Upon appeal from an inferior court for a trial de novo in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided the punishment imposed does not exceed the statutory maximum. *State v. Harrell*, 281 N.C. 111, 187 S.E.2d 789 (1972).

Jury Trial Not Necessary in Action to Revoke Driver's License. — Since an action to revoke a driver's license is a civil action, jury trial is not necessary. *State v. Carlisle*, 20 N.C. App. 358, 201 S.E.2d 704 (1973).

Applied in *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974).

adopted, and is not now provided for by statute, an attorney's motion for a trial by jury is properly denied. In re *Northwestern Bonding Co.*, 16 N.C. App. 272, 192 S.E.2d 33 (1972).

Or in Action to Revoke Driver's License. —

Since an action to revoke a driver's license is a civil action, jury trial is not necessary. *State v. Carlisle*, 20 N.C. App. 358, 201 S.E.2d 704 (1973).

How Jury Trial May Be Waived. — A party may waive his right to jury trial by (1) failing to appear at the trial, (2) by written consent filed with the clerk, (3) by oral consent entered in the minutes of the court, (4) by failing to demand a jury trial pursuant to § 1A-1, Rule 38(b). *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971).

The credibility of testimony is for the jury, not the court, and a genuine issue of fact must be tried by a jury unless this right is waived. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

A compulsory reference, under former § 1-189, did not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial was only upon the written evidence taken before the referee. *Resort Dev. Co. v. Phillips*, 278 N.C. 69, 178 S.E.2d 813 (1971).

Quoted in Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); **Branch**

v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972).

Sec. 27. *Bril, fines, and punishments.*

Editor's Note.—

For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

Punishment Is Province of Legislature.—It is within the province of the General Assembly and not the judiciary to determine the extent of punishment which may be imposed on those convicted of crime. **State v. Cradle**, 281 N.C. 198, 188 S.E.2d 296 (1972).

Punishment within Limits Fixed by Statute, etc.—

In accord with 3rd paragraph in original. See **State v. Atkinson**, 278 N.C. 168, 179 S.E.2d 410 (1971).

A sentence of imprisonment which is within the maximum authorized by statute is not cruel or unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. **State v. Cradle**, 281 N.C. 198, 188 S.E.2d 296 (1972).

A prison sentence which does not exceed the maximum authorized by statute is constitutionally valid. **State v. Blake**, 14 N.C. App. 367, 188 S.E.2d 607 (1972).

Unless Punishment Provisions of Statute Itself, etc.—

In accord with original. See **State v. Atkinson**, 278 N.C. 168, 179 S.E.2d 410 (1971).

Sec. 28. *Imprisonment for debt.*

What Constitutes Debt. —

Taxes which are imposed are not contractual obligations of the taxpayer to the State, and do not constitute a debt within the meaning of the Constitution. **State v. Locklear**, 21 N.C. App. 48, 203 S.E.2d 63 (1974).

Sec. 30. *Militia and the right to bear arms.*

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

Sec. 32. *Exclusive emoluments.*

Denying a nonprofit corporation the right to construct and operate its proposed hospital on its own property with its own funds with adequate staff and equipment

The death penalty, etc.—

The imposition of the death penalty for murder in the first degree is not, per se, a violation of the Fourteenth Amendment to the Constitution of the United States or of any provision of the Constitution of North Carolina. It is not cruel and unusual punishment in the constitutional sense, being expressly authorized by Art. XI, § 2, of the Constitution of North Carolina. **State v. Westbrook**, 279 N.C. 18, 181 S.E.2d 572 (1971).

Whatever the arguments may be against capital punishment it cannot be said to violate the constitutional concept of cruelty. **State v. Westbrook**, 279 N.C. 18, 181 S.E.2d 572 (1971).

Mandatory death penalty for murder in the first degree is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States and this section and §§ 19 and 24 of this Article. **State v. Fowler**, 285 N.C. 90, 203 S.E.2d 803 (1974).

Death Penalty for Rape.—

The death penalty is not prohibited as cruel and unusual in the constitutional sense, and its imposition upon conviction of the crime of rape is not unconstitutional per se. **State v. Atkinson**, 278 N.C. 168, 179 S.E.2d 410 (1971).

Cited in In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972); **State v. Foster**, 284 N.C. 259, 200 S.E.2d 782 (1973).

Section Only Applicable to Actions Arising out of Contract. — This section, which prohibits imprisonment for debt, is only applicable to actions arising out of or founded upon contract. **State v. Locklear**, 21 N.C. App. 48, 203 S.E.2d 63 (1974).

is a grant to existing hospitals of exclusive privileges forbidden by this section. **In re Certificate of Need for Aston Park Hosp.**, 282 N.C. 542, 193 S.E.2d 729 (1973).

Sec. 34. *Perpetuities and monopolies.***The common-law rule, etc. —**

The common-law rule against perpetuities has been long recognized and enforced in this jurisdiction, and its application has the continuing sanction of this section. *North Carolina Nat'l Bank v. Norris*, 21 N.C. App. 178, 203 S.E.2d 657 (1974).

Denying a nonprofit corporation the right to construct and operate its proposed hospital on its own property with its own funds with adequate staff and equipment establishes a monopoly in the existing hospitals contrary to the provisions of this section. *In re Certificate of Need for Aston Park Hosp.*, 282 N.C. 542,

193 S.E.2d 729 (1973).

Plaintiff's Monopolistic Conduct Not Defense to Action Relating to Unfair Competition. — Even if plaintiff's conduct in protecting its property should be considered a monopolistic practice, it is not a defense to an action for injunctive relief and compensatory damages for alleged unfair competition where defendants' conduct has been determined to be unfair competition. *United Artists Records, Inc. v. Eastern Tape Corp.*, 19 N.C. App. 207, 198 S.E.2d 452 (1973).

Cited in *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Sec. 35. *Recurrence to fundamental principles.*

Cited in *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971); *In re Reddy*, 16 N.C. App. 520, 192 S.E.2d 621 (1972).

Sec. 36. *Other rights of the people.*

Cited in *In re Reddy*, 16 N.C. App. 520, 192 S.E.2d 621 (1972).

ARTICLE II LEGISLATIVE

Section 1. *Legislative power.*

General Assembly Is Possessed of Full Legislative Powers. — Under the North Carolina Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

To Legislate for Protection of Health, Safety, Morals and General Welfare. — The General Assembly, exercising the police power of the State, may legislate for the protection of the public health, safety, morals and general welfare of the people. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Questions of Public Policy Are for Legislative Determination. — Absent constitutional restraint, questions as to public policy are for legislative determination. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

The wisdom of an enactment is a legislative and not a judicial question. The General Assembly has the right to experiment with new modes of dealing with old evils, except as prevented by the Constitution. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Whether the public policy and program established by the North Carolina Housing Corporation Act (§ 122A-1 et seq.) is wise or unwise is for determination by the General Assembly. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Legislative function cannot be delegated. —

In accord with 2nd paragraph in original. See *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

The legislature may not delegate its power to make laws even to an administrative agency of the government. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

Distinction between Delegating Power to Make Law and Conferring Authority as to Its Execution. — There is a distinction generally recognized between a delegation of the power to make a law, which necessarily includes a discretion as to what it shall be, and the conferring of authority or discretion as to its execution. The first may not be done, whereas the latter, if adequate guiding standards are laid down, is permissible under certain circumstances. *State v. Lisk*, 21 N.C. App. 474, 204 S.E.2d 868 (1974).

Legislature May Delegate Portion of Power under Prescribed Standards.—

The people, in this section, have conferred their legislative power upon the General Assembly which may not transfer it to another officer or agency without the establishment of such standards for guidance so as to retain in its own hands the supreme legislative power. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

But It Cannot Delegate Absolute Discretion to Apply, etc.—

In accord with original. See *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973); *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974); *State v. Lisk*, 21 N.C. App. 474, 204 S.E.2d 868 (1974).

It Must Declare Policy, Fix Legal Principles, etc.—

In accord with original. See *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973); *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974); *State v. Lisk*, 21 N.C. App. 474, 204 S.E.2d 868 (1974).

Standards Are Unnecessary When Power Is Delegated in the Constitution.—

The principle that the General Assembly may not transfer its legislative power without the establishment of standards for guidance has no application to a direct delegation by the people, themselves, in the Constitution of the State, of any portion of their power, legislative or other. In such case, the Supreme Court looks only to the Constitution to determine what power has been delegated. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

Legislature Cannot Restrict Power of Succeeding Legislature.—

An act of the General Assembly is legal unless the Constitution contains a prohibition against it. One legislature cannot restrict or limit by statute the right of a succeeding legislature to exercise its constitutional power to legislate in its own way. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1971).

Legislature May Delegate Power to Determine Facts.—

In accord with 3rd paragraph in original. See *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

In accord with 4th paragraph in original. See *Foster v. North Carolina Medical*

Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

Where a municipal ordinance required the board of adjustment to issue a special use permit when it made certain affirmative findings specified in the ordinance, the board's determination of whether to issue a special use permit was not an unlawful exercise of legislative power. *Kenan v. Board of Adjustment*, 13 N.C. App. 688, 187 S.E.2d 496 (1972).

The General Assembly, having itself declared the policy to be effectuated and having established the broad framework of law within which it is to be accomplished and standards for the guidance of the administrative agency, may delegate to such agency the authority to make determinations of fact upon which the application of a statute to particular situations will depend. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

The legislature may delegate the power to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend, or another agency of the government is to come into existence. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974); *State v. Lisk*, 21 N.C. App. 474, 204 S.E.2d 868 (1974).

It is not necessary for the legislature to ascertain the facts of, or to deal with, each case. Since legislation must often be adapted to complex conditions involving numerous details with which the legislature cannot deal directly, the constitutional inhibition against delegating legislative authority does not deny to the legislature that necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the legislature shall apply. *State v. Lisk*, 21 N.C. App. 474, 204 S.E.2d 868 (1974).

Delegation of Power to Grant Professional or Occupational Licenses. —

In licensing those who desire to engage in professions or occupations such as may be proper subjects of such regulation, the legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance. *Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy*, 21 N.C. App. 156, 204 S.E.2d 38 (1974).

Delegation of Power to Private Corporation. —

The legislature may not vest in a private corporation the authority to determine "in its absolute or unguided discretion" the price at which another, with

whom it has no contractual relation, may sell to a willing buyer an article lawfully acquired and owned by him. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

The "nonsigner" provision of § 66-56, extending the force and effect of a "fair trade" contract to a seller not a party thereto, is unconstitutional, both because it delegates legislative power to a private corporation, in violation of this section. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

Power May Be Delegated to Municipalities.—Ordinary restrictions with respect to the delegation of power to an agency of the State, which exercises no function of government, do not apply to cities, towns, or counties. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1972).

The general rule that legislative power, vested in the General Assembly, may not be delegated is subject to an exception permitting the delegation to municipal corporations and to counties of power to legislate concerning local problems. *Porter v. Suburban San. Serv., Inc.*, 283 N.C. 479, 196 S.E.2d 760 (1973).

The General Assembly cannot delegate to a city or county more extensive power than it possesses. In *re Ellis*, 277 N.C. 419, 178 S.E.2d 77 (1970).

Though the law-making power can unquestionably create a municipal corporation and delegate legislative authority to it, it cannot clothe the creature with power to do what the Constitution prohibits the creator from doing. In *re Ellis*, 277 N.C. 419, 178 S.E.2d 77 (1970).

The power to zone is the power originally vested in the General Assembly to legislate with reference to the use which may be made of land and the structures which may be erected or located thereon. *Keiger v. Winston-Salem Bd. of Adjustment*, 278 N.C. 17, 178 S.E.2d 616 (1971).

And Is Subject to Constitutional Limitation on Interference with Property Rights.—Power to zone rests originally in the General Assembly, but this power is subject to the constitutional limitation forbidding arbitrary and unduly discriminatory interference with the right of property owners. In *re Ellis*, 277 N.C. 419, 178 S.E.2d 77 (1970).

Municipality May Not Delegate Power to Zone to Board of Adjustment.—The legislative body of a municipal corporation, in which the General Assembly has vested its power to zone, may not delegate the power to zone to the municipal board of adjustment. *Keiger v. Winston-Salem Bd.*

of Adjustment, 278 N.C. 17, 178 S.E.2d 616 (1971).

Discretionary Right to Enlarge Corporate Limits.—In delegating to the town commissioners the discretionary right to decide whether to enlarge the corporate limits as specified in the special act, Session Laws 1971, c. 801, the General Assembly did not delegate legislative authority in violation of N.C. Const., Art. I, § 6 or this section. Except for approval by the town's board of commissioners, the act was complete in every respect at the time of its ratification. The only discretion given the commissioners was to decide whether or not to annex the territory specified in the act. In authorizing the annexation, the General Assembly determined that the annexation was suitable and proper. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1972).

There is no constitutional provision prohibiting the creation of a municipality by an act of the General Assembly. A fortiori, by a special act, it may constitutionally enlarge the boundaries of a town which it has created. It may also provide statutory procedures for extending the corporate limits of a municipality organized and existing under the laws of the State. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1972).

The enlargement of municipal boundaries by the annexation of new territory, resulting in the extension of municipal corporate jurisdiction, is a legitimate subject of legislation. In the absence of constitutional restriction, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the legislature, and an act of annexation is valid which authorizes the annexation of territory without the consent of its inhabitants. *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1972).

Standards Must Be Set Up for Administrative Board.—

When the General Assembly delegates to administrative officers and agencies its own power to prescribe detailed administrative rules and regulations governing the right of individuals to engage in a trade or profession, the statute granting such authority must lay down or point to a standard for the guidance of the officer or agency in the exercise of his or its discretion. Otherwise, such statute will be deemed an unlawful delegation by the General Assembly of its own authority.

Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

In the Medical Care Commission (now Department of Human Resources) Hospital Facilities Finance Act (§ 131-138 et seq.), where the legislature declared the policy of the State, established the broad framework of law within which it is to be accomplished, and established standards and requirements which the Commission (now Department) was to observe in determining the eligibility of each proposed project for the contemplated financial aid, there was no delegation of legislative power such as would require the conclusion that the act, in its entirety, is unconstitutional. See *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Section 90-57.1 contains no specific guidelines for the Board to follow. It merely refers to the establishment and maintenance of a high standard of integrity and dignity in the practice of the profession. *Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy*, 21 N.C. App. 156, 204 S.E.2d 38 (1974).

Sec. 24. Limitations on local, private, and special legislation.

A statute is either "general" or "local," etc.—

In accord with original. See *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E.2d 67 (1972).

What Are General Laws.—

For the purpose of determining whether an enactment is a general law intent must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied and the actual purpose to be accomplished. In *re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E.2d 909 (1972).

What Are Local Laws.—

A local act is an act applying to fewer than all counties, in which the affected counties do not rationally differ from the excepted counties in relation to the purpose of the act. *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E.2d 67 (1972).

Courts Look Beyond Form, etc.—

In accord with original. See *In re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E.2d 909 (1972).

Jurisdiction over Divorce.—Under this section jurisdiction over the subject matter of divorce is given only by statute. *Williams v. Williams*, 13 N.C. App. 468, 186 S.E.2d 210 (1972).

Meaning of "Trade".—

In accord with 3rd paragraph in original. See *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E.2d 67 (1972).

And Thus It Violates Section. — Without guidelines meeting the constitutional standards of certainty, § 90-57.1 is an unlawful attempt to delegate legislative authority and is in violation of the North Carolina Constitution. *Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy*, 21 N.C. App. 156, 204 S.E.2d 38 (1974).

Section 90-88 Contains More Than Adequate Legislative Guidelines. — An examination of § 90-88 reveals that the legislature has imposed guidelines upon the rescheduling of controlled substances that are more than adequate. *State v. Lisk*, 21 N.C. App. 474, 204 S.E.2d 868 (1974).

And Is Proper Delegation of Authority to Determine Facts. — Section 90-88 does not delegate the authority to define crimes; rather it is a delegation of authority to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend. *State v. Lisk*, 21 N.C. App. 474, 204 S.E.2d 868 (1974).

Quoted in In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

In accord with 4th paragraph in original. See *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E.2d 67 (1972).

Private profit is an inherent element of the concept of trade as used in subsection (1)(j) of this section. *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E.2d 67 (1972).

The purchase, sale and serving of alcoholic beverages by a licensed restaurateur constitutes "trade" within the meaning of subsection (1)(j) of this section. *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E.2d 67 (1972).

Option to Sell Mixed Beverage Is Local Act.—A statute which authorized an election in Mecklenburg County to determine whether mixed beverages would be sold by the drink in that county was held to be a local act regulating trade and therefore unconstitutional and void as violative of subsection (1)(j) of this section. *Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E.2d 67 (1972).

Subdivision (55) of former § 153-9 is a home rule statute, applicable throughout the State. It enables the county commissioners of every county to enact ordinances in the exercise of the general police power within the prescribed territory just as other statutes enable the governing bodies of cities and towns to enact ordinances in the exercise of the general police power within their corporate limits. Such statutes are upheld as general laws and therefore valid notwithstanding that they

regulate Sunday trade. Subdivision (55) of former § 153-9 is a general law and therefore does not contravene N.C. Const. 1868, Art. II, § 29, *Whitney Stores, Inc. v. Clark*, 277 N.C. 322, 177 S.E.2d 418 (1970).

As Is Session Laws 1945, Chapter 936.—Session Laws 1945, c. 936, which purports to grant discretionary authority to the governing bodies of municipalities in Vance, Scotland and Moore Counties to refuse to issue a license for the sale of fortified and unfortified wines within the corporate limits of such municipalities, is a local act regulating trade in violation of subsection (1)(j) of this section. *Food*

Fair, Inc. v. City of Henderson, 17 N.C. App. 335, 194 S.E.2d 213 (1973).

Session Laws 1967, c. 506, a local act relating to municipal eminent domain procedures, does not involve any of the forbidden subjects listed in this section. *City of Durham v. Manson*, 21 N.C. App. 161, 204 S.E.2d 41 (1974).

Quoted in *Thompson v. Whitley*, 344 F. Supp. 480 (E.D.N.C. 1972).

Cited in *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971); *Variety Theatres, Inc. v. Cleveland County*, 282 N.C. 272, 192 S.E.2d 290 (1972).

ARTICLE III EXECUTIVE

Sec. 5. *Duties of Governor.*

Commutation of Sentence.—The exercise by a governor of his judgment, resulting in the commutation of the sentence of one man convicted of murder or rape and the refusal to commute the sentence of another convicted of such crime, cannot be called “freakish” or “arbitrary” merely because another governor

might, theoretically, have reached opposite conclusions. *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974).

Quoted in *Wilson v. North Carolina*, 438 F.2d 284 (4th Cir. 1971).

Cited in *Jernigan v. State*, 10 N.C. App. 562, 179 S.E.2d 788 (1971).

ARTICLE IV JUDICIAL

Section 1. *Judicial power.*

Judicial Functions in Criminal Cases.—The functions of the court in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination be one of guilt, then to pronounce the punishment or penalty prescribed by law. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Grant of Discretionary Power to Board of Paroles.—Section 148-62, insofar as it grants discretionary power to the Board of Paroles, is not an assignment of judicial power to the Board of Paroles in con-

travention of this section and N.C. Const., Art. I, § 6. *Jernigan v. State*, 10 N.C. App. 562, 179 S.E.2d 788 (1971).

The granting of parole and the supervision of parolees are purely administrative functions, and accordingly may be entrusted by the legislature to nonjudicial agencies. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Quoted in *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier*, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

Sec. 3. *Judicial powers of administrative agencies.*

Applied in *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier*, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

Sec. 8. *Retirement of Justices and Judges.* The General Assembly shall provide by general law for the retirement of Justices and Judges of the General Court of Justice, and may provide for the temporary recall of any retired Justice or Judge to serve on the court from which he was retired. The General Assembly shall also prescribe maximum age limits for service as a Justice or Judge. (1971, c. 451, s. 1.)

Editor's Note.—

The amendment adopted by vote of the people at the general election held Nov. 7, 1972 added the second sentence.

Sec. 9. Superior Courts.

Appointment of Judges.—North Carolina could by her Constitution provide for the appointment of all State judges without violating any provision of the federal Constitution. The election of superior court judges is not a necessary characteristic of a republican form of government and is not required by the Constitution of the United States. This is a political rather than a judicial question. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971).

Validity of Superior Court Election and Rotation Procedure. — There can be no doubt as to the validity under the federal Constitution of the provisions of the North Carolina Constitution requiring the election of superior court judges by districts or statewide as prescribed by the legislature, or that the State be divided into divisions and districts and judges rotate among the districts, or that they reside in their respective districts. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971).

A superior court judge is a hybrid official with both local and statewide functions and authority. The requirement that he reside in the district from which he is

Session Laws 1971, c. 451, s. 3, provides that the amendment shall be effective Jan. 1, 1973.

elected is a matter of convenience, making him available to hear emergency matters, and convenience is an essential factor in arranging an effective judicial system. He rotates among the districts of his division, and may be assigned beyond his division by the Chief Justice. Thus, there is a reasonable basis for the election procedure requiring him to be nominated in the primary election and elected in the general election by statewide vote and it serves and achieves a legitimate State purpose and is not arbitrary and capricious. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971).

The one man, one vote rule does not apply to the State judiciary, and therefore a mere showing of a disparity among the voters or in the population figures of the district would not be sufficient to strike down the election procedure for superior court judges. A showing of an arbitrary and capricious or invidious action or distinction between citizens and voters would be required. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971).

Sec. 10. District Courts.

Stated in *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971).

Sec. 11. Assignment of Judges.

Validity of Superior Court Election and Rotation Procedure.—There can be no doubt as to the validity under the federal Constitution of the provisions of the North Carolina Constitution requiring the election of superior court judges by districts

or statewide as prescribed by the legislature, or that the State be divided into divisions and districts and judges rotate among the districts, or that they reside in their respective districts. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971).

Sec. 12. Jurisdiction of the General Court of Justice.**I. GENERAL CONSIDERATION.**

The court of appeals has no jurisdiction to entertain a motion for summary judgment made for the first time on appeal. *Britt v. Allen*, 12 N.C. App. 399, 183 S.E.2d 303 (1971).

Applied in *City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E.2d 179 (1972); *Lawing v. Jaynes*, 285 N.C. 418, 206 S.E.2d 162 (1974).

Quoted in *Austin v. Austin*, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Stated in *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971); *State v. Greenwood*, 12 N.C. App. 584, 184 S.E.2d 386 (1971).

Cited in *State v. Harrell*, 279 N.C. 464, 183 S.E.2d 638 (1971).

II. SUPREME COURT.**A. In General.**

Direct Appeals from Utilities Commission Not Constitutionally Permissible. — The Utilities Commission being an administrative agency and not a part of the General Court of Justice, direct appeals from the Utilities Commission to the Supreme Court are not constitutionally permissible. *State ex rel. Utilities Comm'n v. VEPCO*, 21 N.C. App. 45, 203 S.E.2d 418 (1974).

Authority for a writ of error coram nobis stems from this section of the Constitution of North Carolina which gives the Supreme Court authority to exercise supervision over the inferior courts of the State. *Dantzic v. State*, 10 N.C. App. 369, 178 S.E.2d 790, rev'd on other grounds, 279 N.C. 212, 182 S.E.2d 563 (1971).

The availability of a writ of error coram nobis in this State stems from § 4-1, which adopts the common law as the law of this State, and authority for the writ stems from this section which gives the Supreme Court authority to exercise supervision over the inferior courts of the State. *State v. Green*, 277 N.C. 188, 176 S.E.2d 756 (1970), overruled on other grounds, *Dantzic v. State*, 279 N.C. 212, 182 S.E.2d 563 (1971).

Writ of Error Coram Nobis.—

There is no justification for a rule that would require a person who is not in prison to obtain permission from an appellate court in order to file a petition for a writ of error coram nobis to attack collaterally a final judgment of a trial court from which no appeal was taken. *Dantzic v. State*, 279 N.C. 212, 182 S.E.2d 563 (1971).

In *re Taylor*, 230 N.C. 566, 53 S.E.2d 857 (1949), and *State v. Daniels*, 231 N.C. 509, 57 S.E.2d 653 (1950), imposed a new

requirement upon the ancient common-law writ of error coram nobis, namely, a requirement that permission be first obtained from the Supreme Court, such permission to be granted under the supervisory power presently conferred upon the Supreme Court by subsection (1) of this section. The Supreme Court has concluded that such requirement is neither necessary nor desirable under present conditions with reference to a final judgment of a trial court from which there was no appeal. In this respect, *Taylor, Daniels and State v. Green*, 277 N.C. 188, 176 S.E.2d 756 (1970), are overruled. *Dantzic v. State*, 279 N.C. 212, 182 S.E.2d 563 (1971).

As to showing necessary for Supreme Court to grant writ of error coram nobis, see *State v. Green*, 277 N.C. 188, 176 S.E.2d 756 (1970), overruled on other grounds, *Dantzic v. State*, 279 N.C. 212, 182 S.E.2d 563 (1971); *Dantzic v. State*, 10 N.C. App. 369, 178 S.E.2d 790, rev'd on other grounds, 279 N.C. 212, 182 S.E.2d 563 (1971).

A writ of error coram nobis will not lie in the superior court after an appeal to the Supreme Court and an affirmation of the judgment in that court. *Dantzic v. State*, 10 N.C. App. 369, 178 S.E.2d 790, rev'd on other grounds, 279 N.C. 212, 182 S.E.2d 563 (1971).

Sec. 13. Forms of action; rules of procedure.

The General Assembly has the final word on rules of practice and procedure in the trial courts of the State. *State v. Campbell*, 14 N.C. App. 596, 188 S.E.2d 558 (1972).

Governmental Immunity Not Abrogated.—A municipal corporation's governmental immunity against a claim for damages by a party wrongfully restrained or enjoined by the municipal corporation was not abrogated by the enactment of § 1A-1, Rule 65(c), providing that no security for payment of damages for wrongfully obtaining an injunction shall be required of the State or its political subdivisions, but that "damages may be awarded against such party in accord with this rule." *Orange County v. Heath*, 14 N.C. App. 44, 187 S.E.2d 345 (1972).

Subsection (2) of this section would require a direct and positive declaration of policy, rather than a minute procedural change in § 1A-1, Rule 65 to abolish governmental immunity. *Orange County v. Heath*, 282 N.C. 292, 192 S.E.2d 308 (1972).

The concept of sovereign immunity is

so firmly established that it should not and cannot be waived by indirection or by procedural rule. *Orange County v. Heath*, 282 N.C. 292, 192 S.E.2d 308 (1972).

Pretrial Discovery Does Not Infringe upon Rights.—Section 1A-1, Rule 26(b), authorizing the pretrial discovery of existence and contents of insurance, does not subject a defendant's property to unreasonable search and seizure or authorize the taking of a defendant's property without due process of law. *Marks v. Thompson*, 14 N.C. App. 272, 188 S.E.2d 22 (1972).

Right to Request Jury Trial under § 50-10 Not Nullified.—Where the last pleading was filed nearly six months prior to the 1971 amendment of § 50-10, the amendment did not nullify the right to request a jury trial "prior to the call of the action for trial" conferred by § 50-10 at the time defendant filed the last pleading. *Branch v. Branch*, 282 N.C. 133, 191 S.E.2d 671 (1972).

Quoted in *Simmons v. Textile Workers Union*, 15 N.C. App. 220, 189 S.E.2d 556 (1972).

Sec. 14. *Waiver of jury trial.*

Applied in *Williams v. Williams*, 13 N.C. App. 468, 186 S.E.2d 210 (1972); *Hinson v. Hinson*, 17 N.C. App. 505, 195 S.E.2d 98 (1973).

Quoted in *Branch v. Branch*, 282 N.C. 133, 191 S.E.2d 671 (1972).

Sec. 16. *Terms of office and election of Justices of the Supreme Court, Judges of the Court of Appeals, and Judges of the Superior Court.*

The one man, one vote rule does not apply to the State judiciary, and therefore a mere showing of a disparity among the voters or in the population figures of the district would not be sufficient to strike down the election procedure for superior court judges. A showing of an arbitrary and capricious or invidious action or distinction between citizens and voters would be required. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971).

Appointment of Judges.—North Carolina could by her Constitution provide for the appointment of all State judges without violating any provision of the federal Constitution. The election of superior court judges is not a necessary characteristic of a republican form of government and is not required by the Constitution of the United States. This is a political rather than a judicial question. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971).

Validity of Superior Court Election and Rotation Procedure. — There can be no doubt as to the validity under the federal Constitution of the provisions of the North

Carolina Constitution requiring the election of superior court judges by districts or statewide as prescribed by the legislature, or that the State be divided into divisions and districts and judges rotate among the districts, or that they reside in their respective districts. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971).

A superior court judge is a hybrid official with both local and statewide functions and authority. The requirement that he reside in the district from which he is elected is a matter of convenience, making him available to hear emergency matters, and convenience is an essential factor in arranging an effective judicial system. He rotates among the districts of his division, and may be assigned beyond his division by the Chief Justice. Thus, there is a reasonable basis for the election procedure requiring him to be nominated in the primary election and elected in the general election by statewide vote and it serves and achieves a legitimate State purpose and is not arbitrary and capricious. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971).

Sec. 17. *Removal of Judges, Magistrates and Clerks.*

(1) **Removal of Judges by the General Assembly.** Any Justice or Judge of the General Court of Justice may be removed from office for mental or physical incapacity by joint resolution of two-thirds of all the members of each house of the General Assembly. Any Justice or Judge against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least 20 days before the day on which either house of the General Assembly shall act thereon. Removal from office by the General Assembly for any other cause shall be by impeachment.

(2) **Additional method of removal of Judges.** The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(3) **Removal of Magistrates.** The General Assembly shall provide by general law for the removal of Magistrates for misconduct or mental or physical incapacity.

(4) **Removal of Clerks.** Any Clerk of the Superior Court may be removed from office for misconduct or mental or physical incapacity by the senior regular resident

Superior Court Judge serving the county. Any Clerk against whom proceedings are instituted shall receive written notice of the charges against him at least 10 days before the hearing upon the charges. Any Clerk so removed from office shall be entitled to an appeal as provided by law. (1971, c. 560, s. 1.)

Editor's Note.—

The amendment adopted by vote of the people at the general election held Nov. 7, 1972 substituted "Justice or Judge of the General Court of Justice" for "of the Supreme Court, Judge of the Court of Appeals, or Judge of the Superior Court" in the first sentence of subsection (1), inserted "by the General Assembly" in the

third sentence of subsection (1), added present subsection (2) and redesignated former subsections (2) and (3) as (3) and (4) and deleted "District Judges and" preceding "Magistrates" in the catchline and in the text of present subsection (3).

Session Laws 1971, c. 560, s. 3, provides that the amendment shall be effective Jan. 1, 1973.

Sec. 18. District Attorney and prosecutorial districts.

(1) *District Attorneys.* The General Assembly shall, from time to time, divide the State into a convenient number of prosecutorial districts, for each of which a District Attorney shall be chosen for a term of four years by the qualified voters thereof, at the same time and places as members of the General Assembly are elected. The District Attorney shall advise the officers of justice in his district, be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duties related to appeals therefrom as the Attorney General may require, and perform such other duties as the General Assembly may prescribe. (1973, c. 394, s. 3.)

Editor's Note. —

The amendment adopted by vote of the people at the general election held Nov. 5, 1974, substituted "prosecutorial" for "solicitorial" in the first sentence, and "District Attorney" for "Solicitor" in the first and second sentences of subsection (1).

Session Laws 1973, c. 394, s. 3, provides: "If a majority of the votes cast thereon are in favor

of the amendment set out in section 1 of this act, then the Governor shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of his office, and the amendment shall become effective on the first day of the next succeeding month."

As subsection (2) was not changed by the amendment, it is not set out.

ARTICLE V

FINANCE

Revision of Article. — This Article was by vote of the people at the general election held Nov. 3, 1970. The amended article became effective July 1, 1973.

Section 1. *No capitation tax to be levied.* No poll or capitation tax shall be levied by the General Assembly or by any county, city or town, or other taxing unit. (1969, c. 1200, s. 1.)

Sec. 2. State and local taxation.

(1) *Power of taxation.* The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.

(2) *Classification.* Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated. No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.

(3) *Exemptions.* Property belonging to the State, counties, and municipal corporations shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, cultural, charitable, or

religious purposes, and, to a value not exceeding \$300, any personal property. The General Assembly may exempt from taxation not exceeding \$1,000 in value of property held and used as the place of residence of the owner. Every exemption shall be on a State-wide basis and shall be made by general law uniformly applicable in every county, city and town, and other unit of local government. No taxing authority other than the General Assembly may grant exemptions, and the General Assembly shall not delegate the powers accorded to it by this subsection.

(4) *Special tax areas.* Subject to the limitations imposed by Section 4, the General Assembly may enact general laws authorizing the governing body of any county, city, or town to define territorial areas and to levy taxes within those areas, in addition to those levied throughout the county, city, or town, in order to finance, provide, or maintain services, facilities, and functions in addition to or to a greater extent than those financed, provided, or maintained for the entire county, city, or town.

(5) *Purposes of property tax.* The General Assembly shall not authorize any county, city or town, special district, or other unit of local government to levy taxes on property, except for purposes authorized by general law uniformly applicable throughout the State, unless the tax is approved by a majority of the qualified voters of the unit who vote thereon.

(6) *Income tax.* The rate of tax on incomes shall not in any case exceed ten percent, and there shall be allowed personal exemptions and deductions so that only net incomes are taxed.

(7) *Contracts.* The General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only. (1969, c. 872, s. 1; c. 1200, s. 1.)

I. POWER OF TAXATION GENERALLY; CLASSIFICATION.

A. General Consideration.

Editor's Note.—

Pursuant to Session Laws 1969, c. 872, s. 7, and c. 1200, s. 7, subsection (6) of this section as rewritten by the amendment proposed by Session Laws 1969, c. 872, s. 1, has been substituted for subsection (6) as rewritten by the amendment proposed by Session Laws 1969, c. 1200, s. 1. Subsection (6) as it appeared in Session Laws 1969, c. 1200, s. 1, was erroneously carried in the 1973 Supplement.

The cases cited in the following annotation were decided under this section as it stood before the revision of this Article by amendment adopted Nov. 3, 1970, effective July 1, 1973.

A sovereign state, as one of its inherent attributes, has the power of taxation, which must be exercised by its legislative branch. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

A county is not a sovereign and hence does not have the inherent power to levy taxes. A county must derive its taxing power from the State Constitution or from the State's legislative enactments. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

A county board of elections does not have taxing power. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Subsection (1) is a limitation upon the legislative power, separate and apart from the limitation contained in the law of the land clause in N. C. Const., art. I, § 19, and the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Taxes and Local Assessments for Public Improvements Distinguished.—There is a distinction between local assessments for public improvements and taxes levied for purposes of general revenue. It is true that local assessments may be a species of tax, and that the authority to levy them is generally referred to the taxing power, but they are not taxes within the meaning of that term as generally understood in constitutional restrictions and exemptions. *Southern Ry. v. City of Raleigh*, 9 N.C. App. 305, 176 S.E.2d 21 (1970).

Police Power Compared to Legislative Authority to Expend Tax Money.—The power of the State to regulate privately owned institutions under its police power is more extensive than the authority of the legislature to expend tax money for

the accomplishment of the same purpose. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Meaning of "Public Purpose".—

A slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

For a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

The term "public purposes" is employed in the same sense in the law of taxation and in the law of eminent domain. Thus, if the General Assembly may authorize a State agency to expend public money for the purpose of aiding in the construction of a hospital facility to be leased to and ultimately conveyed to a private agency, it may also authorize the acquisition of a site for such facility by exercise of the power of eminent domain. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Legislative Declaration Not Conclusive.

—A legislative declaration which asserts in general terms that the statute under consideration is enacted for a public purpose, although entitled to great weight, is not conclusive. When the facts are determined, what is a public purpose is a question of law for the court. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Supreme Court Determines Constitutionality of Appropriation.—It is the duty and prerogative of the Supreme Court to determine whether an appropriation of tax funds is for a purpose forbidden by the Constitution of the State when that question is properly raised. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Tax Revenues May Not Be Used, etc.—

In accord with original. See *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

The power to appropriate money from the public treasury is no greater than the power to levy the tax which put the money in the treasury. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d

665 (1970).

If an act creating a corporation is unconstitutional as violative of this section and Article I, § 19, of the Constitution of North Carolina, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and is void because the purpose for which the corporation was created is not a public purpose, then taxpayer may maintain an action to restrain state officials from paying to the corporation and the corporation from using money appropriated out of the General Fund. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

The principles of equality and uniformity are indispensable to taxation, whether general or local. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Uniformity, in its legal and proper sense, is inseparably incident to the exercise of the power of taxation. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Compliance with Rule of Uniformity, etc.—

The requirements of "uniformity," "equal protection," and "due process" are, for all practical purposes, the same under both the State and federal Constitutions. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

State May Not Levy Tax in Some Counties and Exempt Others.—The Constitution does not permit a state to levy a tax which discriminates in favor of or against taxpayers in the same classification. The prohibition extends throughout the State. Hence, the State cannot levy a tax in 25 counties and exempt 75 counties. Nor can the State set up a valid scheme by which that precise result is accomplished. Thus, the additional sales tax authorized by the Local Option Sales and Use Tax Act is unconstitutional. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Local taxation must be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Requirement of Uniformity Extends to License, Franchise and Other Forms of Taxation. — Repeated judicial interpretations extend the requirement of uniformity to license, franchise, and other forms of taxation. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Although it is not expressly provided that the tax on trades, etc., shall be uniform, yet a tax not uniform, as properly un-

derstood, would be so inconsistent with natural justice, and with the intent which is apparent in the section of the Constitution above cited, that it may be admitted that the collection of such a tax would be restricted as unconstitutional. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

License taxes must bear equally and uniformly upon all persons engaged in the same class of business or occupation or exercising the same privileges. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

When Tax Is Uniform.—

Taxing is required to be by a uniform rule—that is, by one and the same unvarying standard. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment, as well as in the rate of taxation. But this is not all. The uniformity must be coextensive with the territory to which it applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout the extent of the territory to which it is applicable. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Uniformity is defined to consist in putting the same tax upon all of the same class—that is, while the same tax must be enforced upon all innkeepers, upon railroads, and so throughout, a tax discriminating persons of the same class, whereby some are required to pay more than others, would lack uniformity. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Equality within the class or for those of like station and condition is all that is required to meet the test of constitutionality under subsection (2) of this section. A tax on trades, etc., must be considered uniform when it is equal upon all persons belonging to the prescribed class upon which it is imposed. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

The rule of uniformity is observed, etc.—

With reference to locality a tax is uniform when it operates with equal force and effect in every place where the subject of it is found, and with reference to classification, it is uniform when it operates without distinction or discrimination upon all persons composing the described class. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Uniformity of taxation, as provided for by State Constitution, is required throughout the territorial limits of the taxing

district. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Wide Latitude Accorded, etc.—

In accord with original. See *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Applied in *In re appeal of Forsyth County*, 285 N.C. 64, 203 S.E.2d 51 (1974); *Master Hatcheries, Inc. v. Coble*, 21 N.C. App. 256, 204 S.E.2d 395 (1974).

B. Illustrative Cases.

Construction of Government Owned and Operated Hospital Is for Public Purpose.

—It is well settled that the expenditure of tax funds for the construction of a hospital, to be owned and operated by the State, a county, a city, town or other political subdivision of the State, is an expenditure for a public purpose. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

But Construction of Privately Owned Hospital Is Not.—The expenditure of public funds raised by taxation to finance, or facilitate the financing of, the construction of a hospital facility to be privately operated, managed and controlled is not an expenditure for a public purpose and is prohibited by this section. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

The construction and operation of a privately owned hospital is not necessarily for a public purpose, within the meaning of the constitutional limitation upon the use of tax funds, and the circumstance that the privately owned hospital is not operated for profit is not determinative. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Local Option Sales and Use Tax Act.—

The additional 1% sales and use tax authorized by the Local Option Sales and Use Tax Act was a State tax, not a county tax, and was unconstitutional since it was not uniformly applied to all taxpayers of the same class in all counties of the State. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

The levy imposed by the Local Option Sales and Use Tax Act was discriminatory in that it required one person to pay the tax involved and it exempted his competitor in a county which voted against the tax. Both Nash and Edgecombe were exempt if either voted against the tax. Uniformity is required. No provision was made for partial uniformity, and for that reason the tax authorized under former § 105-164.45 was unconstitutional. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

Chapter 159A Violates Subsection (1). — The creation of county authorities for the purpose of financing pollution abatement and control facilities or industrial facilities for private industry by the issuance of tax-exempt revenue bonds is not for a public purpose and Chapter 159A, which purports to authorize such financing, violates subsection (1). *Stanley v. Department of Conservation & Dev.*, 284 N.C. 15, 199 S.E.2d 641 (1973).

II. EXEMPTIONS.

Statute Exempting Certain Property from Assessments for Local Improvements.—Former § 160-521, exempting railroad right-of-way property from assessment for local improvements, was not unconstitutional on the ground it was not authorized by this section, since this section deals with the power of taxation and not with assessments for local improvements. *Southern Ry. v. City of Raleigh*, 9 N.C. App. 305, 176 S.E.2d 21 (1970).

Property of North Carolina Housing Corporation.—Since Chapter 122A and the North Carolina Housing Corporation's activities pursuant thereto are for a public

purpose, it is permissible for the General Assembly to exempt from taxation the property of the Corporation and the obligations incurred by the Corporation to effectuate such public purpose. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Bonds of North Carolina Housing Authority. — Since the tax-exempt feature makes possible the more favorable sale of revenue bonds and thereby contributes substantially to the accomplishment of the public purpose for which they are issued, the General Assembly may exempt them from taxation by the State or any of its subdivisions. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

The property owned by the Medical Care Commission, including hospital facilities leased to private nonprofit associations for operation, is property owned by the State within the meaning of this constitutional provision, making the exemption of such property from taxation mandatory. *Foster v. North Carolina Medical Care Comm'n.*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Sec. 3. *Limitations upon the increase of State debt.*

(1) *Authorized purposes; two-thirds limitation.* The General Assembly shall have no power to contract debts secured by a pledge of the faith and credit of the State, unless approved by a majority of the qualified voters of the State who vote thereon, except for the following purposes:

- (a) to fund or refund a valid existing debt;
- (b) to supply an unforeseen deficiency in the revenue;
- (c) to borrow in anticipation of the collection of taxes due and payable within the current fiscal year to an amount not exceeding 50 per cent of such taxes;
- (d) to suppress riots or insurrections, or to repel invasions;
- (e) to meet emergencies immediately threatening the public health or safety, as conclusively determined in writing by the Governor;
- (f) for any other lawful purpose, to the extent of two-thirds of the amount by which the State's outstanding indebtedness shall have been reduced during the next preceding biennium.

(2) *Gift or loan of credit regulated.* The General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except a corporation in which the State has a controlling interest, unless the subject is submitted to a direct vote of the people of the State, and is approved by a majority of the qualified voters who vote thereon.

(3) *Definitions.* A debt is incurred within the meaning of this Section when the State borrows money. A pledge of the faith and credit within the meaning of this Section is a pledge of the taxing power. A loan of credit within the meaning of this Section occurs when the State exchanges its obligations with or in any way guarantees the debts of an individual, association, or private corporation.

(4) *Certain debts barred.* The General Assembly shall never assume or pay any debt or obligation, express or implied, incurred in aid of insurrection or rebellion

against the United States. Neither shall the General Assembly assume or pay any debt or bond incurred or issued by authority of the Convention of 1868, the special session of the General Assembly of 1868, or the General Assembly of 1868-69 and 1869-70, unless the subject is submitted to the people of the State and is approved by a majority of all the qualified voters at a referendum held for that sole purpose.

(5) *Outstanding debt.* Except as provided in subsection (4), nothing in this Section shall be construed to invalidate or impair the obligation of any bond, note, or other evidence of indebtedness outstanding or authorized for issue as of July 1, 1973. (1969, c. 1200, s. 1.)

Editor's Note.—

For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

The cases cited in the following annotation were decided under this section as it stood before the revision of this Article by amendment adopted Nov. 3, 1970, effective July 1, 1973.

The method of financing set forth in § 122A-6 does not create a debt within the meaning of the Constitution and therefore the limitations of this section are inapplicable. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Authority to Establish Reserve or Contingency Fund Not Pledge of Faith and Credit. — The fact that such appropriations as the General Assembly may see fit to make may be used for the establishment of a reserve or contingency fund to be available for the payment of the principal of and the interest on any bonds or notes of a public corporation, does not constitute a pledge of the faith and credit of the State or of any political subdivision thereof for the payment of the principal of and the interest on any bonds or notes of the corporation. *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

Sec. 4. Limitations upon the increase of local government debt.

(1) *Regulation of borrowing and debt.* The General Assembly shall enact general laws relating to the borrowing of money secured by a pledge of the faith and credit and the contracting of other debts by counties, cities and towns, special districts, and other units, authorities, and agencies of local government.

(2) *Authorized purposes; two-thirds limitation.* The General Assembly shall have no power to authorize any county, city or town, special district, or other unit of local government to contract debts secured by a pledge of its faith and credit unless approved by a majority of the qualified voters of the unit who vote thereon, except for the following purposes:

- (a) to fund or refund a valid existing debt;
- (b) to supply an unforeseen deficiency in the revenue;
- (c) to borrow in anticipation of the collection of taxes due and payable within the current fiscal year to an amount not exceeding 50 per cent of such taxes;

When Issuance of Bonds Does not Constitute Lending or Giving of State Credit.—Where an act specifically provides that bonds or notes issued under it shall not be deemed to constitute a debt, liability or obligation of the State or of any political subdivision thereof, or a pledge of the faith and credit of the State or of any such political subdivision, but "shall be payable solely from the revenues and other funds provided therefor," the issuance of such bonds does not constitute a giving or lending of the credit of the State, or of its agency, within the meaning of this section. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Section 131-138 et seq. Does Not Violate Section.—Section 131-138 et seq., authorizing the Medical Care Commission (now Department of Human Resources) to issue revenue bonds to finance the construction of hospital facilities to be leased and ultimately conveyed to a public or private nonprofit agency, does not authorize the contracting of a debt by the State, or its agency, or lending of the faith and credit of the State, or its agency, in violation of this section. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

- (d) to suppress riots or insurrections;
- (e) to meet emergencies immediately threatening the public health or safety, as conclusively determined in writing by the Governor;
- (f) for purposes authorized by general laws uniformly applicable throughout the State, to the extent of two-thirds of the amount by which the unit's outstanding indebtedness shall have been reduced during the next preceding fiscal year.

(3) *Gift or loan of credit regulated.* No county, city or town, special district, or other unit of local government shall give or lend its credit in aid of any person, association, or corporation, except for public purposes as authorized by general law, and unless approved by a majority of the qualified voters of the unit who vote thereon.

(4) *Certain debts barred.* No county, city or town, or other unit of local government shall assume or pay any debt or the interest thereon contracted directly or indirectly in aid or support of rebellion or insurrection against the United States.

(5) *Definitions.* A debt is incurred within the meaning of this Section when a county, city or town, special district, or other unit, authority, or agency of local government borrows money. A pledge of faith and credit within the meaning of this Section is a pledge of the taxing power. A loan of credit within the meaning of this Section occurs when a county, city or town, special district, or other unit, authority, or agency of local government exchanges its obligations with or in any way guarantees the debts of an individual, association, or private corporation.

(6) *Outstanding debt.* Except as provided in subsection (4), nothing in this Section shall be construed to invalidate or impair the obligation of any bond, note, or other evidence of indebtedness outstanding or authorized for issue as of July 1, 1973. (1969, c. 1200, s. 1.)

I. EDITOR'S NOTE.

For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

The cases cited in the following annotation were decided under this section as it stood before the revision of this Article by amendment adopted Nov. 3, 1970, effective July 1, 1973.

II. PURPOSES; TWO-THIRDS LIMITATION.

This section contemplates a contracting of an obligation to be paid at some future time. *Davis v. Iredell County*, 9 N.C. App. 381, 176 S.E.2d 361 (1970).

It does not apply where the funds to be applied are already on hand and the proposed expenditure will impose no further liability on the municipality, nor involve the imposition of further taxation upon it. *Davis v. Iredell County*, 9 N.C. App. 381, 176 S.E.2d 361 (1970).

The acquisition of land from surplus funds is not beyond the power of a city and

it in no way offends the provisions of this section. *Davis v. Iredell County*, 9 N.C. App. 381, 176 S.E.2d 361 (1970).

Provisions of Medical Care Commission (now Department of Human Resources) Hospital Facilities Finance Act Held Unconstitutional. — Provisions of the Medical Care Commission (now Department of Human Resources) Hospital Facilities Finance Act (§ 131-138 et seq.), which authorize local governmental units to enter into lease agreements with the Medical Care Commission (now Department of Human Resources) and which make obligations of any such governmental unit under a lease agreement payable not only from revenues derived from the leased facility but also from revenues derived from other hospital facilities owned by the lessee and related to the leased facility, were held unconstitutional in that they authorize local government units to contract a debt without a vote of the people in excess of the amount specified in this section. *Foster v. North Carolina Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973).

Sec. 5. *Acts levying taxes to state objects.* Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose. (1969, c. 1200, s. 1.)

Editor's Note.—

For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

The cases cited in the following annotation were decided under this section as it stood before the revision of this Article by amendment adopted Nov. 3, 1970, effective July 1, 1973.

A law authorizing a bond issue for various purposes which does not declare what proportion of the proceeds of the bonds shall be applied to each specific purpose is not void. Such matter may properly rest within the sound discretion of the municipal authorities. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

Transfer of Funds from One Project to Another. — While a municipality has a limited authority, under certain conditions, to transfer or allocate funds from one project to another, included within the general purpose for which bonds are authorized, the transfer must be to a project included in the general purpose as stated in the bond resolution, and the funds may be diverted to the proposed purposes only in the event the municipality finds in good faith that conditions have so changed since the bonds were authorized that proceeds therefrom are no longer needed for the original purpose. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

Courts Will Not Interfere with Exercise of Discretionary Powers of Municipal Corporation. — With respect to the use of bond money, the court will not interfere

with the exercise of discretionary powers of a municipal corporation unless its actions are so unreasonable and arbitrary as to amount to an abuse of discretion. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

Immaterial or Temporary Changes Not Unlawful Diversions of Funds.—While the law will not justify the use of the proceeds of a State or municipal bond issue for purposes other than those specified in the act authorizing the issue, it does not follow that immaterial or temporary changes consistent with the general purpose of the legislative act should be interpreted as unlawful diversions of public funds. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

Changes Necessary to Accomplish General Purpose Are Not Outlawed. — It is worthy of note the cases on the use of bond money emphasize "deviation from the general purpose for which bonds are authorized" and do not outlaw such changes as are necessary under existing conditions to accomplish the general purpose. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

A definition of corporate purpose cannot be static. Changing conditions require that application of the limitations be tempered with due recognition of the existing situation so the purpose for which the public body was organized may be accomplished and enjoyment thereof by the public made possible. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

Sec. 6. *Inviolability of sinking funds and retirement funds.*

(1) *Sinking funds.* The General Assembly shall not use or authorize to be used any part of the amount of any sinking fund for any purpose other than the retirement of the bonds for which the sinking fund has been created, except that these funds may be invested as authorized by law.

(2) *Retirement funds.* Neither the General Assembly nor any public officer, employee, or agency shall use or authorize to be used any part of the funds of the Teachers' and State Employees' Retirement System or the Local Governmental Employees' Retirement System for any purpose other than retirement system benefits and purposes, administrative expenses, and refunds; except that retirement system funds may be invested as authorized by law, subject to the investment limitation that the funds of the Teachers' and State Employees' Retirement System and the Local Governmental Employees' Retirement System shall not be applied, diverted, loaned to, or used by the State, any State agency, State officer, public officer, or public employee. (1969, c. 1200, s. 1.)

Editor's Note.—

For note on taxation and revenue bonds

to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

Sec. 7. *Drawing public money.*

(1) *State treasury.* No money shall be drawn from the State Treasury but in

consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually.

(2) *Local treasury.* No money shall be drawn from the treasury of any county, city or town, or other unit of local government except by authority of law. (1969, c. 1200, s. 1.)

Editor's Note.—An amendment proposed by Session Laws 1973, c. 1222, and defeated at the general election held Nov. 5, 1974, would have added to this article a new § 8, relating to bond issues to finance capital projects for industry.

An order to make retroactive payments under the federal aid to dependent families program looks directly to the payment of public funds out of the State treasury in violation of this section. *Dawkins v. Craig*, 483 F.2d 1191 (4th Cir. 1973).

ARTICLE VI

SUFFRAGE AND ELIGIBILITY TO OFFICE

Section 1. *Who may vote.* Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided. (1971, c. 201, s. 1.)

Editor's Note.—

The amendment adopted by vote of the people at the general election held Nov. 7, 1972 substituted "18" for "21."

Session Laws 1971, c. 201, s. 4, as amended by Session Laws 1971, c. 1141, s. 1, provides that the amendment shall be effective Jan. 1, 1973.

Sec. 2. *Qualifications of voter.*

"Residence" Defined.—

Residence within the purview of this provision is synonymous with domicile, and as used in the North Carolina Constitution of 1970 continues to mean domicile. *Hall v. Wake County Bd. of Elections*, 280 N.C. 600, 187 S.E.2d 52 (1972).

One-Year Residency Requirement Invalid As Applied to Local Elections.—The one-year durational residency requirement as it relates to the right to vote in local elections, is unconstitutional and invalid, as violative of the equal protection clause of the Fourteenth Amendment. *Andrews v. Cody*, 327 F. Supp. 793 (M.D.N.C. 1971).

Denial of Right to Vote to Convicted Felon Is Not Cruel and Unusual Punish-

ment.—Plaintiff's argument that denial of right to vote for being a convicted felon is cruel and unusual punishment is without merit, especially considering the large number of states that do so. *Fincher v. Scott*, 352 F. Supp. 117 (M.D.N.C. 1972).

United States Const., Amend. XIV, § 2, Expressly Allows Exclusion of Felons.—A state may constitutionally continue the "historic exclusion" of felons from the franchise without regard to whether such exclusion can pass muster under the equal protection clause, because U.S. Const., amend. XIV, § 2, expressly allows the exclusion of felons from the franchise without reduction of representation. *Fincher v. Scott*, 352 F. Supp. 117 (M.D.N.C. 1972).

Sec. 6. *Eligibility to elective office.* Every qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office. (1971, c. 201, s. 1.)

Editor's Note.—

The amendment adopted by vote of the people at the general election held Nov. 7, 1972 inserted "who is 21 years of age."

Session Laws 1971, c. 201, s. 4, as amended by Session Laws 1971, c. 1141, s. 1, provides that the amendment shall be effective Jan. 1, 1973.

Qualifications Are for "Elective Office"; a Sheriff's Deputy Need Not Reside in the County in Which He Serves.—See opinion of Attorney General to Sheriff John H. Stockard, 41 N.C.A.G. 754 (1972).

Sec. 8. *Disqualifications for office.*

Requirement That Applicant for Office Admits Existence of God Violates First Amendment of United States Constitution.

—See opinion of Attorney General to Mr. Clyde Smith, Deputy Secretary of State, 41 N.C.A.G. 727 (1972).

ARTICLE VII

LOCAL GOVERNMENT

Section 1. *General Assembly to provide for local government.* The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

The General Assembly shall not incorporate as a city or town, nor shall it authorize to be incorporated as a city or town, any territory lying within one mile of the corporate limits of any other city or town having a population of 5,000 or more according to the most recent decennial census of population taken by order of Congress, or lying within three miles of the corporate limits of any other city or town having a population of 10,000 or more according to the most recent decennial census of population taken by order of Congress, or lying within four miles of the corporate limits of any other city or town having a population of 25,000 or more according to the most recent decennial census of population taken by order of Congress, or lying within five miles of the corporate limits of any other city or town having a population of 50,000 or more according to the most recent decennial census of population taken by order of Congress. Notwithstanding the foregoing limitations, the General Assembly may incorporate a city or town by an act adopted by vote of three-fifths of all the members of each house. (1971, c. 857, s. 1.)

Editor's Note.—

The amendment adopted by vote of the people at the general election held Nov. 7, 1972, added the second paragraph.

Session Laws 1971, c. 857, s. 4, provides that the amendment shall be effective Jan. 1, 1973.

A municipal corporation, city or town, is an agency created by the State to assist in the civil government of a designated territory. Its charter is the legislative description of the power to be exercised. In re Incorporation of Indian Hills, 280 N.C. 659, 186 S.E.2d 909 (1972).

The charter of a municipal corporation, city or town, is the legislative description of the power to be exercised. In re Incorporation of Indian Hills, 280 N.C. 659, 186 S.E.2d 909 (1972).

Powers of Municipal Corporation. — A municipal corporation possesses, and can exercise, the following powers, and no others: (1) those granted in express words; (2) those necessarily or fairly implied; and (3) those essential to the declared objects

and purposes of the corporation, not simply convenient, but indispensable. In re Incorporation of Indian Hills, 280 N.C. 659, 186 S.E.2d 909 (1972).

Doubt as to Power Resolved against Corporation.—Any fair, reasonable doubt concerning the existence of power is resolved by the courts against a municipal corporation, and the power is denied. In re Incorporation of Indian Hills, 280 N.C. 659, 186 S.E.2d 909 (1972).

County Has No Inherent Power to Levy Taxes. — A sovereign state, as one of its inherent attributes, has the power of taxation, which must be exercised by its legislative branch. The county is not a sovereign and hence does not have the inherent power to levy taxes. A county must derive its taxing power from the State Constitution or from the State's legislative enactments. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

A county board of elections does not have taxing power. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971).

ARTICLE VIII CORPORATIONS

Section 1. *Corporate charters.*

Quoted in *Sides v. Cabarrus Mem. Hosp.*, 22 N.C. App. 117, 205 S.E.2d 784 (1974).

ARTICLE IX EDUCATION

Section 1. *Education encouraged.*

Quoted in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 318 F. Supp. 786 (W.D.N.C. 1970).

Sec. 2. *Uniform system of schools.*

Charlotte-Mecklenburg Schools Ordered to Desegregate.—See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 318 F. Supp. 786 (W.D.N.C. 1970).

Students Expelled under § 115-147 Entitled to Reinstatement or Equivalent.—Under the North Carolina Constitution and the implementing statute, students expelled from

(W.D.N.C. 1970); *Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972).

school pursuant to the authority of § 115-147 may be entitled to either reinstatement or to equivalent free educational opportunities in a more suitable environment. *Webster v. Perry*, 367 F. Supp. 666 (M.D.N.C. 1973).

Quoted in *Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972).

Sec. 3. *School attendance.*

Right to Education.—The Constitution of North Carolina treats education as the right of every child of "sufficient physical

and mental ability." *Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972).

Sec. 4. *State Board of Education.*

Editor's Note.—

For note on defining navigable waters and the application of the public trust doctrine in North Carolina, see 49 N.C.L. Rev. 888 (1971).

Stated in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971).

Sec. 5. *Powers and duties of Board.*

Constitution of 1868 Authorized Rules on Certification of Teachers.—Article IX, § 9, Const. 1868, was designed to make, and did make, the powers conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly. That Constitution, itself, conferred upon the State Board of Education the enumerated powers to regulate the salaries and qualifications of teachers and to make needful rules and regulations in relation to this and other aspects of the administration of the public school system. In the silence of the General Assembly, the authority of the State Board to promulgate and administer further regulations concerning the certification of teachers in the public schools was limited only by other provisions in the Constitution itself. *Guthrie v.*

Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

And Present Constitution Contains Similar Authorization.—Rules and regulations relating to the certification of teachers being needed for the effective supervision and administration of the public school system, there is no difference in substance between the powers of the State Board of Education authorizing regulations on this matter under Art. IX, § 9, Const. 1868, and this section. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

Quoted in *Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972).

ARTICLE X

HOMESTEADS AND EXEMPTIONS

Sec. 5. *Insurance.*

Purpose of Section.—This section was adopted for the express purpose of protecting insurance for wives and children from creditors during the life of the insured. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

The obvious purpose of this section was to enlarge rather than to restrict the rights of the wife and children of an insured. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

The exemption provided by this section is separate from and in addition to other exemptions provided in this Article. This section applies only to one factual situation, namely, where a husband insures his own life for the benefit of his wife and children. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

When Insurance Is "for Sole Use and Benefit of Wife and/or Children".—Insurance is "for the sole use and benefit of the wife and/or children" within the meaning of this section when the "wife and/or children" are the only persons named as beneficiaries. So long as they remain the only persons named as beneficiaries, the policy, including the cash surrender value thereof, is not subject to the claims of the insured's creditors during his lifetime. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

The words "proceeds" or "proceeds and avails" when used in life insurance exemption statutes comprehend the protection of cash surrender values and other values built up during the life of the policies as well as the death benefits. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

Section Does Not Conflict with or Nullify § 58-206.—Section 58-206 exempts the cash surrender values of policies of life insurance in which the "wife and/or children" of the insured (bankrupt) are designated beneficiaries, and this section of the Constitution does not conflict with and nullify § 58-206 in those instances where the "wife and/or children" are designated beneficiaries, but on the contrary is in accord therewith. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

The intent of the General Assembly and of the electorate would be thwarted if this section were construed as providing a lesser benefit than that provided by § 58-206 for the "wife and/or children." *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

Life Policy of Bankrupt Is Protected.—The cash surrender value of a life insurance policy issued on the life of a bankrupt for the benefit of his wife, with the bankrupt reserving the right to change the beneficiary, is not an asset of the bankrupt's estate and is therefore exempt from the claims of the trustee in bankruptcy. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

A trustee in bankruptcy is not entitled to the cash surrender value of a life insurance policy in which the wife is the named beneficiary notwithstanding the insured (bankrupt) has reserved the right to change the beneficiary. *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 177 S.E.2d 291 (1970).

ARTICLE XI

PUNISHMENTS, CORRECTIONS, AND CHARITIES

Section 1. *Punishments.*

Right and Duty of Prosecuting Attorney to Seek Death Penalty. — The grand jury, an agency of the State, after investigation according to law, indicted the defendant for murder in the first degree, and the solicitor, an officer of the State, after investigation, determined, on behalf of the

State, that the defendant should be tried for this offense and that the death penalty should be sought. These determinations having been made on behalf of the State, it was the right and duty of the prosecuting attorney, vigorously, but fairly and in accordance with law, both in the presentation

of evidence and in his argument, to seek that result. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

Cited in *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974).

Sec. 2. Death punishment.

Imposition of Death Penalty Is Not Cruel and Unusual Punishment. — The imposition of the death penalty for murder in the first degree is not, per se, a violation of the Fourteenth Amendment to the Constitution of the United States or of any provision of the Constitution of North

Carolina. It is not cruel and unusual punishment in the constitutional sense, being expressly authorized by this section. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

Cited in *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974).

ARTICLE XIV
MISCELLANEOUS

Sec. 3. General laws defined. Whenever the General Assembly is directed or authorized by this Constitution to enact general laws, or general laws uniformly applicable throughout the State, or general laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws, and every amendment or repeal of any law relating to such subject matter shall also be general and uniform in its effect throughout the State. General laws may be enacted for classes defined by population or other criteria. General laws uniformly applicable throughout the State shall be made applicable without classification or exception in every unit of local government of like kind, such as every county, or every city and town, but need not be made applicable in every unit of local government in the State. General laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, shall be made applicable without classification or exception in every unit of local government, or in every local court district, as the case may be. The General Assembly may at any time repeal any special, local, or private act. (1969, c. 1200, s. 1.)

Editor's Note.—

The amendment adopted by vote of the people at the general election held Nov. 3, 1970, effective July 1, 1973, inserted "or general laws uniformly applicable throughout the State" in the first sentence, sub-

stituted "such" for "that" preceding "subject matter" near the end of the first sentence, added the third sentence and deleted "county, city and town, and other" preceding "unit of local government" near the end of the fourth sentence.

Sec. 5. Conservation of natural resources. It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.

To accomplish the aforementioned public purposes, the State and its counties, cities and towns, and other units of local government may acquire by purchase or gift properties or interests in properties which shall, upon their special dedication to and acceptance by resolution adopted by a vote of three-fifths of the members of each house of the General Assembly for those public purposes, constitute part of the "State Nature and Historic Preserve," and which shall not be used for other purposes except as authorized by law enacted by a vote of three-fifths of the members of each house of the General Assembly. The General Assembly shall prescribe by

general law the conditions and procedures under which such properties or interests therein shall be dedicated for the aforementioned public purposes. (1971, c. 630, s. 1.)

Editor's Note.—This section was added by the constitutional amendment adopted by vote of the people at the general election held Nov. 7, 1972.

Session Laws 1971, c. 630, s. 4, provides that the section shall be effective July 1, 1973.

Constitution of the United States

AMENDMENTS

AMENDMENT XXVI.

§ 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

The Twenty-sixth Amendment was certified by the Administrator of General Services on July 5, 1971, to have been ratified by three fourths of the whole

number of states and to have become valid as a part of the Constitution of the United States.

Constitution of the United States

Article I

Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Year, and the Indians not taxed, three fifths of all other Persons.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Year, and the Indians not taxed, three fifths of all other Persons.

Appendix I. Rules of Practice in the General Court of Justice

(1) RULES OF PRACTICE IN THE SUPREME COURT OF NORTH CAROLINA

1. Terms of Court

The rules of the Supreme Court, etc.—

In accord with 2nd paragraph in original. See *State v. Brown*, 9 N.C. App. 534, 176 S.E.2d 907 (1970).

Appellate rules of practice are applicable

to indigent defendants and their court-appointed counsel as they are to all others. *State v. Jacobs*, 278 N.C. 693, 180 S.E.2d 832 (1971).

6. Appeals in Criminal Cases—Priority

Cited in *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E.2d 769 (1974).

19. Transcripts

(1) What to Contain and How Arranged.

Jurisdiction of Trial Court Should Appear.—The Supreme Court, in reviewing criminal appeals, will require that the record of the case on appeal show that the trial court had jurisdiction of the defendant and of the offense

charged. *State v. Willis*, 285 N.C. 195, 204 S.E.2d 33 (1974).

Applied in *State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803 (1974).

(3) Exceptions Grouped.

Rules Mandatory.—

The rules of practice in the Supreme Court are mandatory and this rule and Rule 21 require that an error asserted on appeal must be based upon an appropriate exception duly taken and shown in the record. *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971).

What Assignment of Error Should Set Forth.—The assignment of error should set forth within itself the question asked, the objection, the ruling on the objection, and what the witness would have answered if he had been permitted to testify. *State v. Davis*, 282 N.C. 107, 191 S.E.2d 664 (1972).

The question to which the objection was sustained and the answer which the witness would have made had he been permitted to answer must be set out in the assignment. *State v. Davis*, 284 N.C. 701, 202 S.E.2d 770 (1974).

Not Sufficient to Show Exceptions, etc.—

Since the rules require that assignments of error specifically show within themselves the questions sought to be pre-

sented, it follows, therefore, that a mere reference in the assignment of error to the record page where the asserted error may be discovered fails completely to comply with this rule and Rule 21. *State v. Brown*, 9 N.C. App. 534, 176 S.E.2d 907 (1970).

Assignments Not Supported by Exceptions, etc.—

Rules 19 and 21 of both the Supreme Court and the Court of Appeals require any error asserted on appeal to be supported by an exception duly taken and shown in the record. *State v. Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972).

Where the record reveals that testimony was received without objection or exception noted, an assignment of error based on the admission of that testimony is ineffectual and presents no question for appellate review. *State v. Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972).

Assignment May Not Present Question Not Embraced in Exception.—Assignments of error must be based upon exceptions duly noted, and may not present a question not embraced in an exception. *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971).

Where the exceptions appear in the record, etc.—

Exceptions which appear for the first time in the purported assignments of error present no question for appellate review. *State v. Jacobs*, 278 N.C. 693, 180 S.E.2d 832 (1971); *State v. Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972).

Exceptions which appear nowhere in the record except under the purported assignments of error will not be considered. *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971).

Assignments Must Point Out, etc.—

Each assignment must specifically state the alleged error so that the question sought to be presented is therein revealed. *State v. Jacobs*, 278 N.C. 693, 180 S.E.2d 832 (1971); *State v. Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972).

An assignment of error does not comply with this rule if it does not itself specifically show the questions sought to be presented. *State v. Gainey*, 280 N.C. 366, 185 S.E.2d 874 (1972).

Evidence Admitted or Rejected Must Be Set Out in Assignment.—When the assignment is that the court erred in the admission or rejection of evidence the evidence

itself must be set out in the assignment, and a mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. *State v. Fox*, 277 N.C. 1, 175 S.E.2d 561 (1970); *State v. Fountain*, 282 N.C. 58, 191 S.E.2d 674 (1972).

Admission of Evidence.—An assignment of error does not comply with this rule where defendant made no objection to the question which elicited the testimony in question and there was no motion to strike it. *State v. Gainey*, 280 N.C. 366, 185 S.E.2d 874 (1972).

Discretion of Supreme Court.—

Since no exception was taken to the entry of the trial judge's order, there was no basis for the assignment of error, and no question of law was presented to the Supreme Court for decision, but due to the seriousness of the case, the court considered the assignment. *State v. Jones*, 278 N.C. 259, 179 S.E.2d 433 (1971).

Applied in *Singleton v. Stewart*, 280 N.C. 460, 186 S.E.2d 400 (1972); *State v. Davis*, 282 N.C. 107, 191 S.E.2d 664 (1972).

Quoted in *State v. Sawyer*, 283 N.C. 289, 196 S.E.2d 250 (1973).

Cited in *Dunn v. City of Charlotte*, 284 N.C. 542, 201 S.E.2d 873 (1974).

(4) Evidence to Be Stated in Narrative Form.

Applied in *State v. Allen*, 283 N.C. 354, 196 S.E.2d 256 (1973).

21. Exceptions

I. EXCEPTIONS.

Rule Mandatory.—

In accord with 2nd paragraph in original. See *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971).

An assignment of error alone, etc.—

This rule and Rule 19 require that an error asserted on appeal must be based upon an appropriate exception duly taken and shown in the record. *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971); *State v. Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972).

Assignments of error must be based upon exceptions duly noted, and may not present a question not embraced in an exception. *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971).

Where the assignments of error are not based upon any exceptions in the record they should not be considered by this court. *State v. Boyd*, 278 N.C. 682, 180 S.E.2d 794 (1971).

Where the record reveals that testimony was received without objection or exception noted, an assignment of error based on the admission of that testimony is ineffec-

tual and presents no question for appellate review. *State v. Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972).

Exceptions which appear nowhere in the record except under the purported assignments of error will not be considered. *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971).

Exceptions which appear for the first time in the purported assignments of error present no question for appellate review. *State v. Jacobs*, 278 N.C. 693, 180 S.E.2d 832 (1971); *State v. Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972); *City of Kings Mountain v. Cline*, 281 N.C. 269, 188 S.E.2d 284 (1972).

Assignment of Error Must Be Clearly Stated.—

Each assignment must specifically state the alleged error so that the question sought to be presented is therein revealed. *State v. Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972).

Exceptions Must Be Set Out, etc.—

An assignment of error will not present a question unless it is based upon an exception set out in the case on appeal and

numbered as required by this rule. *City of Kings Mountain v. Cline*, 281 N.C. 269, 188 S.E.2d 284 (1972).

Reference to Page.—

Since the rules require that assignments of error specifically show within themselves the questions sought to be presented, it follows, therefore, that a mere reference in the assignment of error to the record page where the asserted error may be discovered fails completely to comply with this rule and Rule 19(3). *State v. Brown*, 9 N.C. App. 534, 176 S.E.2d 907 (1970).

Exceptions to Evidence.—

Ordinarily, where evidence admissible for some purposes, but not for all, is admitted generally, its admission will not be held for error unless the appellant requested at the time of its admission that its purpose be restricted. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970), appeal dismissed, 277 N.C. 459, 177 S.E.2d 900 (1970); *State v. Rhodes*, 10 N.C. App. 154, 177 S.E.2d 754 (1970); *State v. Richards*, 15 N.C. App. 163, 189 S.E.2d 577 (1972).

When a general objection is interposed

and overruled, it will not be considered reversible error if the evidence is competent for any purpose. *State v. Dawson*, 278 N.C. 351, 180 S.E.2d 140 (1971).

Case Considered Notwithstanding Absence of Exception. — Since no exception was taken to the entry of the trial judge's order, there was no basis for the assignment of error, and no question of law was presented to the Supreme Court for decision, but due to the seriousness of the case, the court considered the assignment. *State v. Jones*, 278 N.C. 259, 179 S.E.2d 433 (1971).

An assignment based on the court's failure to charge should set out the defendant's contention as to what the court should have charged. *State v. Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972).

Applied in *State v. Bryant*, 282 N.C. 92, 191 S.E.2d 745 (1972); *State v. Washington*, 283 N.C. 175, 195 S.E.2d 534 (1973); *State v. Lampkins*, 283 N.C. 520, 196 S.E.2d 697 (1973).

Cited in *State v. Sawyer*, 283 N.C. 289, 196 S.E.2d 250 (1973); *State v. Foster*, 284 N.C. 259, 200 S.E.2d 782 (1973); *Dunn v. City of Charlotte*, 284 N.C. 542, 201 S.E.2d 873 (1974).

28. Appellant's Brief

Exceptions Not Discussed, etc.—

In accord with 2nd paragraph in original. See *State v. Wilson*, 280 N.C. 674, 187 S.E.2d 22 (1972); *State v. Willis*, 281 N.C. 558, 189 S.E.2d 190 (1972); *State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803 (1974).

In accord with 12th paragraph in original. See *State v. Jenerett*, 281 N.C. 81, 187 S.E.2d 735 (1972).

Even though based upon exceptions duly noted in the record and preserved in the statement of the case on appeal, assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, are deemed abandoned. *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971).

Where no authority was cited and no reason stated in support of the assignment of error in permitting certain testimony, save the bare assertion that it was irrelevant and prejudicial, the assignment was deemed abandoned. *State v. Dawson*, 278 N.C. 351, 180 S.E.2d 140 (1971).

Where assignments of error are not discussed in defendant's brief they are deemed abandoned. *State v. Boyd*, 278 N.C. 682, 180 S.E.2d 794 (1971).

The statement in the brief as to the questions involved may be treated as the

abandonment of all others. *State v. Willis*, 281 N.C. 558, 189 S.E.2d 190 (1972).

In Capital Case.—

Although assignments of error not discussed in defendant's brief are deemed abandoned, in capital cases these assignments will be carefully considered. *State v. Hairston*, 280 N.C. 220, 185 S.E.2d 633 (1972); *State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803 (1974).

Where the assignment of error is based on failure to charge the jury, it is necessary to set out appellant's contention as to what the court should have charged. *State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803 (1974).

Applied in *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971); *Investment Properties of Asheville, Inc. v. Allen*, 281 N.C. 174, 188 S.E.2d 441 (1972); *State v. Anderson*, 281 N.C. 261, 188 S.E.2d 336 (1972); *State v. Eppley*, 282 N.C. 249, 192 S.E.2d 441 (1972); *State v. Washington*, 283 N.C. 175, 195 S.E.2d 534 (1973); *State v. Sawyer*, 283 N.C. 289, 196 S.E.2d 250 (1973); *State v. Felton*, 283 N.C. 368, 196 S.E.2d 239 (1973); *State v. Sneed*, 284 N.C. 606, 201 S.E.2d 867 (1974).

Cited in *State v. Cradle*, 281 N.C. 198, 188 S.E.2d 296 (1972); *State v. Foster*, 284 N.C. 259, 200 S.E.2d 782 (1973).

44. Petition to Rehear

Applied in *Investment Properties of Asheville, Inc. v. Allen*, 283 N.C. 277, 196 S.E.2d 262 (1973).

(2) SUPPLEMENTARY RULES

GOVERNING THE HEARING OF CAUSES IN THE SUPREME COURT
WHICH WERE ORIGINALLY DOCKETED IN THE COURT OF
APPEALS AND OTHER RULES REQUIRED BY THE ACT
ESTABLISHING THE COURT OF APPEALS.

Rule 3. Appeals as of Right from the Court of Appeals to the Supreme Court.

Cited in *Keiger v. Winston-Salem Bd. of Adjustment*, 278 N.C. 17, 178 S.E.2d 616 (1971).

Rule 7. Records and Briefs—Review of a Determination of the Court of Appeals by Supreme Court.

Applied in *State v. Kelly*, 281 N.C. 618, 189 S.E.2d 163 (1972).

(3) ORDER TRANSFERRING CERTAIN CASES FROM THE COURT OF APPEALS TO THE SUPREME COURT

(Rescinded as of November 1, 1971.)

(4) RULES OF PRACTICE IN THE COURT OF APPEALS OF NORTH CAROLINA

Rule

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|---|--|
| 1. Appeals—When Heard. | 18. Appeal Docketed and Dismissed Not to Be Reinstated Until Appellant Has Paid Costs. |
| 2. Appeals—How Docketed. | 19. Record on Appeal. |
| 3. Appeals—When Not Entertained. | 24. Appeal Dismissed if Record on Appeal Not Properly Reproduced. |
| 4. Appeals—When Heard. | 27. Briefs. |
| 5. Appeals—Criminal Actions. | 28. Appellant's Brief. |
| 6. [Retained.] | 29. Appellee's Brief. |
| 7. [Retained.] | 34. Certiorari and Supersedeas. |
| 8. [Retained.] | (a) When Certiorari Applied for. |
| 9. [Retained.] | 43. Executions. |
| 10. Submission on Briefs. | (b) Issuing and Return of. |
| 11. Briefs Regarded as Personal Appearance. | 45. Sittings of the Court. |
| 12. [Retained.] | 47. [Retained.] |
| 13. Appeal Dismissed for Failure to Docket in Time. | |
| (1) Appeal Docketed by Appellee When Frivolous and Taken for Purposes of Delay. | |

1. Appeals—When Heard.

Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. For the transaction of other business the Court of Appeals shall be open at all times.

Editor's Note. —

The amendment adopted Sept. 28, 1973, effective Jan. 1, 1974, rewrote this rule, which formerly provided for two sessions of the Court, a Spring Session and a Fall Session, each year.

The Rules of Practice, etc.—

In accord with 2nd paragraph in original. See *State v. Thigpen*, 10 N.C. App.

88, 178 S.E.2d 6 (1970); *State v. Wallace*, 16 N.C. App. 624, 192 S.E.2d 653 (1972).

Appellate rules of practice are applicable to indigent defendants and their court-appointed counsel as they are to all others. *State v. Jacobs*, 278 N.C. 693, 180 S.E.2d 832 (1971).

3. Appeals—How Docketed.

Appeals in both civil and criminal cases shall be docketed in the order in which they are filed with the clerk.

Editor's Note. — The amendment adopted July 1, 1974, effective July 24, 1974, deleted the former first sentence, which provided that each appeal should be docketed from the judicial district to which it belonged and that criminal cases should be placed at the head of the docket, and deleted "each in its own class," following "shall be docketed."

4. Appeals—When Not Entertained.

The Court of Appeals will not entertain an appeal:

From the ruling on an interlocutory motion, unless provided for elsewhere. Any interested party may enter an exception to the ruling on the motion and present the question thus raised to this Court on the final appeal; provided, that when any interested party conceives that he will suffer substantial harm from the ruling on the motion, unless the ruling is reviewed by this Court prior to the trial of the cause on its merits, he may petition this Court for a writ of certiorari within thirty days from the date of the entry of the order ruling on the motion.

Editor's Note.—The amendment adopted Jan. 20, 1971, rewrote this rule.

Motion to Dismiss.—An order denying a motion to dismiss an action is an interlocutory order from which no immediate right of appeal lies. *GMAC v. Feder*, 12 N.C. App. 696, 184 S.E.2d 383 (1971).

Motion to Strike.—This rule denies to a party the right of appeal from an order which denied a motion to strike defendant's answer and counterclaim. *Wachovia Bank & Trust Co. v. Parker Motors, Inc.*, 13 N.C. App. 632, 186 S.E.2d 675 (1972).

No appeal lies from interlocutory order allowing petitioners' motion to strike portions of respondent's answer and further answer. *Gardner v. Brady*, 13 N.C. App. 647, 186 S.E.2d 659 (1972).

An order allowing defendants' motions to strike portions of the complaint is not appealable. *Woods v. James Enterprises*, 13 N.C. App. 650, 186 S.E.2d 677 (1972).

Appointment of Guardian Ad Litem.—No appeal lies from interlocutory order affirming an order of clerk which appointed a guardian ad litem. *Gardner v. Brady*, 13 N.C. App. 647, 186 S.E.2d 659 (1972).

Denial of Motion for Summary Judgment.—The Court of Appeals dismisses as fragmentary an appeal from a denial of a motion for summary judgment. *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

Denial of Motion to Dismiss Complaint for Failure to State Cause of Action.—The

Court of Appeals will not entertain an appeal from an order denying defendant's motion to dismiss plaintiff's complaint for failure of the complaint to state a cause of action upon which relief can be granted; the defendant's remedy is to petition for writ of certiorari. *Green v. Best*, 9 N.C. App. 599, 176 S.E.2d 795 (1970).

Applied in *Acorn v. Jones Knitting Corp.*, 12 N.C. App. 266, 182 S.E.2d 862 (1971); *Moore v. Moore*, 14 N.C. App.

165, 187 S.E.2d 371 (1972); *Dennis v. Ross*, 15 N.C. App. 228, 189 S.E.2d 607 (1972); *In re Northwestern Bonding Co.*, 16 N.C. App. 272, 192 S.E.2d 33 (1972).

Quoted in *In re Mark*, 15 N.C. App. 574, 190 S.E.2d 381 (1972).

Cited in *Shaw v. Stiles*, 13 N.C. App. 173, 185 S.E.2d 268 (1971); *Atkinson v. Tarheel Homes & Realty Co.*, 14 N.C. App. 638, 188 S.E.2d 703 (1972).

5. Appeals—When Heard.

In general, appeals will be calendared for hearing in the order in which they are docketed, subject to the power of the Court to vary the order to give priority to criminal appeals, or for any other cause deemed appropriate. Except as advanced for peremptory setting on motion of a party or of the Court's own initiative, no appeal will be calendared for hearing at a time less than 30 days after the filing of the appellant's brief. Except where a shorter time is provided by the Court in conjunction with the peremptory setting of an appeal for hearing, the clerk of the Court of Appeals will give not less than 20 days' notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar.

If the record on appeal is not docketed within ninety days after the date of the judgment, order, decree, or determination appealed from, the case may be dismissed under Rule 17, if the appellee shall file a proper certificate prior to the docketing of such record on appeal; provided, the trial tribunal may, for good cause, extend the time not exceeding sixty days, for docketing the record on appeal.

Editor's Note.—

The amendment adopted Aug. 31, 1972, effective July 1, 1973, substituted "thirty-five days" for "twenty-eight days" near the beginning of the first paragraph.

The amendment adopted July 1, 1974, effective July 24, 1974, rewrote the first paragraph.

Rule Determines Time for Docketing, etc.—

The docketing of the record on appeal in the Court of Appeals is determined by this rule. *Simmons v. Textile Workers Union*, 15 N.C. App. 220, 189 S.E.2d 556 (1972).

Time for Docketing Stated in Days, Not Months.—It should be noted that the time for docketing is stated in "days," not "months." *State v. Hamby*, 16 N.C. App. 122, 191 S.E.2d 245 (1972).

Extension of Time for Docketing, etc.—

In accord with 2nd paragraph in original. See *Clark v. Williams*, 22 N.C. App. 341, 206 S.E.2d 311 (1974); *State v. Peek*, 22 N.C. App. 350, 206 S.E.2d 386 (1974).

In accord with 2nd paragraph in original. See *See Campbell v. McNeil*, 15 N.C. App. 559, 190 S.E.2d 383 (1972).

An order extending the time within which to serve a case on appeal does not automatically extend the time within which an appeal must be docketed. *State v. Hunt*,

14 N.C. App. 626, 188 S.E.2d 546 (1972); *State v. Scott*, 16 N.C. App. 424, 192 S.E.2d 54 (1972).

The record on appeal must be docketed in the Court of Appeals within 90 days after the date of the judgment, order, decree or determination appealed from. Within this period of 90 days, but not after the expiration thereof, the trial tribunal may for good cause extend the time not exceeding 60 days for docketing the record on appeal. *Simmons v. Textile Workers Union*, 15 N.C. App. 220, 189 S.E.2d 556 (1972).

After the time for docketing the record on appeal in the Court of Appeals has expired, the trial tribunal is without authority to enter a valid order extending the time for docketing. *Simmons v. Textile Workers Union*, 15 N.C. App. 220, 189 S.E.2d 556 (1972); *Reap v. City of Albemarle*, 16 N.C. App. 171, 191 S.E.2d 373 (1972).

Under this rule the trial tribunal may, for good cause, extend the time for docketing the record on appeal for a period not exceeding 60 days, but this cannot be accomplished by an order purporting to extend the time for an indefinite period or to an undesignated date. *Clark v. Williams*, 22 N.C. App. 341, 206 S.E.2d 311 (1974).

Where the record on appeal was not docketed

in the Court of Appeals and no order extending the time for docketing was entered within 90 days after the date of the judgment, but after the expiration of the 90-day period the trial judge signed an order purporting to extend the time for docketing, the trial tribunal is without authority to enter a valid order extending the time for docketing, and the appeal is therefore subject to dismissal. *Vincent v. Vincent*, 18 N.C. App. 668, 197 S.E.2d 801 (1973).

Only the judge who tried the case has authority to sign an order extending the time for service of the case on appeal. *Keyes v. Hardin Oil Co.*, 13 N.C. App. 645, 186 S.E.2d 678 (1972).

Order Granting Extension Not Signed by Judge Who Signed Order Appealed from.—Criminal appeal is subject to dismissal when the order granting the extension of time to serve the case on appeal was not signed by the trial judge who signed the original order appealed from. *State v. Shoemaker*, 9 N.C. App. 273, 175 S.E.2d 781 (1970).

Effect of Noncompliance.—

For failure to docket in apt time, an appeal is subject to dismissal. *State v. Morgan*, 9 N.C. App. 624, 177 S.E.2d 457 (1970); *Clark v. Williams*, 22 N.C. App. 341, 206 S.E.2d 311 (1974).

For failure to docket a record on appeal within the time allowed by this rule, an appeal is dismissed. *Public Serv. Co. v. Lovin*, 9 N.C. App. 709, 177 S.E.2d 448 (1970); *James v. Harris*, 9 N.C. App. 733, 177 S.E.2d 306 (1970); *Williford v. Williford*, 10 N.C. App. 541, 179 S.E.2d 118 (1971); *State v. Peek*, 22 N.C. App. 350, 206 S.E.2d 386 (1974).

The appeal is subject to be dismissed for failure to docket the record on appeal in the Court of Appeals within the time required by the rules. *State v. Hamby*, 16 N.C. App. 122, 191 S.E.2d 245 (1972).

For failure of appellant to docket the record on appeal within the time allowed by the rules of the Court of Appeals, an appeal is subject to dismissal. *State v. Adams*, 16 N.C. App. 640, 192 S.E.2d 648 (1972); *Real Estate Exch. & Investors, Inc. v. Tongue*, 17 N.C. App. 575, 194 S.E.2d 873 (1973).

Within 90 days after the date of a judgment appealed from, but not thereafter, the trial tribunal may for good cause shown extend the time for docketing the record on appeal not exceeding 60 days, but, in a case when the second order extending time to docket was signed, the 90-day period had already expired and the trial tribunal no longer had authority to enter a valid order further extending the time. *State v. Las-*

siter, 18 N.C. App. 208, 196 S.E.2d 592 (1973).

The penalty for violating this rule is dismissal of the case. *State v. Small*, 20 N.C. App. 423, 201 S.E.2d 584 (1974).

Appeal May Be Treated as Petition for Certiorari.—When this rule has been violated, defendant's appeal may be treated as petition for certiorari and granted in order that the case may be considered on its merits. *State v. Small*, 20 N.C. App. 423, 201 S.E.2d 584 (1974).

Failure to Serve the Case on Appeal Warranted Dismissal.—Where the case involved affidavits which were not part of the record proper, it could not be appealed by docketing the record proper without a statement of case on appeal. Thus the trial court was correct in dismissing the appeal for failure to serve the case on appeal within the time allowed. *Pressley v. American Cas. Co.*, 14 N.C. App. 561, 188 S.E.2d 734 (1972).

Applied in *State v. Burgess*, 11 N.C. App. 430, 181 S.E.2d 120 (1971); *State v. Cook*, 11 N.C. App. 439, 181 S.E.2d 172 (1971); *Horton v. Davis*, 11 N.C. App. 592, 181 S.E.2d 781 (1971); *Phillips v. Wrenn Bros.*, 12 N.C. App. 35, 182 S.E.2d 285 (1971); *State v. Locklear*, 12 N.C. App. 36, 182 S.E.2d 200 (1971); *King v. Daniels*, 12 N.C. App. 156, 182 S.E.2d 640 (1971); *Sheets v. Sessions*, 12 N.C. App. 283, 182 S.E.2d 873 (1971); *Lewter v. Herndon*, 13 N.C. App. 242, 184 S.E.2d 926 (1971); *State v. Bennett*, 13 N.C. App. 251, 185 S.E.2d 7 (1971); *Whitehead v. Whitehead*, 13 N.C. App. 393, 185 S.E.2d 706 (1972); *State ex rel. Simmons v. Johnson*, 14 N.C. App. 168, 187 S.E.2d 370 (1972); *State v. Barbee*, 14 N.C. App. 173, 187 S.E.2d 356 (1972); *State v. Davis*, 14 N.C. App. 278, 188 S.E.2d 13 (1972); *State v. Guffey*, 14 N.C. App. 281, 188 S.E.2d 29 (1972); *Cater v. Zurich Ins. Co.*, 14 N.C. App. 282, 188 S.E.2d 27 (1972); *State v. Simpson*, 14 N.C. App. 456, 188 S.E.2d 535 (1972); *State v. Jones*, 14 N.C. App. 656, 188 S.E.2d 678 (1972); *State v. Oxendine*, 15 N.C. App. 222, 189 S.E.2d 607 (1972); *State v. Lee*, 15 N.C. App. 234, 189 S.E.2d 505 (1972); *State v. Bauler*, 15 N.C. App. 540, 190 S.E.2d 275 (1972); *State v. LoSicco*, 16 N.C. App. 401, 192 S.E.2d 102 (1972); *State v. Walters*, 17 N.C. App. 94, 193 S.E.2d 316 (1972); *State v. Walls*, 17 N.C. App. 127, 193 S.E.2d 387 (1972); *Lambert v. Patterson*, 17 N.C. App. 148, 193 S.E.2d 380 (1972); *James v. Greenway, Inc.*, 17 N.C. App. 156, 193 S.E.2d 372 (1972); *Johnson v. Johnson*, 17 N.C. App. 398, 194 S.E.2d 522 (1973); *Bensch v. Bensch*, 18

N.C. App. 43, 195 S.E.2d 587 (1973); State v. Tilley, 18 N.C. App. 341, 196 S.E.2d 549 (1973); Newman v. Newman, 18 N.C. App. 674, 197 S.E.2d 555 (1973); Bill v. Hughes, 21 N.C. App. 152, 203 S.E.2d 395 (1974).

Stated in State v. Treadway, 12 N.C. App. 167, 182 S.E.2d 638 (1971); State v. Davis, 12 N.C. App. 174, 182 S.E.2d 662 (1971); Crow v. Crow, 12 N.C. App. 176, 182 S.E.2d 650 (1971); State v. Williams, 13 N.C. App. 423, 185 S.E.2d 604 (1972); Bank of N.C. v. Barry, 14 N.C. App. 169, 187 S.E.2d 478 (1972); State v. Griffith, 14 N.C. App. 177, 187 S.E.2d 370 (1972); State v. Johnson, 14 N.C. App. 279, 188 S.E.2d

16 (1972); State v. Brady, 16 N.C. App. 555, 192 S.E.2d 640 (1972).

Cited in State v. Lewis, 9 N.C. App. 323, 176 S.E.2d 1 (1970); State v. McDaniel, 10 N.C. App. 743, 179 S.E.2d 833 (1971); Lee v. Rowland, 11 N.C. App. 27, 180 S.E.2d 455 (1971); Branch v. Branch, 14 N.C. App. 651, 188 S.E.2d 528 (1972); Choate v. Choate, 15 N.C. App. 89, 189 S.E.2d 647 (1972); State v. Stitt, 18 N.C. App. 217, 196 S.E.2d 532 (1973); State v. Bryant, 18 N.C. App. 340, 196 S.E.2d 628 (1973); Lord v. Jeffreys, 22 N.C. App. 13, 205 S.E.2d 563 (1974).

6. Appeals—Criminal Actions.

(a) *Appeal Bond*. If a justified appeal bond (except in pauper appeals) is not filed with the record on appeal, as required by G.S. 1-286, the appeal will be dismissed.

(b) *Pauper Appeals*. See Rule 22.

(c) *When Appeal Abates*. See Rule 37.

(d) *Appeal Dismissed if Record on Appeal Not Printed or Mimeographed or Otherwise Reproduced as Provided by Rule*. See Rule 24.

Editor's Note.—The amendment adopted Aug. 31, 1972, effective July 1, 1973, substituted "thirty-five days" for "twenty-eight days" in two places in the former first paragraph.

The amendment adopted Sept. 28, 1973,

effective Jan. 1, 1974, deleted the former first paragraph, relating to docketing and calling of appeals in criminal cases.

Cited in Lee v. Rowland, 11 N.C. App. 27, 180 S.E.2d 445 (1971).

7. Retained for future use.

Editor's Note. — This rule, which related to call of judicial districts, was deleted by

amendment adopted Sept. 28, 1973, effective Jan. 1, 1974.

8. Retained for future use.

Editor's Note. — This rule, which related to disposition of cases at the end of the docket,

was deleted by amendment adopted Sept. 28, 1973, effective Jan. 1, 1974.

9. Retained for future use.

Editor's Note. — This rule, which related to call of docket, was deleted by amendment adopted Sept. 28, 1973, effective Jan. 1, 1974.

10. Submission on Briefs.

By consent of counsel, any case may be submitted without oral argument, upon briefs by both sides, without regard to the number of the case on the docket, or date of docketing the appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket; but the Court, notwithstanding, may direct an oral argument to be made, if it shall deem best.

Editor's Note. — The amendment adopted Sept. 28, 1973, effective Jan. 1, 1974, deleted the

former second paragraph, relating to docketing of appeals submitted under this rule.

11. Briefs Not Received After Argument.

Applied in State v. Brooks, 15 N.C. App. 367, 190 S.E.2d 338 (1972).

12. Briefs Regarded as Personal Appearance.

When a case has been scheduled for oral argument and is reached, in the event of the absence of counsel for either or both sides, the briefs shall be considered as personal appearance.

Editor's Note. — The amendment adopted July 1, 1974, effective July 24, 1974, deleted "on the regular call of the docket" following "reached."

15. Retained for future use.

Editor's Note. — This rule, which related to dismissal of appeals not prosecuted, was deleted by amendment adopted Sept. 28, 1973, effective Jan. 1, 1974.

17. Appeal Dismissed for Failure to Docket in Time.

If the appellant shall fail to bring up and file the record on appeal within the time provided by Rule 5, the appellee may file with the clerk of this Court a motion to docket and dismiss at appellant's cost. The appellee must file a certificate of the clerk or comparable officer of the trial tribunal from which the appeal comes, showing the names of the parties thereto, the time when the judgment, order, decree, or determination was entered, and appeal therefrom taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled; provided, that such motion of appellee to docket and dismiss the appeal will not be considered unless the appellee, before making such motion to dismiss, has paid the clerk of this Court the fee charged by the statute or rule of Court for docketing an appeal, the fee for preparing and entering judgment, and the determination fee; execution for such amount to issue in favor of appellee against appellant.

(1) *Appeal Docketed by Appellee When Frivolous and Taken for Purposes of Delay.* A record on appeal which is obviously frivolous and appears to have been taken only for purposes of delay, may be docketed in this Court by appellee before the time required by Rule 5, and if it appears to the Court that the appellee's contention is correct, the appeal will be dismissed at cost of appellant.

Editor's Note. — The amendment adopted Sept. 28, 1973, effective Jan. 1, 1974, deleted, preceding the proviso to the present second sentence of the first paragraph, "The motion may be allowed within ten days or at the first session of the Court thereafter, with leave to the appellant within thirty days and after five days' notice to the appellee to apply for the redocketing of the cause."

The amendment adopted July 1, 1974, effective July 24, 1974, substituted "within the time provided by" for "before the call of cases from the district to which the case belongs, by failure to comply with" in the first sentence.

Record on Appeal from Judgment on the Pleadings.—Where an appeal is from a judgment on the pleadings, the record proper constitutes the case to be filed in the appellate court, and it is not necessary for the appealing parties to file a statement of case on appeal. Dismissal for failure to serve case on appeal within the time al-

lowed is not proper in such a case. *Pressley v. American Cas. Co.*, 14 N.C. App. 561, 188 S.E.2d 734 (1972).

Authority to Enter Valid Order Extending Time for Docketing. — Where the record on appeal was not docketed in the Court of Appeals and no order extending the time for docketing was entered within 90 days after the date of the judgment, but after the expiration of the 90-day period the trial judge signed an order purporting to extend the time for docketing, the trial tribunal was without authority to enter a valid order extending the time for docketing, and the appeal is therefore subject to dismissal. *Vincent v. Vincent*, 18 N.C. App. 668, 197 S.E.2d 801 (1973).

Applied in *Lewter v. Herndon*, 13 N.C. App. 242, 184 S.E.2d 926 (1971); *Lambert v. Patterson*, 17 N.C. App. 148, 193 S.E.2d 380 (1972); *Bensch v. Bensch*, 18 N.C. App. 43, 195 S.E.2d 587 (1973).

18. Appeal Docketed and Dismissed Not to Be Reinstated Until Appellant Has Paid Costs.

When an appeal is dismissed by reason of the failure of the appellant to bring up a record on appeal as provided in Rule 5, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant has paid to the clerk of this Court for the use and benefit of the appellee the costs of the appellee in procuring the certificate and in causing the same to be docketed and the appeal dismissed.

Editor's Note. — The amendment adopted Sept. 28, 1973, effective Jan. 1, 1974, deleted "and Rule 17" following "Rule 5" near the beginning of this rule.

19. Record on Appeal.

(a) *What to Contain and How Arranged.* In every record on appeal brought to this Court the trial tribunal and the presiding Judge shall be identified, the appealing party shall be identified, and proceedings shall be set forth in the order of the time in which they occurred, and the processes, orders, and documents included in the record on appeal shall be identified by their title or heading, and shall be arranged to follow each other in the order that they were filed. Every pleading, motion, affidavit, or other document included in the record on appeal shall plainly show the date on which it was filed and, if verified, the date of the verification and the name of the person who verified it. Every order, judgment, decree, and determination shall show the date on which it was signed and the date on which it was filed.

The pleadings on which the case was tried, the issues, and the order, judgment, decree, or determination appealed from shall be included in the record on appeal in all cases, and the charge of the Court where there is exception thereto. It shall not be necessary to include any affidavits, orders, processes, or documents not required for an understanding of the exceptions relied on, provided counsel so agree in writing, and such agreement is included; but, in the event of disagreement of counsel, the trial tribunal shall designate by written order what shall be included in the record on appeal.

This rule is subject to the power of this Court, in its discretion, to order additional parts of the record or proceedings to be sent up, and added to the record on appeal.

The pages of the record on appeal shall be numbered. On the front thereof shall be an index and at the end shall be the signature, office address and telephone number of counsel representing the appellant.

Editor's Note.—

The amendment adopted Jan. 20, 1971, divided the last paragraph of subsection (a) into two sentences and added to the second sentence the requirement that at the end of the record there shall be the signature, office address and telephone number of counsel representing the appellant.

As the rest of this rule was not changed by the amendment, only subsection (a) is set out.

The rules of practice are mandatory and a failure to comply with them subjects the appeal to dismissal by the Court of Appeals ex mero motu. *State v. Harris*, 10 N.C. App. 553, 180 S.E.2d 29 (1971); *Jack-*

son v. Jackson, 14 N.C. App. 71, 187 S.E.2d 490 (1972); *Carter v. Town of Chapel Hill*, 14 N.C. App. 93, 187 S.E.2d 588 (1972).

It is the duty of appellant to see that the record is properly made up and transmitted to the Court. *State v. Thigpen*, 10 N.C. App. 88, 178 S.E.2d 6 (1970); *Finley v. Finley*, 15 N.C. App. 681, 190 S.E.2d 660 (1972); *State v. Parks*, 20 N.C. App. 207, 200 S.E.2d 837 (1973).

The appellant has the duty to see that the record on appeal is properly made up. *State v. Lindsey*, 14 N.C. App. 266, 188 S.E.2d 7 (1972).

Correct Chronological Arrangement of Record. — For an example of correct chronological arrangement of the record

on appeal, see *State v. Harris*, 10 N.C. App. 553, 180 S.E.2d 29 (1971).

This rule requires that the proceedings in the trial court be set forth in the order of time in which they occurred. In re *City of Washington*, 15 N.C. App. 505, 190 S.E.2d 309 (1972).

This rule expressly provides that on appeal the proceedings of the trial court and all documents be set forth in the record in the order of the time in which they occurred. *Rickenbaker v. Rickenbaker*, 21 N.C. App. 276, 204 S.E.2d 198 (1974).

The record must necessarily include the issues involved in the appeal. *State v. Lindsey*, 14 N.C. App. 266, 188 S.E.2d 7 (1972).

The pleadings constitute a part of the record proper. *Pressley v. American Cas. Co.*, 14 N.C. App. 561, 188 S.E.2d 734 (1972).

Affidavits.—Affidavits, being in the nature of evidence, are generally not part of the record proper. In order to be considered on appeal, they must be brought into the record by appropriate means. The proper method to bring the affidavits to the attention of the appellate court is to incorporate them into the statement of case on appeal. *Pressley v. American Cas. Co.*, 14 N.C. App. 561, 188 S.E.2d 734 (1972).

Record on Appeal from Judgment on Pleadings.—Where an appeal is from a judgment on the pleadings, the record proper constitutes the case to be filed in the appellate court, and it is not necessary for the appealing parties to file a statement of case on appeal. Dismissal for failure to serve case on appeal within the time allowed is not proper in such a case. *Pressley v. American Cas. Co.*, 14 N.C. App. 561, 188 S.E.2d 734 (1972).

Responsibility before Stipulating to Record.—Solicitors have the responsibility of getting correct records in criminal cases to the Court of Appeals, and they should be careful before stipulating to the correctness of records. *State v. Lindsey*, 14 N.C. App. 266, 188 S.E.2d 7 (1972).

Stenographer's Note.—

The stenographic transcript of the evidence may not be used as an alternative to narration of the evidence. *McConnell v. McConnell*, 11 N.C. App. 193, 180 S.E.2d 465 (1971).

This rule reflects the expectation of the court that there will be certain circumstances in which there will be no stenographic record of a prior hearing. *Howell v. Howell*, 19 N.C. App. 260, 198 S.E.2d 462 (1973).

Failure to State Evidence in Narrative Form.—

An appeal that sets forth the evidence in question and answer form is subject to dismissal by the Court of Appeals in its discretion. *State v. Thigpen*, 10 N.C. App. 88, 178 S.E.2d 6 (1970).

Defendant's motion to dismiss the appeal, on the grounds that the evidence in the record on appeal was presented in question and answer form rather than by narrative, was denied, and the court, in its discretion under this rule, heard the appeal and considered the matter on its merits. *Lambe v. Smith*, 11 N.C. App. 580, 181 S.E.2d 783 (1971).

Where Defendant Not Aware He Was Narrating Evidence.—Motion to dismiss an appeal because of defendant's failure to comply with this rule will be denied under circumstances in which the defendant was not aware that he was narrating evidence but was narrating, in the only form possible, the actual proceedings at the hearing. *Brown v. Brown*, 19 N.C. App. 393, 198 S.E.2d 756 (1973).

Written Transcript of Testimony Not Essential.—This rule outlines an alternative course for appellant's counsel to follow, and in so doing, indicates that a written transcript of the testimony is not essential in filing a record on appeal. *Howell v. Howell*, 19 N.C. App. 260, 198 S.E.2d 462 (1973).

Assignment Should Clearly Present and Specifically Point Out Alleged Error.—While the circumstances of each case must largely dictate the form of an assignment of error, the assignment should clearly present and specifically point out the alleged error relied upon without the necessity of going beyond the assignment itself to ascertain the question to be debated. *State v. Thigpen*, 10 N.C. App. 88, 178 S.E.2d 6 (1970).

Any single assignment of error must present a single question of law. *Nye v. University Dev. Co.*, 10 N.C. App. 676, 179 S.E.2d 795 (1971).

An assignment of error must present a single question of law for consideration by the court so as to bring into focus the several distinct questions of law which the appellant wishes the appellate court to consider. *Duke v. Meisky*, 12 N.C. App. 329, 183 S.E.2d 292 (1971).

Broadside Assignments Are Ineffective.—Where one assignment of error attempts to present more than one question of law it is broadside and ineffective. *Nye v. University Dev. Co.*, 10 N.C. App. 676, 179 S.E.2d 795 (1971).

An assignment which is based on numerous exceptions and attempts to present several separate questions of law—none of which are set out in the assignment itself—leaves it broadside and ineffective. An assignment which attempts to raise several different questions is broadside. *State v. Brown*, 9 N.C. App. 534, 176 S.E.2d 907 (1970).

The assignment of error must be so specific that the court is given some real aid and a voyage of discovery through an often voluminous record not rendered necessary. *State v. Thigpen*, 10 N.C. App. 88, 178 S.E.2d 6 (1970).

Asserted Error Must Be Supported by Exception.—This rule and Rule 21 of both the Supreme Court and the Court of Appeals require any error asserted on appeal to be supported by an exception duly taken and shown in the record. *State v. Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972).

Rule 21 and this rule require any error asserted on appeal to be supported by an exception duly taken and shown in the record. *State v. Whitted*, 14 N.C. App. 62, 187 S.E.2d 391 (1972).

An assignment of error is ineffectual if not based on a proper exception. *Campbell v. McNeil*, 15 N.C. App. 559, 190 S.E.2d 383 (1972).

A contention in the brief not based on any exception or assignment of error will not be considered. *State v. Walters*, 13 N.C. App. 497, 186 S.E.2d 191 (1972).

Appeal Subject to Dismissal Where Assignments Do Not Refer to Exceptions.—An appeal is subject to dismissal for failure to comply with subsection (c) of this rule where none of the assignments of error refer to any exception upon which it purports to be based. *State v. Morgan*, 9 N.C. App. 624, 177 S.E.2d 457 (1970).

Mere Reference to Record Page Is Insufficient.—A mere reference in the assignment of error to the record page where the asserted error may be discovered fails completely to comply with this rule and Rule 21. *State v. Brown*, 9 N.C. App. 534, 176 S.E.2d 907 (1970).

Assignment Relating to Charge Must Set Out Portion Excepted to.—When an exception relates to the charge, that portion to which the exception is taken must be set out in the particular assignment of error. A mere reference to the exception number and the page number of the record where the exception appears will not present the alleged error for review. *State v. Brown*, 9 N.C. App. 534, 176 S.E.2d 907 (1970).

Assignments of error to the charge

should quote the portion of the charge to which appellant objects, and assignments based on failure to charge should set out appellant's contention as to what the court should have charged. *State v. Brown*, 9 N.C. App. 534, 176 S.E.2d 907 (1970).

And Entire Charge Must Be Included in Record.—This rule requires that where there is exception to the charge of the court, the charge shall be included in the record on appeal. This means the entire charge, and the court will not attempt to consider alleged error in the selected portions of a charge where the entire charge is not before them. *State v. Young*, 11 N.C. App. 145, 180 S.E.2d 322 (1971).

Or Charge Will Be Presumed Correct.—When an exception is taken to the charge and it is not contained in the record on appeal, it is presumed that the court correctly instructed the jury on every principle of law applicable to the facts. *Elsevier v. Gann Machine Shop, Inc.*, 9 N.C. App. 539, 176 S.E.2d 875 (1970).

When Exceptions to Be Grouped under One Assignment of Error.—One assignment of error should have grouped under it all exceptions which present the same single question of law. *Nye v. University Dev. Co.*, 10 N.C. App. 676, 179 S.E.2d 795 (1971).

The appellant must classify his exceptions, putting in a separate group all exceptions which relate to each particular question. The failure to group requires a dismissal of the appeal. *State v. Thigpen*, 10 N.C. App. 88, 178 S.E.2d 6 (1970).

This requirement for grouping of exceptions is designed to have all exceptions which present the same single question of law grouped together and assigned as error. *Nye v. University Dev. Co.*, 10 N.C. App. 676, 179 S.E.2d 795 (1971).

More than one exception may be grouped under a single assignment of error, but this may be done only when all the exceptions relate to but a single question of law. *Nye v. University Dev. Co.*, 10 N.C. App. 676, 179 S.E.2d 795 (1971).

It is the grouping of exceptions (whether one or more) presenting the same single question of law, which constitutes an assignment of error. *Nye v. University Dev. Co.*, 10 N.C. App. 676, 179 S.E.2d 795 (1971).

The grouping of the exceptions assigned as error required by subsection (c) of this rule should bring together all of the exceptions which present a single question of law. *Duke v. Meisky*, 12 N.C. App. 329, 183 S.E.2d 292 (1971).

Grouping of Exceptions Relating to Testimony. — Where exceptions were entered to orders overruling objections to testimony of witnesses, but each of the exceptions had for its basis a different rule of law and evidence, the mere fact that they all relate to testimony does not mean that they present a single question of law. *Nye v. University Dev. Co.*, 10 N.C. App. 676, 179 S.E.2d 795 (1971).

Subsection (c) is not satisfied when all exceptions grouped under a single assignment present questions in the field of the law of evidence; that field is far too broad to serve as an adequate focusing device for appellate consideration. *Duke v. Meisky*, 12 N.C. App. 329, 183 S.E.2d 292 (1971).

Examples of Proper and Improper Grouping of Exceptions.—*Dobias v. White*, 240 N.C. 680, 83 S.E.2d 785 (1954) gives examples of proper and improper grouping of exceptions under one assignment of error. *Nye v. University Dev. Co.*, 10 N.C. App. 676, 179 S.E.2d 795 (1971).

Exceptions Not Grouped as Required.—Where appellant's exceptions are not grouped as required, they may not be considered. *State v. Young*, 11 N.C. App. 145, 180 S.E.2d 322 (1971).

Record on Appeal from Trial of Misdemeanor Charge. — The necessity for the record on appeal from the trial of a misdemeanor charge to show the proceedings in the district court is compelling; the district court has exclusive original jurisdiction of each of the offenses with which defendant was charged, and the superior court had no jurisdiction to try defendant except after a disposition in the district court and an appeal to superior court. *State v. Harris*, 10 N.C. App. 553, 180 S.E.2d 29 (1971).

The solicitors of the several districts should make certain that the fact of a disposition, in the district court, and an appeal to superior court is always shown in the record on appeal from the trial of a misdemeanor charge. *State v. Harris*, 10 N.C. App. 553, 180 S.E.2d 29 (1971).

20. Pleadings.

Adding New Parties.—In an action to determine custody of a child, an order which was entered in the Court of Appeals making the paternal grandparents parties, pursuant to their motion, thereby subjected them to the jurisdiction of the Court of Appeals and of the trial court to the same extent as if they had been original parties

The solicitors have the duty to make certain the record on appeal from the trial of a misdemeanor charge presents an accurate record of the proceeding; in the absence of agreement a solicitor should file exceptions and have the judge settle the matter. *State v. Harris*, 10 N.C. App. 553, 180 S.E.2d 29 (1971).

Failure to Show Jurisdiction or to Contain Warrants or Judgment Appealed from. — For failure of the record to show jurisdiction in the superior court and to contain the warrants upon which defendant was tried and the judgment from which the appeal is taken, the appeal will be dismissed. *State v. Parks*, 20 N.C. App. 207, 200 S.E.2d 837 (1973).

Applied in *In re Garcia*, 9 N.C. App. 691, 177 S.E.2d 461 (1970); *Johnson v. Johnson*, 14 N.C. App. 40, 187 S.E.2d 420 (1972); *State ex rel. Simmons v. Johnson*, 14 N.C. App. 168, 187 S.E.2d 370 (1972); *State v. Wallace*, 16 N.C. App. 624, 192 S.E.2d 653 (1972); *State v. Brice*, 17 N.C. App. 189, 193 S.E.2d 299 (1972); *State v. Neal*, 19 N.C. App. 426, 199 S.E.2d 143 (1973); *Kamp v. Brookshire*, 21 N.C. App. 280, 204 S.E.2d 208 (1974).

Quoted in *Resort Dev. Co. v. Phillips*, 9 N.C. App. 158, 175 S.E.2d 782 (1970); *Carter v. Carter*, 13 N.C. App. 648, 186 S.E.2d 684 (1972); *Clouse v. Chairtown Motors, Inc.*, 14 N.C. App. 117, 187 S.E.2d 398 (1972).

Stated in *Lancaster v. Smith*, 13 N.C. App. 129, 185 S.E.2d 319 (1971); *State v. Lipsey*, 14 N.C. App. 246, 188 S.E.2d 24 (1972).

Cited in *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971); *State v. Jacobs*, 278 N.C. 693, 180 S.E.2d 832 (1971); *Mid-eastern Constr. Co. v. Hamlett*, 14 N.C. App. 57, 187 S.E.2d 438 (1972); *Tomlinson v. Brewer*, 15 N.C. App. 142, 189 S.E.2d 586 (1972); *State v. Thompson*, 15 N.C. App. 416, 190 S.E.2d 355 (1972); *In re Stanley*, 17 N.C. App. 370, 194 S.E.2d 219 (1973); *Burroughs v. Tarheel Homes & Realty, Inc.*, 19 N.C. App. 107, 198 S.E.2d 18 (1973).

plaintiff. *Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E.2d 319 (1971).

Applied in *Stewart v. Nation-Wide Check Corp.*, 9 N.C. App. 172, 175 S.E.2d 172 (1970).

Cited in *Stewart v. Nation-Wide Check Corp.*, 279 N.C. 278, 182 S.E.2d 410 (1971).

21. Exceptions. (See also Rule 19 (c)).

An assignment of error must be based on an exception, etc.—

Rule 19 and this rule require any error asserted on appeal to be supported by an exception duly taken and shown in the record. *State v. Whitted*, 14 N.C. App. 62, 187 S.E.2d 391 (1972).

Rule 19 and this rule of both the Supreme Court and the Court of Appeals require any error asserted on appeal to be supported by an exception duly taken and shown in the record. *State v. Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972).

An assignment of error will not present a question unless it is based upon an exception set out in the case on appeal and numbered as required by this rule. *Devine v. Aetna Cas. & Surety Co.*, 19 N.C. App. 198, 198 S.E.2d 471 (1973).

Assignment Must Be Specific.—The assignment of error must show specifically the questions attempted to be presented without the necessity of going beyond the assignment of error itself. *Lancaster v. Smith*, 13 N.C. App. 129, 185 S.E.2d 319 (1971).

Reference to Record Page Is Insufficient.—A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. *Lancaster v. Smith*, 13 N.C. App. 129, 185 S.E.2d 319 (1971).

Where Exceptions Not Properly Numbered.—Where defendant has recorded five assignments of error, only two of which are supported by exceptions duly noted in the record and those two exceptions were not properly numbered as required by this rule, the court may refuse to consider them. *State v. Barnes*, 18 N.C. App. 263, 196 S.E.2d 576 (1973).

Court Will Not Consider Error, etc.—

It is the duty of the appellant who asserts prejudicial error to point out the asserted error by exception. The failure to except leaves nothing to review. *State v. Thigpen*, 10 N.C. App. 88, 178 S.E.2d 6 (1970).

Exceptions not duly noted, etc.—

Exceptions which appear for the first time in the purported assignments of error present no question for appellate review. *State v. Jacobs*, 278 N.C. 693, 180 S.E.2d 832 (1971); *State v. Whitted*, 14 N.C. App. 62, 187 S.E.2d 391 (1972).

An assignment of error which is not supported by an exception previously noted in the case on appeal presents no question of law for the court to decide. *State v. Thigpen*, 10 N.C. App. 88, 178 S.E.2d 6 (1970).

Assignments of error to the charge based upon exceptions appearing nowhere in the record but under the assignments of error are ineffective. *Bank of N.C. v. Barry*, 14 N.C. App. 169, 187 S.E.2d 478 (1972).

Exceptions which appear for the first time in the assignments of error will not be considered. *Devine v. Aetna Cas. & Surety Co.*, 19 N.C. App. 198, 198 S.E.2d 471 (1973).

Exceptions Not Grouped as Required.—

Where appellant's exceptions are not grouped as required, they may not be considered. *State v. Young*, 11 N.C. App. 145, 180 S.E.2d 322 (1971).

Where no exceptions are taken to the court's findings they are presumed to be supported by competent evidence and are binding on appeal. *Pegram-West, Inc. v. Hiatt Homes, Inc.*, 12 N.C. App. 519, 184 S.E.2d 65 (1971).

When no exception is taken to the charge and it is not contained in the record on appeal, it is presumed that the court correctly instructed the jury on every principle of law applicable to the facts. *Elsevier v. Gann Machine Shop, Inc.*, 9 N.C. App. 539, 176 S.E.2d 875 (1970).

An appeal itself is an exception, etc.—

An appeal is itself an exception to the judgment and to any matter appearing on the face of the record proper. *Wimbish v. Wimbish Aviation, Inc.*, 12 N.C. App. 98, 182 S.E.2d 641 (1971).

But Not for Questions of Evidence.—An appeal alone does not present for review the findings of fact or the sufficiency of the evidence to support them; review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form and supported by the verdict. *Wimbish v. Wimbish Aviation, Inc.*, 12 N.C. App. 98, 182 S.E.2d 641 (1971).

Applied in *State v. Brown*, 9 N.C. App. 534, 176 S.E.2d 907 (1970); *Johnson v. Johnson*, 14 N.C. App. 40, 187 S.E.2d 420 (1972); *State v. Wright*, 16 N.C. App. 562, 192 S.E.2d 655 (1972); *Davenport v. Travelers Indem. Co.*, 16 N.C. App. 572, 192 S.E.2d 612 (1972); *State v. Wallace*, 16 N.C. App. 624, 192 S.E.2d 653 (1972); *State v. Williams*, 17 N.C. App. 31, 193 S.E.2d 478 (1972); *State v. Belk*, 17 N.C. App. 123, 193 S.E.2d 305 (1972).

Stated in *Campbell v. McNeill*, 15 N.C. App. 559, 190 S.E.2d 383 (1972).

Cited in *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971); *Mideastern Constr. Co. v. Hamlett*, 14 N.C. App. 57, 187

S.E.2d 438 (1972); *State v. Thompson*, 15 N.C. App. 416, 190 S.E.2d 355 (1972); *Burroughs v. Tarheel Homes & Realty, Inc.*, 19 N.C. App. 107, 198 S.E.2d 18 (1973).

24. Appeal Dismissed if Record on Appeal Not Properly Reproduced.

If the record on appeal (except in pauper appeals and except the stenographic transcript referred to in Rule 19(d)(2)) shall not be properly reproduced as required by the rules, by reason of the failure of the appellant to send up the record on appeal, or deposit the cost therefor, in time for it to be properly reproduced when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dismissed; but the Court may, on motion of appellant, after five days' notice, for good cause shown, reinstate the appeal. When a case is called and the record on appeal is not fully and properly reproduced, if the appellee does not move to dismiss, the case will be continued.

Editor's Note. — The amendment adopted Sept. 28, 1973, effective Jan. 1, 1974, deleted "at the same session" following "five days' notice," near the end of the first sentence and deleted "to be heard at the next session" at the end of the first sentence.

Rule 19(d)(2), referred to in this rule, was eliminated by amendment adopted Feb. 11, 1969, effective July 1, 1969, which rewrote subsection (d) of Rule 19.

27. Briefs.

Twenty-five copies of briefs of both parties shall be filed in all cases (except in pauper appeals, as provided in Rule 22). Such briefs may be sent up by counsel ready printed, or they may be printed or reproduced as provided by these rules if a proper deposit for cost is made, as specified in Rule 23. They must be of the size and style prescribed by such rule. The briefs are expected to cover all the points presented in the oral argument, though additional authorities may be cited, if discovered after brief is filed, by furnishing list to opposing counsel and handing memorandum of same to the clerk to be placed by him with the papers in the case, but counsel will not be permitted to consume time on the argument in the citation of additional authorities. At the end of the original of each brief filed shall appear the signature, office address and telephone number of counsel representing the party for whom the brief is filed.

Editor's Note.—The amendment adopted Jan. 20, 1971, added the last sentence.

Failure by appellant to file a brief works an abandonment of his assignments of

error, except those appearing upon the fact of the record proper, which are cognizable *ex mero motu*. *State v. Walters*, 17 N.C. App. 94, 193 S.E.2d 316 (1972).

27½. Statement of the Questions Involved.

Quoted in *State v. Bailey*, 18 N.C. App. 313, 196 S.E.2d 556 (1973).

Stated in *Fonville v. Dixon*, 16 N.C. App. 664, 193 S.E.2d 406 (1972).

28. Appellant's Brief.

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions. As to an exception that there was no evidence, it shall be sufficient to refer to pages of the record containing the evidence. Such brief shall contain, properly numbered, the several grounds of exception and assignment of error with reference to the pages of the record, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket, and when reproduced a copy thereof furnished by him to appellee's counsel.

Appellant shall, upon filing a copy of his brief to be reproduced, on the same date mail or deliver to appellee's counsel a copy thereof. If the appellant's brief has not been filed with the clerk of this Court, and no copy has been mailed or delivered to appellee's counsel within 20 days after the appeal is docketed, the

appeal will be dismissed on motion of appellee, unless for good cause shown the Court shall give further time to file the brief.

Editor's Note.—The amendment adopted Aug. 31, 1972, effective July 1, 1973, substituted "fourth Tuesday" for "third Tuesday" in the second sentence of the second paragraph.

The amendment adopted July 1, 1974, effective July 24, 1974, substituted "within 20 days after the appeal is docketed" for "by 12:00 o'clock noon on the fourth Tuesday preceding the call of the district to which the case belongs" in the second sentence of the second paragraph and deleted "when the call of that district is begun" following "motion of appellee," in the same sentence.

Assignments of error not brought forward, etc.—

In accord with 1st paragraph in original. See *Gibson v. Montford*, 9 N.C. App. 251, 175 S.E.2d 776 (1970); *Little v. Little*, 9 N.C. App. 361, 176 S.E.2d 521 (1970); *In re Rose*, 9 N.C. App. 413, 176 S.E.2d 249 (1970); *State v. Brown*, 9 N.C. App. 534, 176 S.E.2d 907 (1970); *Clott v. Greyhound Lines, Inc.*, 9 N.C. App. 604, 177 S.E.2d 438 (1970); *State v. O'Hora*, 12 N.C. App. 250, 182 S.E.2d 823 (1971).

In accord with 3rd paragraph in original. See *State v. Lyles*, 9 N.C. App. 448, 176 S.E.2d 254 (1970).

Where defendant attempted to assign as error other rulings of the court, but no argument appeared in his brief, they are, therefore, deemed abandoned. *State v. Young*, 11 N.C. App. 145, 180 S.E.2d 322 (1971).

Even though based upon exceptions duly noted in the record and preserved in the statement of the case on appeal, assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, are deemed abandoned. *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971).

An assignment of error is subject to being overruled where no reason or argument is stated or authority cited in its support. *State v. Stack*, 12 N.C. App. 101, 182 S.E.2d 633 (1971).

Exceptions, etc.—

Exceptions not brought forward and argued in appellant's brief are deemed abandoned. *Jackson v. Collins*, 9 N.C. App. 548, 176 S.E.2d 878 (1970).

If the only exceptions appearing in the record are not set out in defendant's brief and no reason or argument is stated and no authority cited with respect thereto, this rule would require that the exceptions

be deemed abandoned. *State v. Cheek*, 10 N.C. App. 273, 178 S.E.2d 132 (1970).

Assignments of error are ineffectual unless they are based on proper exceptions. *State v. Blackshear*, 10 N.C. App. 237, 178 S.E.2d 105 (1970).

Brief Should Point Out Numbered Exception and Page of Record Where It Appears.—This rule simply requires that appellant, in his brief, point out the numbered exception upon which he is relying and indicate upon what page of the printed record the exception may be found. *State v. McDonald*, 11 N.C. App. 497, 181 S.E.2d 744 (1971).

An appellant's brief does not comply with this rule where it does not contain, properly numbered, the several grounds of exception and assignment of error with reference to the pages of the record. *State v. Blackshear*, 10 N.C. App. 237, 178 S.E.2d 105 (1970).

Assignments based on pages in the record instead of numbered exceptions are inadequate. *State v. Blackshear*, 10 N.C. App. 237, 178 S.E.2d 105 (1970).

Applied in *Dotson v. Allied Chem. Corp.*, 10 N.C. App. 123, 178 S.E.2d 27 (1970); *State v. Herald*, 10 N.C. App. 263, 178 S.E.2d 120 (1970); *State v. Berryman*, 10 N.C. App. 649, 179 S.E.2d 875 (1971); *State v. Dickens*, 11 N.C. App. 392, 181 S.E.2d 257 (1971); *State v. Hudson*, 11 N.C. App. 712, 182 S.E.2d 198 (1971); *State v. Harris*, 12 N.C. App. 272, 182 S.E.2d 827 (1971); *Dale v. Lattimore*, 12 N.C. App. 348, 183 S.E.2d 417 (1971); *Scism v. Holland*, 12 N.C. App. 405, 183 S.E.2d 282 (1971); *Andrews v. Andrews*, 12 N.C. App. 410, 183 S.E.2d 843 (1971); *State v. Fountain*, 13 N.C. App. 107, 185 S.E.2d 284 (1971); *Lewter v. Herndon*, 13 N.C. App. 242, 184 S.E.2d 926 (1971); *State v. Stockton*, 13 N.C. App. 287, 185 S.E.2d 459 (1971); *State v. Broadnax*, 13 N.C. App. 319, 185 S.E.2d 442 (1971); *State v. Brown*, 13 N.C. App. 327, 185 S.E.2d 453 (1971); *State v. Able*, 13 N.C. App. 365, 185 S.E.2d 422 (1971); *State v. Walters*, 13 N.C. App. 497, 186 S.E.2d 191 (1972); *State v. Rush*, 13 N.C. App. 539, 186 S.E.2d 595 (1972); *State v. Royall*, 14 N.C. App. 214, 188 S.E.2d 50 (1972); *State v. Harris*, 14 N.C. App. 270, 188 S.E.2d 2 (1972); *State v. Guffey*, 14 N.C. App. 281, 188 S.E.2d 29 (1972); *State v. Pass*, 14 N.C. App. 635, 188 S.E.2d 544 (1972); *Engines & Equip., Inc. v. Lipscomb*, 15 N.C. App. 120, 189 S.E.2d 498 (1972); *Braswell v. Purser*, 16 N.C. App.

14, 190 S.E.2d 857 (1972); *Shamel v. Shamel*, 16 N.C. App. 65, 190 S.E.2d 856 (1972); *State v. Alexander*, 16 N.C. App. 95, 191 S.E.2d 395 (1972); *Reap v. City of Albemarle*, 16 N.C. App. 171, 191 S.E.2d 373 (1972); *Teachey v. Woolard*, 16 N.C. App. 249, 191 S.E.2d 903 (1972); *Hathcock v. Lowder*, 16 N.C. App. 255, 192 S.E.2d 124 (1972); *State v. Brady*, 16 N.C. App. 365, 192 S.E.2d 91 (1972); *State v. Lo-Sicco*, 16 N.C. App. 401, 192 S.E.2d 102 (1972); *State v. Wright*, 16 N.C. App. 562, 192 S.E.2d 655 (1972); *Merchants Distrib., Inc. v. Hutchinson*, 16 N.C. App. 655, 193 S.E.2d 436 (1972); *State v. Williams*, 17 N.C. App. 31, 193 S.E.2d 478 (1972); *State v. Mills*, 17 N.C. App. 461, 194 S.E.2d 645 (1973); *Parker v. Parker*, 18 N.C. App. 144, 196 S.E.2d 293 (1973); *State v. Lassiter*, 18 N.C. App. 208, 196 S.E.2d 592 (1973); *State v. Stitt*, 18 N.C. App. 217,

196 S.E.2d 532 (1973); *State v. Barnes*, 18 N.C. App. 263, 196 S.E.2d 576 (1973); *State v. Grissom*, 18 N.C. App. 332, 196 S.E.2d 620 (1973); *State v. Shelton*, 18 N.C. App. 616, 197 S.E.2d 588 (1973); *Lincoln County v. Skinner*, 19 N.C. App. 127, 198 S.E.2d 40 (1973); *Williams v. Town of Grifton*, 19 N.C. App. 462, 199 S.E.2d 288 (1973); *Higgins v. Builders & Fin., Inc.*, 20 N.C. App. 1, 200 S.E.2d 397 (1973); *State v. Brown*, 20 N.C. App. 71, 200 S.E.2d 666 (1973); *Kohler v. J.A. Jones Constr. Co.*, 20 N.C. App. 486, 201 S.E.2d 728 (1974); *State v. Vample*, 20 N.C. App. 518, 201 S.E.2d 694 (1974); *Lawing v. Jaynes*, 20 N.C. App. 528, 202 S.E.2d 334 (1974); *State v. Harris*, 21 N.C. App. 550, 204 S.E.2d 914 (1974); *State v. Clark*, 22 N.C. App. 81, 206 S.E.2d 252 (1974).

Stated in *State v. Oliver*, 13 N.C. App. 184, 184 S.E.2d 900 (1971).

Cited in *State v. Whitted*, 21 N.C. App. 649, 205 S.E.2d 611 (1974).

29. Appellee's Brief.

The appellee shall file a copy of his brief to be reproduced, or 25 printed copies thereof, with the clerk of this Court within 20 days after appellant's brief has been mailed or delivered to appellee, and on the same date mail or deliver to appellant's counsel a copy, and the filing thereof shall be noted by the clerk on his docket and when reproduced, a copy furnished by the clerk to counsel for appellant. It is not required that the appellee's brief shall contain a statement of the case. On failure of the appellee to file his brief by the time required, the cause will be heard and determined without argument from the appellee unless for good cause shown the Court shall give appellee further time to file his brief.

Editor's Note. — The amendment adopted July 1, 1974, effective July 24, 1974, substituted "within 20 days after appellant's brief has been mailed or delivered to appellee" for "by noon of

the Second Tuesday preceding the call of the district to which the case belongs" in the first sentence.

34. Certiorari and Supersedeas.

(a) *When Certiorari Applied for.* Generally, the writ of certiorari, as a substitute for an appeal, must be applied for within the time in which the appeal should have been docketed under these rules; or, if no appeal lay, then within 30 days after the date of the order or determination complained of.

Editor's Note. — The amendment adopted Sept. 28, 1973, effective Jan. 1, 1974, rewrote subsection (a).

As the rest of this rule was not changed by the amendment, only subsection (a) is set out.

43. Executions.

(b) *Issuing and Return of.* Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the session of this Court next ensuing its teste. In the absence of such request, the clerk shall, within 30 days after the certificate of decision is sent down, issue such execution to the county from which the cause came, making it returnable on a day named. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the session of the appropriate trial tribunal held

next after the date of its issue, and thereafter successive executions will only be issued from said trial tribunal, and when satisfied, the fact shall be certified to this Court, to the end that an entry to this effect be made here.

Executions for the cost of this Court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable on a day named.

The officer to whom said executions are directed shall be amenable to the penalties prescribed by law for failure to make due and proper return thereof.

Editor's Note. — The amendment adopted Sept. 28, 1973, effective Jan. 1, 1974, substituted "on a day named" for "on the first day of the next ensuing session" at the end of the third sentence of the first paragraph of subsection (b) and for "to a subsequent day of

the session; or they may be issued after the end of the session, returnable on a day named, at the next succeeding session of this Court" at the end of the second paragraph of subsection (b).

As subsection (a) was not changed by the amendment, it is not set out.

45. Sittings of the Court.

Panels of the Court will sit as scheduled by the Chief Judge.

Editor's Note. — The amendment adopted Sept. 28, 1973, effective Jan. 1, 1974, rewrote this rule.

47. Retained for future use.

Editor's Note. — This rule, which related to additional sessions of the Court, and reconvening the Court, was deleted by

amendment adopted Sept. 28, 1973, effective Jan. 1, 1974.

48. Noncompliance with Rules.

For failure to docket, etc.—

The responsibility of docketing the record on appeal in the form provided for by the rules of the Court of Appeals is that of the appealing party and for failure to comply with the rules the appeal is subject to be dismissed *ex mero motu*. *Resort Dev. Co. v. Phillips*, 9 N.C. App. 158, 175 S.E.2d 782 (1970).

With respect to failure to serve the case on time, as distinguished from failure to docket the case on time, rather than dismiss the appeal, the Court of Appeals will review only the record proper and determine whether errors of law are disclosed on the face thereof. *State v. Brady*, 16 N.C. App. 555, 192 S.E.2d 640 (1972).

When the order extending the time to serve the case on appeal is not signed by the trial judge who signed the original judgment appealed from as required by Rule 50, the appeal is subject to dismissal by authority of this rule. *State v. Brady*, 16 N.C. App. 555, 192 S.E.2d 640 (1972).

Failure to Show Jurisdiction or to Contain Warrants or Judgment Appealed from. — For failure of the record to show jurisdiction in the superior court and to contain the warrants upon which defendant was tried and the judgment from which the appeal was taken, the

appeal was dismissed. *State v. Parks*, 20 N.C. App. 207, 200 S.E.2d 837 (1973).

Applied in *State v. Walters*, 13 N.C. App. 497, 186 S.E.2d 191 (1972); *Alley v. Alley*, 14 N.C. App. 176, 187 S.E.2d 500 (1972); *State v. Guffey*, 14 N.C. App. 281, 188 S.E.2d 29 (1972); *Cater v. Zurich Ins. Co.*, 14 N.C. App. 282, 188 S.E.2d 27 (1972); *State v. Jackson*, 14 N.C. App. 288, 188 S.E.2d 28 (1972); *Finley v. Finley*, 15 N.C. App. 681, 190 S.E.2d 660 (1972); *State v. LoSicco*, 16 N.C. App. 401, 192 S.E.2d 102 (1972); *State v. Walls*, 17 N.C. App. 127, 193 S.E.2d 387 (1972); *Parker v. Parker*, 18 N.C. App. 144, 196 S.E.2d 293 (1973); *State v. Tilley*, 18 N.C. App. 341, 196 S.E.2d 549 (1973); *Bill v. Hughes*, 21 N.C. App. 152, 203 S.E.2d 395 (1974).

Quoted in *In re City of Washington*, 15 N.C. App. 505, 190 S.E.2d 309 (1972).

Stated in *Carter v. Carter*, 13 N.C. App. 648, 186 S.E.2d 684 (1972); *State v. Davis*, 14 N.C. App. 287, 188 S.E.2d 4 (1972).

Cited in *State v. Johnson*, 14 N.C. App. 279, 188 S.E.2d 16 (1972); *Choate v. Choate*, 15 N.C. App. 89, 189 S.E.2d 647 (1972); *State v. Lassiter*, 18 N.C. App. 208, 196 S.E.2d 592 (1973); *State v. Bryant*, 18 N.C. App. 340, 196 S.E.2d 628 (1973); *Lord v. Jeffreys*, 22 N.C. App. 13, 205 S.E.2d 563 (1974).

50. Case on Appeal—Extension of Time for Service of.

Extension May Be Granted after Expiration of Session at Which Judgment Was Entered.—Sections 15-180 and 1-282 do not authorize a trial judge to grant an appellant another extension of time to serve statement of case on appeal after the expiration of the session at which the judgment was entered. However, the trial judge is given authority to do this under this rule. *State v. Lewis*, 9 N.C. App. 323, 176 S.E.2d 1 (1970).

Only Trial Judge May Grant Extensions.—The trial judge, not the solicitor, has authority to grant extensions of time to serve case on appeal. *State v. Kirby*, 15 N.C. App. 480, 190 S.E.2d 320 (1972).

Under this rule only the trial judge may extend the time for service of the case on appeal, and an order of another judge is therefore ineffective. *State v. Hamby*, 16 N.C. App. 122, 191 S.E.2d 245 (1972).

Order Granting Extension Dismissed Where Not Signed by Judge Who Signed Order Appealed from.—Criminal appeal is subject to dismissal when the order granting the extension of time to serve the case on appeal was not signed by the trial judge who signed the original order appealed from. *State v. Shoemaker*, 9 N.C. App. 273, 175 S.E.2d 781 (1970); *State v. Brady*, 16 N.C. App. 555, 192 S.E.2d 640 (1972).

With respect to failure to serve the case on time, as distinguished from failure to docket the case on time, rather than dismiss the appeal, the Court of Appeals will review only the record proper and determine whether errors of law are disclosed on the face thereof. *State v. Brady*, 16 N.C. App. 555, 192 S.E.2d 640 (1972).

(5) GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Rule

3. Continuances.

2. Calendaring of Civil Cases.

Cited in *Green v. Eure*, 18 N.C. App. 671, 197 S.E.2d 599 (1973).

3. Continuances.

An application for a continuance shall be made to the presiding judge of the court in which the case is calendared.

When an attorney has conflicting engagements in different courts, priority shall be as follows: Appellate Courts, Superior Court, District Court, Magistrate's Court.

At mixed sessions, criminal cases in which the defendant is in jail shall have absolute priority.

Editor's Note.—The amendment adopted Feb. 13, 1973, deleted "Federal Court" fol-

lowing "Appellate Courts," in the second paragraph.

6. Motions in Civil Actions.

Rule Number Necessary. — The trial judge should decline to rule upon motions which did not contain the rule number under which the movant is proceeding. *Lehrer v. Edgecombe Mfg. Co.*, 13 N.C. App. 412, 185 S.E.2d 727 (1972).

Except When Defense of Insufficiency of Service of Process Asserted in Responsive Pleading.—Although worded as a motion, the defense of insufficiency of service of process was asserted in defendant's responsive pleading; therefore, the rule requiring that a movant state the rule number under which he is proceeding was

inapplicable, and failure of defendant to so state did not constitute waiver of his defense of invalid service of process. *Williams v. Hartis*, 18 N.C. App. 89, 195 S.E.2d 806 (1973).

Applied in *Long v. Coble*, 11 N.C. App. 624, 182 S.E.2d 234 (1971); *Duke v. Meisky*, 12 N.C. App. 329, 183 S.E.2d 292 (1971); *Mangum v. Surles*, 12 N.C. App. 547, 183 S.E.2d 839 (1971); *Finley v. Finley*, 15 N.C. App. 681, 190 S.E.2d 660 (1972); *Neff v. Queen City Coach Co.*, 16 N.C. App. 466, 192 S.E.2d 587 (1972); *Smith v. Smith*, 17 N.C. App. 416, 194

S.E.2d 568 (1973); Hamm v. Texaco, Inc., 17 N.C. App. 451, 194 S.E.2d 560 (1973).

Stated in Don's Plumbing Co. v. Union Supply Co., 11 N.C. App. 662, 182 S.E.2d 219 (1971); Mull v. Mull, 13 N.C. App.

154, 185 S.E.2d 14 (1971); Clouse v. Chairtown Motors, Inc., 14 N.C. App. 117, 187 S.E.2d 398 (1972).

Cited in Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972).

10. Opening and Concluding Arguments.

Trial Judge Controls Sequence of Argument.—The time and sequence of argument of a case to the jury is controlled by the trial judge under the authority of this rule. State v. Andrews, 12 N.C. App. 421, 184 S.E.2d 69 (1971), cert. denied, 404 U.S. 1041, 92 S. Ct. 726, 32 L. Ed. 2d 807 (1972).

And He May Rule at Close of Evidence.—The trial judge is not required to rule upon the sequence of the argument prior to the closing of the evidence. State v. Andrews, 12 N.C. App. 421, 184 S.E.2d 69 (1971), cert. denied, 404 U.S. 1041, 92

S. Ct. 726, 32 L. Ed. 2d 807 (1972).

The trial court properly allowed the State to close the argument where defendant called a witness and examined him but did not glean helpful information from the witness because the witness refused to incriminate himself. State v. Curtis, 18 N.C. App. 116, 196 S.E.2d 278 (1973).

Applied in State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971).

Quoted in State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

11. Examination of Witnesses.

Discretion of Trial Judge as to Change of Counsel. — This rule clearly leaves it to the discretion of the trial court to permit a change

of counsel if a lengthy examination is imminent. State v. Houston, 19 N.C. App. 542, 199 S.E.2d 668 (1973).

Appendix II. Rules of Practice in United States District Courts

United States District Court for the Middle District of North Carolina

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RULE

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I. General Rules**Rule 2.****ATTORNEYS****(b) Eligibility and Admission.**

(1) Any person who has been admitted to practice and is in good standing before the Supreme Court of North Carolina, and who is a resident of the State of North Carolina, is eligible for admission to the bar of this court.

(2) Eligible attorneys may be admitted to practice in this court by the court or by the full-time United States magistrate upon oral motion made by a member of the bar of this court. If the motion for admission is granted, the applicant shall take the following oath or affirmation:

I do solemnly swear [affirm] that I have been admitted to practice before the Supreme Court of North Carolina, and that I am a member in good standing of that court; that I am a resident of the State of North Carolina; that to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will demean myself as an attorney of this court uprightly and according to law, SO HELP ME GOD. [SUCH BE MY SOLEMN AFFIRMATION.]

(c) **Fee.** The fee for admission to the bar of this court shall be \$10.00 payable to the clerk at the time of admission.

(f) Disbarment and Discipline.

(1) The standards of conduct of the members of the bar of this court shall be those standards prescribed by the canons of professional ethics of the American Bar Association and the canons of ethics of the North Carolina State Bar as they are now written and as they are hereafter modified or amended.

(2) Upon notice and hearing, any member of the bar of this court may, for good cause shown, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper. Whenever any member of the bar of this court has been disbarred from practice by either the appellate or trial division of the General Court of Justice, the North Carolina State Bar, or as otherwise provided by North Carolina General Statutes § 84-28, and such disbarment has become final, such member shall be disbarred forthwith from practice in this court, without notice or a hearing, upon the filing in this court of a certified copy of the final order of disbarment.

(3) Any attorney who before his admission to the bar of this court, or during his disbarment or suspension, exercises any of the privileges of the members of the bar of this court, or pretends to be entitled to do so, shall be guilty of contempt of court and subject to appropriate punishment therefor.

(g) Public Discussion of Litigation by Attorneys.

(1) *Release of Information by Attorneys.* It is the duty of the lawyer or law firm not to release or authorize the release of information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation with which he or the firm is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

(2) *Same: Pending Investigation.* With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in or associated with the investigation shall refrain from making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

(3) *Same: From Arrest.* From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer or law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication, relating to that matter and concerning:

(i) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(ii) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(iii) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(iv) The identity, testimony, or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(v) The possibility of a plea of guilty to the offense charged or a lesser offense;

(vi) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

(4) *Same: Matters of Record.* The foregoing shall not be construed to preclude the lawyer or law firm during this period, in the proper discharge of his or its official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

(5) *Same: During Trial.* During the trial of any criminal matter, including the period of selection of the jury, no lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial which a reasonable person would expect to be disseminated by means of public communication, except that the lawyer or law firm may quote from or refer without comment to public records of the court in the case.

(6) *Same: After Trial.* After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

(7) *Same: More Restrictive Rules.* Nothing in this rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

(8) *Same: Civil Actions.* A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will

interfere with a fair trial and which relates to:

- (i) Evidence regarding the occurrence or transaction involved;
- (ii) The character, credibility, or criminal record of a party, witness, or prospective witness;
- (iii) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such;
- (iv) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule;
- (v) Any other matter reasonably likely to interfere with a fair trial of the action.

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, substituted "may" for "shall," inserted "by the Court or by the full-time United States magistrate" and deleted "in open court" in the first sentence of subsection (b) (2), added present subsection (1) of section (f) and redesignated former subsections (1) and (2) of section (f) as (2) and (3), inserted the references to law firms throughout section (g) and made conforming changes so as to make that section applicable to law firms as well as attorneys, substituted "which a reasonable person

would expect to be disseminated by means of public communication" for "for dissemination by any means of public communication" in subsections (1), (2), (3), (5) and (6) of section (g) and added subsection (8) of section (g). The amendment also inserted "or associated with" near the beginning of subsection (2) of section (g).

The amendment adopted Nov. 8, 1973, increased the fee in section (c) from \$2.00 to \$10.00.

Only the sections changed by the amendments are set out.

Rule 3.

COURT SCHEDULE AND CONDUCT OF BUSINESS

(c) Court in Continuous Session. The court shall be in continuous session in all divisions of the district, and all civil matters are deemed to be in an open status and subject to call at any time upon reasonable notice to the interested parties.

(d) Place of Holding Court. Regular sessions of court, motion days, pre-trial conferences, and other court business, will be conducted in the courtroom located in the United States Post Office Building in division headquarters, unless otherwise directed. Court shall commence at 9:30 A.M. unless otherwise announced.

(g) Preparation of Trial Calendars. All pending criminal cases are calendared for trial at each regular criminal session of court as a matter of course. Trial dates in civil cases will be announced by the court, if known, at the time of the final pre-trial conference.

(h) Release of Information by Courthouse Personnel. All courthouse personnel, including, among others, the United States marshal and his deputies, the Clerk of Court and his deputies, bailiffs, and court reporters, are prohibited from disclosing to any person, without authorization by the court, information relating to a case that is not part of the public records of the court. This proscription applies to the divulgence of information concerning arguments and hearings held in chambers or otherwise outside the presence of the public.

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, substituted "civil matters" for "matters, criminal and civil, not reached at regular sessions of court" and deleted "before the next regular session of court" following "any time" in section (c), corrected an

error in punctuation in section (d), rewrote the second sentence of section (g) and deleted "pending criminal" preceding "case" near the end of the first sentence of section (h).

The amendment adopted Aug. 2, 1973, deleted the former third sentence of sec-

tion (d), which provided that on opening day of regular sessions court should commence at 10 A.M., and deleted "On all other days" at the beginning of the last

sentence of section (d).

As the rest of the rule was not changed by the amendment, only sections (c), (d), (g) and (h) are set out.

Rule 4.

NATURALIZATION

Petitions for naturalization will be regularly considered and acted upon, and appropriate ceremonies conducted in connection therewith, at Greensboro, North Carolina, on Fridays after the third Mondays in March, July and October, beginning at 2:00 P.M. A committee composed of three prominent residents of this district will be appointed from time to time to arrange for and conduct appropriate patriotic ceremonies in connection with all regularly held naturalization proceedings. The court may, in its discretion, at other times, consider and act upon petitions for naturalization by members of the armed services, and seamen on merchant vessels registered under the laws of the United States, and members of the immediate families and dependents of such personnel, and in other exceptional cases.

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, substituted "third Monday in May and November" for "first Monday in June and December" in the first sentence and inserted "appropriate patriotic" in the second sentence.

The amendment adopted Jan. 12, 1973, substituted "North Carolina, on Fridays after the third Mondays in March, July and October, beginning at two P.M." for "on Friday after the third Monday in May and November of each year" in the first sentence.

Rule 6.

BRIEFS

(a) Service. Every brief required by these rules or an order of the court shall be served upon opposing parties or their counsel before it is presented to the clerk, and the brief shall clearly indicate the time and method of service. Briefs shall not become a part of the record in the case nor be considered to be a part of the "original papers" within the meaning of those words as used in Local Rule 10.

(c) Citation of Cases. Cases cited should include parallel citations, the year of the decision, and the court deciding the case. The following are illustrations of this rule:

(1) State Court citations:

(a) Court of Appeals:

Atkinson v. Wilkerson, 10 N.C. App. 643, 179 S.E.2d 872 (1971).

(b) The Supreme Court:

Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

(2) District Court citations:

(a) Published:

First National Bank of Catawba County v. Wachovia Bank & Trust Co., N.A., 325 F. Supp. 523 (M.D.N.C. 1971).

(b) Not published:

Wise v. Richardson, No. C-191-S-70 (M.D.N.C., Aug. 11, 1971).

(3) Circuit Court of Appeals:

(a) Published decisions:

Mullins v. Oakley, 437 F.2d 1217 (4th Cir. 1971).

(b) Decisions not published:

Brown v. Hirst, No. 71-1291 (4th Cir., June 8, 1971).

Cason v. State of North Carolina, mem. dec., No. 13,535 (4th Cir., July 14, 1970).

Smith v. Jones, Misc. No. 15,356 (4th Cir., Aug. 10, 1971).

(4) United States Supreme Court citations:

McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).

(5) If a petition for certiorari was filed in the United States Supreme Court, disposition of the case in the Supreme Court should always be shown with parallel citations. For example: Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 653 U.S. 910, 77 S. Ct. 665, 1 L. Ed. 2d 664 (1957).

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, added to the second sentence of section (a) the language beginning "nor be considered" and rewrote section (c).

As section (b) was not changed by the amendment, it is not set out.

Rule 7.**JURORS**

(a) Number of Jurors in Civil Jury Cases. In all civil jury cases the jury shall consist of six (6) members.

(b) Court Techniques to Insure a Fair Trial. In every case the court will endeavor to aid in the selection of an impartial jury. However, in the trial of criminal cases calculated to attract substantial public interest, in order to shield the jurors from prejudicial publicity and to insure the accused a fair trial, the court, on its own motion, or on the motion of either party, without disclosure of the identity of the movant, may, among other things, order a continuance, a change of venue, sequestration of jurors, sequestration of witnesses, expand the *voir dire* examination of prospective jurors and issue cautionary instructions.

(c) Examination of Jurors. The court shall conduct the examination of prospective jurors.

(d) Same: Scope.

(1) In conducting the examination of jurors in civil cases, the court shall interrogate the jurors in such a fashion and manner as reasonably calculated to elicit from the jurors any prior knowledge of the case, and any connection they might have with the litigants and their attorneys, either personally, professionally, socially, economically or otherwise. The jurors shall also be asked if they know of any reason why they could not sit with the other jurors, hear the evidence in the case, the arguments of counsel, and the instructions of the court, and then render to each of the parties a fair and impartial trial and verdict.

(2) In criminal cases, the line of questioning set out in subsection (d) (1) of this rule shall be followed, where appropriate, and in addition the court shall determine whether any juror is or has been a law enforcement or peace officer.

(e) Same: Questions Requested by Counsel. After the court has completed its interrogation, counsel may request additional questions to be asked the jurors. If deemed by the court to be proper, the jurors will then be interrogated with respect to the matters requested by counsel.

(f) Jury Lists.

(1) The names of prospective jurors for any session of court or for a specific case shall not be disclosed prior to their reporting for duty except in compliance with instructions of the court. No juror shall be approached, either directly or

through any member of his immediate family, in an effort to secure information concerning his background.

(2) The clerk shall make available to counsel for the parties, or to any party acting *pro se*, a jury list which sets forth the name, general address and occupation of each juror when court is opened for the session or case for which the jurors were summoned.

(g) Instructions to Jury. In all cases tried by a jury, the points on which either party desires the jury to be instructed must be in writing and furnished to the court before jury arguments commence.

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, changed the reference in present subsection (d) (2), rewrote present subsection (f) (1) and deleted "When the jurors report for duty at a session of court" at the beginning and added the language begin-

ning "when court is opened" at the end of present subsection (f) (2).

The amendment adopted Oct. 14, 1971, effective Jan. 1, 1972, added present section (a) and redesignated former sections (a) through (f) as (b) through (g).

Rule 11.

TRIAL PUBLICITY

(a) Photographing and Reproduction of Court Proceedings. The taking of photographs in the courtroom or its environs, or radio or television broadcasting from the courtroom or its environs, during the progress of or in connection with judicial proceedings, including proceedings before a United States magistrate, whether or not court is actually in session, is prohibited. The word "environs" is defined to mean the offices and corridors on floors on which are located courtrooms or offices of the United States attorney, the United States marshal, the United States district court clerk or the United States probation officer. Proceedings, other than judicial proceedings, designed and conducted as ceremonies, such as administering oaths of office to appointed officials of the court, presentation of portraits, and similar ceremonial occasions, may be photographed in or broadcast from the courtroom, under the supervision of the court.

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, deleted "commissioner or" following "United

States" in the first sentence of section (a).

As section (b) was not changed by the amendment, it is not set out.

Rule 12.

ORDERS AND JUDGMENTS GRANTABLE BY CLERK

Pursuant to the provisions of Rule 77(c), Federal Rules of Civil Procedure, the clerk is authorized to grant and enter the following orders and judgments without further direction by the court, but his action may be suspended, altered or rescinded by the court for cause shown:

(1) Consent orders for the substitution of attorneys.

(2) Consent orders extending for not more than 60 days the time within which to answer or otherwise plead, answer interrogatories submitted under Rule 33, Federal Rules of Civil Procedure, or requests for admission as provided for in Rule 36, Federal Rules of Civil Procedure. Matters in bankruptcy and those matters set forth in Rule 6(b), Federal Rules of Civil Procedure, are not included in this authorization.

(3) Consent orders extending for not more than 60 days the time to file the record on appeal and to docket the appeal in the appellate court, except in criminal cases.

(4) Consent orders dismissing an action, except in bankruptcy proceedings

and in causes to which Rule 23(c) and Rule 66, Federal Rules of Civil Procedure applies.

(5) Judgments of default as provided for in Rule 55(a) and 55(b) (1), Federal Rules of Civil Procedure.

(6) Orders canceling liability on bonds other than orders disbursing funds from the clerk's registry account.

(7) Orders changing the time of opening and adjourning court in absence of the judge.

(8) *Ex parte* orders authorized by Local Rule 21(h).

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, substituted "60 days" for "30 days" near the beginning of subdivisions (2) and (3), added "other than orders disbursing funds from the clerk's registry account" at the end of subdivision (6), and added subdivision (8).

Rule 15.

CUSTODY AND DISPOSITION OF MODELS, EXHIBITS AND DEPOSITIONS

(b) Removal.

(1) All models, diagrams, exhibits, depositions, or other material placed in the custody of the clerk shall be removed by the party offering such evidence, or filing such materials, within 30 days after the expiration of the time for appeal from final judgment, unless otherwise directed by the Court. At the time of removal, a detailed receipt shall be given to the clerk and filed in the case jacket.

(2) If the party offering, or filing, models, diagrams, exhibits, depositions or other material fails to remove such materials as provided herein, the clerk shall write the attorney of record, or if none, the party offering the evidence, calling attention to the provisions of this rule. If after the mailing of such notice the materials have not been removed within 30 days, they may be destroyed by the clerk.

Editor's Note.—The amendment adopted Aug. 2, 1973, substituted "within 30 days after the expiration of the time for appeal from final judgment, unless otherwise directed by the Court" for "except as otherwise directed by the Court, within 30 days after the judgment becomes final" at the end of the first sentence of section (b)(1). As section (a) was not changed by the amendment, it is not set out.

II. Civil Rules

Rule 17.

FORM OF PLEADINGS AND DOCUMENTS

(1) All pleadings and papers submitted for filing must designate the case number of the action and fully conform to the provisions of Rules 10 and 11, Federal Rules of Civil Procedure.

(2) Requests for temporary restraining orders or injunctive relief set forth in complaints shall be treated as any other prayers for relief. If facts and circumstances are deemed to warrant urgent, preferential consideration of a request for a temporary restraining order or injunctive relief, such request shall be set out in a motion complying with the requirements of Local Rule 21.

(3) Where the complaint discloses that none of the plaintiffs or defendants is a resident of the division in which the complaint is captioned for filing, the clerk shall change the caption so as to designate the filing of the complaint and the issuance of the summons in a division in which one of the plaintiffs or one of the defendants reside. The clerk shall promptly notify the plaintiff, or his counsel, of the division in which the case has thus been docketed. The same procedure shall be

followed in civil cases removed from the state courts to the district court.

(4) Each paper presented to the clerk for filing shall be flat and unfolded, without manuscript cover, and firmly bound.

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, added present subdivision (2) and redesignated former subdivisions (2) and (3) as (3) and (4).

Rule 18.

FILING FEE AND SECURITY FOR COSTS

(a) Initiating Civil Actions. In every civil action commenced in this court:

(1) There shall be paid to the clerk of the court at the time of filing of the complaint or petition a \$15.00 filing fee, except that upon the filing of a habeas corpus petition, the fee shall be \$5.00; and

(b) Removal of Actions From State Courts. In every action removed from a state court to this court:

(1) There shall be paid to the clerk a \$15.00 filing fee; and

(2) Filed with the record being removed a \$200.00 removal bond, or cash deposited in the amount of \$200.00 in lieu of such bond, as security for costs as required by 28 U.S.C. § 1446(d).

(c) Filing Notice of or Petition for Appeal. Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari \$5.00 shall be paid to the clerk of the district court, by the appellant or petitioner. 28 U.S.C. § 1917.

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, re-wrote sections (a) and (b) and added section (c).

The amendment adopted Aug. 2, 1973, deleted former subsection (2) of section (a), requiring a \$200 bond or deposit as security for costs.

Rule 21.

MOTIONS IN CIVIL ACTIONS

(a) Must Be in Writing. All motions and objections to interrogatories and requests for admissions, unless made during a hearing or trial, shall be in writing.

(h) Extension of Time for Filing Response, Supporting Documents and Briefs. When it is reasonably shown in a motion or response, or in a written request, that the filing of a response, additional affidavits, briefs, depositions or other documents in support of or in opposition to a motion is necessary, and such documents are not then available, the clerk may enter an *ex parte* order specifying the time within which such response and/or additional documents shall be filed, or the clerk may approve such stipulation in regard thereto as may have been executed by counsel for the parties. A copy of any *ex parte* order so entered shall immediately be served upon opposing counsel. Applications by respondents for extensions of time under this rule shall be filed within five days from the date of service of the motion to which the response or supporting documents relate.

(l) Motions for Continuance. All motions to continue a pre-trial conference, hearing on a motion, or the trial of an action shall be presented to the court for its consideration, even though counsel have agreed to such continuance. No such continuance will be granted other than for good cause and upon such terms and conditions as the court may impose.

(n) Failure to File and Serve Motion Papers. If briefs are required, the failure of the movant or respondent to file a brief, or the failure of a respondent to file his response, within the times specified in this rule, shall constitute a waiver

of the right thereafter to file such brief or response, except upon a showing of excusable neglect. A motion unaccompanied by a brief, when a brief is required, may, in the discretion of the court, be summarily denied. A response unaccompanied by a brief, when a brief is required, may, in the discretion of the court, be disregarded and the motion to which it expresses opposition considered and decided as an uncontested motion. If a respondent fails to file his response within the time required by this rule, the motion will be considered and decided as an uncontested motion, and normally will be granted without notice to the parties.

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, made changes in sections (a), (h), (l) and (n). In section (a), the amendment substituted "and" for "including" following "motions" near the beginning of the section. In section (h), the amendment inserted "Response" in the catchline and "a response" and "response and/or" in the first sentence, inserted "briefs" and "the clerk may" the second time those words appear in the first sentence, deleted the former second sentence and rewrote the last sentence. In section (l), the amendment added "All" at the beginning of the first sentence

and substituted the language beginning "shall be presented" for "shall not be granted by the mere agreement by counsel" at the end of the first sentence and deleted "Any such motion, verbal or written, must be considered by the court, and" at the beginning of the second sentence. In section (n), the amendment substituted "of the right thereafter to file" for "to file thereafter" in the first sentence and inserted "the motion to which it expresses opposition" in the third sentence.

As the rest of the rule was not changed by the amendment, only sections (a), (h), (l) and (n) are set out.

Rule 24.

MINORS AND INCOMPETENTS AS PARTIES

(g) Consent Judgments Approving Settlement; Contents.

(1) Before judgments approving compromise settlements of claims of minors or incompetents are presented to the court, they shall be consented and agreed to by counsel for the parties to the action and by the next friend or guardian of the minor or incompetent.

(2) The judgment presented should provide, *inter alia*, that the parties have agreed to a settlement of all matters in controversy between them and the amount of the settlement; that the court has investigated the matter of the proposed settlement and considered the evidence offered by the parties; that the court is of the opinion, and finds as a fact, that the proposed compromise settlement is fair and reasonable and is for the best interests of the minor or incompetent; and that the court is of the opinion, and finds as a fact, that the compromise settlement agreement should be ratified, approved and confirmed by the court.

(k) Payment of Judgment. The amount of the judgment shall be paid into the office of the clerk of this court and the clerk shall make such disbursements from the proceeds as provided by the judgment of the court. The balance of the proceeds of the judgment shall be paid to the legal guardian of the minor or incompetent, if within this state. If there is no such guardian, the balance of the proceeds shall be paid to the clerk of superior court of the county in this state in which the minor or incompetent resides. If the minor or incompetent does not reside within this state, the balance shall be paid to a legal guardian approved by the court.

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, added "Consent" at the beginning and "Contents" at the end of the catchline to section (g) and deleted the catchlines "To be consented to" at the beginning of subsection (1) and "Contents" at the beginning of subsection (2) of section (g). The amend-

ment also inserted "in this state" in the third sentence of section (k) and added the fourth sentence of section (k).

The amendment adopted Aug. 2, 1973, rewrote subsection (1) of section (g), substituting "are" for "shall be" preceding "presented," "they" for "the judgment" preceding "shall be consented" and "the"

for "all" preceding "parties," inserting "and" preceding "by the next friend" and deleting "and, in cases where the minor is at least 18 years of age, by the minor plaintiffs" at the end of the subsection. As the rest of the rule was not changed by the amendment, only sections (g) and (k) are set out.

Rule 25.

OPENING STATEMENTS IN CIVIL ACTIONS

At the commencement of the trial of civil actions, the party upon whom rests the burden of proof shall state, without argument, his cause of action and the evidence by which he expects to sustain his claim. The adverse party shall then state, without argument, his defense and the evidence by which he expects to sustain same. If the trial is to the jury, the opening statement shall be made immediately after the jury is sworn. If the trial is to the court, the opening statement shall be made immediately after the case is called for trial. Opening statements shall be subject to such time limitations as might be imposed by the court.

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, substituted "sworn" for "empaneled" at the end of the third sentence.

III. Criminal Rules

Rule 28.

PROMPT DISPOSITION OF CRIMINAL CASES

(a) Intent and Interpretation of This Rule.

This rule is intended and shall be construed to minimize undue delay; to further the prompt disposition of criminal cases; and to enable this court to achieve the objectives of Rule 50(b) of the Federal Rules of Criminal Procedure.

(b) Priorities.

(1) If necessary to effect the intent of this rule, preference shall be given to criminal proceedings as far as practicable in preparation of calendars for the trial of cases in this district.

The trial or disposition of any case in which it appears to the court that there is reason to believe that the pre-trial liberty of a particular defendant who is in custody or released pursuant to Rule 46 of the Federal Rules of Criminal Procedure, poses a danger to himself, to any other person, or to the community, shall be given preference over other criminal cases if necessary to ensure prompt disposition of any such case.

(2) Cases other than criminal cases shall not be included on calendars for court sessions scheduled for the trial of criminal cases if to do so would be contrary to the intent of this rule. Criminal sessions of court shall be of such duration that the court can reasonably anticipate reaching all cases calendared for trial during the session. Two regular sessions of court for the trial of criminal cases shall be held annually in each of the six divisions of this district beginning on the dates set out in Local Rule 3(b).

(3) Every pending criminal case shall be calendared for disposition not later than the next regularly scheduled session of court for the trial of criminal cases in the division in which the case is pending, following the filing of an information or the return of an indictment.

(4) The Clerk, acting under the direction of Chief Judge, shall have the authority and responsibility for scheduling necessary hearings on pre-trial motions, arraignments, trials, and post-trial motions in all criminal cases. When appropriate the Clerk shall prepare and distribute calendars to the court, to supporting personnel of the court and to concerned offices of the Department of Justice.

(c) Time Limitations.

Subject to the provisions of sub-section (d) of this rule the following time limits shall be observed:

(1) Arraignments. All defendants shall be arraigned within 25 days, calculated from the date of the filing of the information or the return of the indictment in which they are charged. All defendants who have not been arraigned shall be present and ready for arraignment at 9:30 o'clock A.M. on the opening day of the next regular session of court in the division in which the case is pending.

The Court and Magistrates releasing defendants from custody prior to trial shall, in addition to attendance at other proceedings, require their appearance in the United States District Court at the next regular session for the trial of criminal cases in the division in which the case is pending unless otherwise directed by the Court, and at such other times and places as thereafter directed by the Court or any officer acting under the Court's direction. As a condition of release defendants shall be required to furnish an address or the name of a person at which or through whom they can receive notice of orders to appear before the Court or a Magistrate. Notice shall be deemed to have been given when mailed. If, upon arraignment, a defendant declines or refuses to plead, the Court shall enter a plea of "not guilty" for him and the case will be calendared for trial by jury.

(2) Trial. The trial shall commence within 90 days after a plea of not guilty, if the defendant is being held in custody, or within 180 days if he is not in custody.

(3) Sentencing. A defendant shall be sentenced promptly after conviction or a finding of guilty, unless the Court shall find that there is just cause for deferring sentence until a later specific date.

(4) If a defendant is apprehended outside of this district, the times set out above shall begin to run when the defendant is returned to this district.

(d) Extension of Time Limits.

Any period of time prescribed by this rule may be extended by the Court at any time. The following are examples of some circumstances the Court may consider in determining whether such time limits shall be extended.

(1) Periods of delay resulting from other proceedings concerning the defendant, such as proceedings for the determination of competency and the periods during which he is incompetent to stand trial, extraordinary pre-trial motions, stays, interlocutory appeals, trials of other charges, and the periods during which such matters are under consideration.

(2) Periods of delay resulting from continuances granted by the Court for persuasive reasons, on application of the defendant or the prosecution. The Court shall grant such continuances only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges and the interest of the defendant in a speedy trial.

(3) Periods of delay resulting from the absence or unavailability of the defendant.

(4) A reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.

(5) Periods of delay resulting from detention of the defendant in another jurisdiction, provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.

(6) Periods during which the defendant is without counsel for reasons other than the failure of the Court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

(7) Periods of delay necessary to avoid hardship due to distance, travel time and difficulties for the Court, and for defendants, their counsel and witnesses; or any other circumstances peculiar to this district which cannot be relieved by transfer

of cases under subsection (e) of this rule.

(8) Other periods of delay occasioned by exceptional circumstances.

(e) Transfer of Cases.

At arraignments the Court shall consider and determine whether in the interest of justice, the intent of this rule requires transfer of a case to another division, if trial cannot be had (and sentence imposed), within the time limits prescribed by this rule, in the division in which the case is pending. If trial is to be by jury the Court's policy expressed in its Plan For The Random Selection of Jurors, pursuant to 28 U.S.C. 1861, shall be considered.

(f) Effect of Noncompliance with Time Limits.

Upon the expiration of a time limit prescribed by, or extended, under this rule, a defendant who is in custody may be released from custody upon such terms as the Court shall fix, unless the Court finds that the defendant is responsible for the failure to comply with the time limits. Subject to the provisions of 18 U.S.C. § 3146 (Bail Reform Act of 1966) and any other applicable law or rule, if the Court finds that a defendant who is not in custody is responsible for failure to comply with the time limits, such defendant may have his release revoked unless there is good cause shown for the failure to comply. Subject to the power of the Court to dismiss a case for unnecessary delay, the failure to comply with the time limits herein prescribed shall not require the dismissal of the prosecution.

(g) Appointment of Counsel; Pre-Trial Motions and Conferences.

(1) Appointment of Counsel. The Magistrate and the Court shall take action necessary at initial appearance and at all other preliminary proceedings to ensure that all defendants are afforded an opportunity to employ and consult with counsel or that counsel is appointed promptly when appropriate under the Criminal Justice Act or Rule 44 of the Federal Rules of Criminal Procedure.

(2) Pre-Trial Motions. Motions in criminal cases, particularly motions made pursuant to Rules 12, 21 and 41(e), Federal Rules of Criminal Procedure, shall be in writing and state with particularity the grounds therefor and the relief or order sought. Unless a different time limitation is fixed by statute or the Federal Rules of Criminal Procedure all such motions shall be filed with the Clerk at least five days prior to the date of arraignment, accompanied by a brief citing all authorities upon which the movants rely. Copies of such motions and briefs shall be served upon the United States Attorney at the time they are filed with the Clerk. In unusual or exceptional circumstances, and for good cause shown, the Court may allow such motions to be made after the time fixed by this rule. The time for filing pre-trial motions shall not be extended nor will any delay be allowed in pre-trial proceedings which will be inconsistent with the intent and purpose of this rule. All pre-trial hearings shall be conducted as soon as possible consistent with these objectives and the Court's other work requiring priority consideration.

(3) Pre-Trial Conferences. In protracted criminal cases involving unusual facts and issues, or the use of numerous exhibits, the court, upon motion of either party, or upon its own motion, may order a pre-trial conference for the purpose of considering the stipulation of undisputed facts and exhibits, and such other matters as will promote a fair and expeditious trial.

(h) Grand Jury Sessions.

The Court shall fix and the Clerk shall notify the appropriate officials of the court from time to time the dates on which a grand jury shall be convened.

The intent and purpose of this rule imposes upon the United States Attorney an obligation to present bills of indictment or file informations, when appropriate, promptly after the arrest of persons who are not released from custody.

(i) Retrials.

Where a new trial has been ordered by the district court, or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time.

(j) Reports on Defendants in Custody; Defendants Serving Sentences on Other Convictions.

(1) The United States Attorney shall within 5 days after the close of the reporting period file with the Clerk of Court a bi-weekly DJ-130 report of persons in custody. A copy of such report shall be furnished to each judge of this Court.

(2) The United States Marshal shall by the 5th day of every month, furnish the Court, with a copy to each judge, a list of the names of persons in federal custody, the location at which and the charge(s) on which they are being held, and the beginning date of such custody, according to his records.

(3) If the United States Attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a federal, state, or other institution, or that of another jurisdiction, it is his duty, promptly, (i) to undertake to obtain the presence of the prisoner for a plea and trial; or (ii) if unable to obtain the presence of the defendant, to cause a detainer to be filed with the official having custody of the prisoner and request him to advise the prisoner of the detainer and to inform the prisoner of his rights under the Federal Rules of Criminal Procedure and this Plan.

(k) Definition of "Custody."

As used in this rule, "custody" means custody on the federal charge contained in the pertinent complaint, information or indictment.

Editor's Note.—The amendment adopted Nov. 7, 1972, effective Jan. 1, 1973, rewrote this rule. The rewritten rule, which includes former Rules 28, 29 and 30, is the court's plan for the prompt disposition of criminal cases prepared and adopted in compliance with the requirements of Rule

50(b) of the Federal Rules of Criminal Procedure.

The amendment adopted Aug. 2, 1973, substituted "9:30 o'clock A.M." for "10:00 o'clock a.m." in the second sentence of subdivision (1) of subsection (c).

Rule 29.

[Superseded]

Cross Reference.—See Editor's note to Rule 28.

Rule 30.

[Superseded]

Cross Reference.—See Editor's note to Rule 28.

Rule 34.**POST-CONVICTION MOTIONS**

(a) Generally. Motions filed pursuant to 28 United States Code § 2255 making a collateral attack upon a sentence imposed by this court, and petitions for writs of habeas corpus filed in this court by persons in state custody, shall be in writing, signed and verified. Additionally, such motions and petitions shall be on forms supplied by the court, and, to the extent applicable, all information required by the form shall be fully and accurately given.

(b) Federal Prisoners. Upon the filing by a federal prisoner of a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, the clerk shall

cause one copy of the motion to be delivered immediately to the United States attorney. The United States shall file an answer to each claim asserted, shall admit or deny the allegations or contentions upon which the petitioner relies and shall set forth affirmatively any other reason for denying relief. The United States shall attach to its answer certified copies of the indictment, plea of petitioner, and the judgment, or such of them, and such other records, as may be material to the issues joined.

The original of the answer and attachments shall be filed with the clerk and a copy of the answer shall be served on the petitioner or his counsel within twenty days after the service of the motion, unless a shorter time is ordered by the magistrate or court. The date and method of service on the petitioner shall be indicated on the original answer filed with the clerk.

(c) State Prisoners. Upon the filing by a state prisoner of an application for a writ of habeas corpus under the provisions of 28 U.S.C. §§ 2241, et seq., the clerk shall cause one copy of the application to be mailed immediately to the respondent. The respondent shall file answer to each claim asserted, shall admit or deny the allegations or contentions upon which the petitioner relies, and shall set forth affirmatively any other reason for denying relief. The respondent shall attach to his answer certified copies of the indictment, plea of petitioner, and the judgment, or such of them, and such other records, including the records of any post-conviction proceedings, as may be material to the issues joined.

The original of the answer and attachments shall be filed with the clerk and a copy of the answer shall be served on the petitioner or his counsel within twenty days (forty days in cases brought under 28 U.S.C. § 2254) after service of the application unless a shorter time is ordered by the magistrate or the court. The date and method of service on the petitioner shall be indicated on the original answer filed with the clerk.

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, designated the former provisions of this rule as section (a) and added sections (b) and (c). Sections (b) and (c) had been previously adopted by order dated Dec. 2, 1970, and designated therein as (a) and (b).

The amendment adopted Nov. 12, 1971, inserted "(forty days in cases brought under 28 U.S.C. § 2254)" in the first sentence of the second paragraph of section (c) and also inserted "the" preceding "court" near the end of that sentence.

Rule 35.

REPRESENTATION OF INDIGENT DEFENDANTS

The plan of the court for the representation of defendants who are financially unable to obtain an adequate defense, and for the furnishing of expert and other services, pursuant to the Criminal Justice Act of 1964, as amended, provides for representation by private attorneys. For the purpose of preparing and certifying panels of attorneys from which appointments will be made, the Court has appointed a District Committee, and Division Committees in each of the six divisions of the district, composed of experienced attorneys. A member of the District Committee resides in each of the six divisions of the court, and Division Committees have a member from each county in each division. Local bar associations have also been invited to participate in the preparation and certification of panels of attorneys from which appointments will be made. Because of the length of the plan, it is not being reproduced in these rules. A copy is available, however, through the clerk. Every effort has been made to insure that all qualified members of the Bar will be given an equal opportunity to participate in the representation of defendants under the Act. The panels will be revised annually. The court may, in the exercise of its discretion, appoint attorneys to represent defendants under the Act whose names do not appear on the panels.

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, inserted "as amended" in the first sentence.

IV. Bankruptcy Rules

Rule 36.

FILING FEES

(d) Petitions in Pending Cases. The filing fees for petitions in pending cases are as follows:

- (1) Petition to reclaim property from a bankrupt estate, \$10.00.
- (2) Petition to review an order of the referee, \$10.00.
- (3) Objections to the discharge, \$10.00.
- (4) Petition to determine dischargeability of claims, \$10.00.
- (5) Amendments to schedule of creditors after notice to creditors, \$10.00.

Comment: Filing fees for petitions filed with the referee shall accompany the petitions when filed with checks payable to the clerk of court.

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, added present subdivision (4) of section (d) and redesignated former subdivision (4) of section (d) as (5).

As the rest of the rule was not changed by the amendment, only section (d) is set out.

Rule 44.

OBJECTIONS TO DISCHARGE OF BANKRUPT AND DISCHARGEABILITY OF CLAIMS

(a) Objections to Discharge of Bankrupt. The objection to the discharge may contain one or more specifications of the grounds of opposition to such discharge. Each specification should be numbered and reference made to the applicable subparagraph of Section 14 c of the Bankruptcy Act. Each specification should allege the essential facts and all the elements constituting the bar to discharge and not merely allege generalities or conclusions. A specification alleged in the words of the statute alone is not sufficient except where the specification is under Section 14 c (2) of the Bankruptcy Act (11 USC § 32) for failing to keep accounts and records from which the bankrupt's financial condition and business transactions might be ascertained. A copy of the objections should be served upon the bankrupt or his attorney in the manner set out in Local Rule 42(c).

(b) Objections to Dischargeability of Claims. Since the court (referee in bankruptcy) has exclusive jurisdiction to determine whether a claim is discharged in bankruptcy, a petition for such determination must be filed with the referee within the time fixed by order of the court. The petition should contain sufficient facts to indicate the nature of the claim, the grounds for the nondischargeability, and the amount of judgment prayed for. A copy of the petition should be served upon the bankrupt or his attorney in the manner set forth in Local Rule 42(c).

Comment: Section 17 of the Bankruptcy Act (11 USC § 35) contains a list of the types of claims which are not discharged in bankruptcy. The court now has exclusive jurisdiction to determine what claims are not discharged. It also has further exclusive jurisdiction to determine the amount due and owing and render a judgment for the same. This is a judgment in the federal court and is enforced as an ordinary judgment of such court. For filing fees see Local Rule 36 (d) (3) & (4). Official Form No. 44, Specifications of Objection to Discharge (of bankrupt) is set forth as Form No. 4 in the Appendix of these rules.

Editor's Note.—The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, designated the former provisions of this rule as section (a), added the last sentence of section (a) and added section (b).

V. United States Magistrates

Rule 50.

JURISDICTION AND DUTIES OF UNITED STATES MAGISTRATES

In accordance with Rule 83, Federal Rules of Civil Procedure, and Rule 57, Federal Rules of Criminal Procedure, and, specifically, pursuant to the provisions of 28 U.S.C. § 636(b), the following additional duties are hereby specified for the full-time United States magistrate in Greensboro, North Carolina.

(a) Habeas Corpus, State Prisoners.

All petitions for writ of habeas corpus shall be transmitted to the clerk in Greensboro. [Local Rule 3(a).] The clerk shall forthwith assign the petitions in rotation to the judges in the district. If at any time one or more additional judges may be appointed and qualified, the clerk shall include the additional judge or judges in the rotation system. In the event of illness of a judge or the inability to act, the chief judge or the next active judge in point of service may modify this procedure on a temporary or permanent basis without the necessity of a formal order.

After a petition has been assigned to a judge, the clerk shall forthwith deliver it to the full-time United States magistrate in Greensboro.

The full-time magistrate is specifically authorized to enter orders permitting the filing of such petitions in forma pauperis. If the full-time magistrate deems the petition to be frivolous or otherwise inappropriate for filing, the full-time magistrate shall report, verbally or in writing as directed by the judge, and the judge shall enter his order thereon.

The full-time magistrate shall thereafter report and recommend, either orally or in writing, to the judge whether in the opinion of the full-time magistrate, it is proper to grant a plenary hearing. If the full-time magistrate is of the opinion that no plenary hearing is required, he shall submit in writing an outline of the facts and conclusions which support his position, which said facts and conclusions may be adopted, modified, or rejected, or in the discretion of the judge, used merely as a guide for independent findings and conclusions by the judge. In any event, all orders granting plenary hearings or dismissing petitions shall be entered by the judge.

In the discretion of the judge, the full-time magistrate may be requested to attend any plenary hearing for the purpose of preparing an outline of the facts and conclusions to be ultimately prepared by the judge.

(b) Civil Rights, 42 U.S.C. § 1983.

State prisoner matters seeking relief under 42 U.S.C. § 1983, including motions to appeal in forma pauperis, and related requests involving proceedings other than habeas corpus such as declaratory judgment actions, which are generally the purported equivalent of habeas corpus petitions, are to be assigned by the clerk to a judge in rotation as described above, and thereafter delivered to the full-time magistrate for further proceedings substantially in accord with the procedure prescribed for handling habeas corpus petitions, including specifically the right of the full-time magistrate to permit the filing of any petition or complaint in forma pauperis. If the petition or complaint is deemed to be frivolous, or is otherwise inappropriate for filing in forma pauperis, the magistrate may report, verbally or in writing as directed by the judge, and the judge shall enter his order thereon.

The clerk shall submit motions to appeal in forma pauperis to the full-time

magistrate who shall report and recommend, either orally or in writing, to the judge whether, in the opinion of the full-time magistrate, the motion should be granted or denied.

(c) Proceedings Under 28 U.S.C. § 2255.

Federal prisoner cases, including complaints relating to treatment in jails and penitentiaries accorded to federal prisoners, shall be assigned to the trial judge or, if the trial judge is not available, to any other judge. In the discretion of the judge to which the proceedings have been assigned, such cases may be referred to the full-time magistrate for proceedings substantially as prescribed in habeas corpus matters.

(d) Record of Proceedings.

(1) The United States magistrate disposing of a case involving a petty offense, as defined in 18 U.S.C. § 1, or a minor offense, as defined in 18 U.S.C. § 3401, shall file with the clerk a record of the proceedings prepared on forms and dockets to be furnished by the Administrative Office of the United States Courts. The record of proceedings, including the court reporter's notes, transcript, tape or other recording of the proceedings, with the original papers, shall be filed with the clerk not later than 20 days following the date of final disposition.

(2) All fines collected or collateral forfeited shall be transmitted immediately to the clerk.

(3) In all other cases, as soon as a defendant is discharged or, after having been bound over, is either confined on final commitment or released on bail, the magistrate is required within 20 days thereafter to transmit to the clerk of court his entire file of the case, including, if issued or received by him, the original complaint, warrant of arrest with the officer's return thereon, temporary and final commitments with returns thereon and his completed transcript reflecting the entire record of the proceedings before the magistrate.

(e) Warrants of Arrest.

The approval of the United States attorney or one of his designated assistants shall be secured by United States magistrates prior to the issuance of warrants on complaints of local police officers or private individuals.

(f) Appeals.

Upon appeal from a judgment of a United States magistrate as provided in 18 U.S.C. § 3402 and Rule 11, Rules for United States Magistrates, the appellant shall, within 15 days, serve and file a brief. The United States attorney shall serve and file a brief within 15 days after receipt of a copy of the appellant's brief. The appellant may serve and submit a reply brief within 5 days after receipt of the appellee's brief. Not later than forty (40) days after the filing of the magistrate's certificate, the appeal shall be placed by the clerk upon the court calendar for disposition.

(g) Special Master References.

In addition to the matters heretofore mentioned, particular cases may, in the discretion of the chief judge or judges of this court, be referred to the full-time magistrate as special master pursuant to the Federal Rules of Civil Procedure. This includes, but is not limited to, the supervision of pre-trial and discovery procedures in multidistrict litigation. If such reference is made, a special order shall be entered thereon. Where the parties are financially able to pay compensation for such services, any fee allowed by the court shall be assessed as taxable costs and paid to the Treasury of the United States or in such manner as directed by the Administrative Office of the United States Courts. No such reference shall be made unless consistent with the full-time magistrate's other duties which are accorded a higher priority.

(h) Pre-Trial and Discovery.

Upon direction by the court, actions ready for initial pre-trial or hearings on discovery motions, shall be noticed for hearing by the clerk before the full-time magistrate or one of the judges of the court. Authority is hereby given the full-time magistrate to conduct initial, interim, and/or final pre-trial conferences, to determine discovery motions, refine the issues, approve stipulations of facts, schedule dates for completion of various stages of the proceedings and generally supervise the aspects of the action relating to discovery. He may also hear and determine motions relating to security for costs; motions to extend time for pleading; motions for leave to amend pleadings or to file amended pleadings; motions for substitution of counsel or parties; motion to add parties, to intervene, or to file third-party complaints; motions to sever or to consolidate and motions to set aside default judgments.

Part-time United States magistrates shall exercise the jurisdiction and powers set forth in their respective orders of appointment.

In criminal actions, when consistent with other duties imposed upon the full-time magistrate, authority is hereby given to the magistrate to enter and determine all motions relating solely to pre-trial discovery. He may consider and determine motions relating to depositions, discovery and inspection; motions relating to subpoenas; motions for mental or other examination; motions for appointment of interpreters or expert witnesses; motions for bill of particulars; and motions for release or substitution of counsel.

Any order entered by the full-time magistrate pursuant to the powers and duties given herein may be appealed within five days to a judge of the court.

(i) Miscellaneous.

The judges may, in their discretion, request the full-time magistrate to perform such other duties as may be authorized by law and which are not inconsistent with the Constitution and laws of the United States.

Editor's Note.—This rule was adopted numbered Rule 50 by amendment adopted by order dated Dec. 2, 1970, and was Sept. 17, 1971, effective Jan. 1, 1972. formerly designated Rule 17. It was re-

Rule 51.**REFERENCE OF MINOR OFFENSE CASES TO UNITED STATES MAGISTRATES**

(a) Information Filed in the District. Where a defendant, against whom an information charging a minor offense is pending in this court, is brought before a magistrate, the magistrate may proceed in the manner prescribed by the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates.

(b) Transfer Under Rule 20 of the Federal Rules of Criminal Procedure. Upon the transfer, under Rule 20 of the Federal Rules of Criminal Procedure, of an information or indictment charging a minor offense, the case shall be referred immediately to a magistrate who may take the plea and impose sentence in accordance with the rules for the trial of minor offenses, if the defendant consents in writing to this procedure.

Editor's Note.—This rule was adopted by order dated and effective on Sept. 17, 1971.

Rule 52.**FORFEITURE OF COLLATERAL SECURITY IN LIEU OF APPEARANCE**

Pursuant to Rule 8, Rules of Procedure, United States magistrates, in the interest of justice, good court administration and sound law enforcement, for the petty offenses listed below, whether originating under the applicable federal statute or regulations or applicable state statute by virtue of the Assimilative Crimes Statute, 18 U.S.C. § 13, occurring within the territorial jurisdiction of the United States magistrate, collateral may be posted in lieu of the appearance of the offender unless (1) the offense is denominated as one for which appearance is mandatory or (2) it is the opinion of the arresting or citing officer that the offense charged was aggravated.

Upon the failure of the person charged with an offense or offenses to appear before the United States magistrates for trial of the offense or offenses listed below, except those offenses denominated "mandatory appearance," and not aggravated, as provided above, the collateral in the amount listed opposite the offense shall be forfeited to the United States. The posting of said collateral shall signify that the offender does not contest the charge nor request a hearing before the United States magistrate, and said collateral shall be administratively forfeited.

The clerk shall certify the record of any forfeiture of collateral for a traffic violation to the proper state authority.

No forfeiture of collateral will be permitted for a subsequent offense or offenses not arising out of the same facts or sequence of events resulting in the original offense or offenses.

There shall be maintained in the office of the clerk and with each United States magistrate a current list of the petty offenses and fines applicable thereto for which forfeiture of collateral security may be accepted.

Pursuant to the foregoing provisions, the offenses for which collateral may be posted in lieu of appearance by the person charged with the said offense are:

1. NATIONAL PARK SERVICE VIOLATIONS

(Title 36, Chapter I, Code of Federal Regulations)

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
2.1	Abandoned and unattended property	\$ 25.00
2.2	Aircraft	25.00
2.3	Audio devices	25.00
2.4	Begging and soliciting	25.00
2.5	Camping	25.00
2.6	Closing of areas	25.00
2.8(a)(b)	Dogs, cats and other pets	25.00
2.9(b)	Explosives	15.00
2.10	False report	25.00
2.12	Fires	25.00
2.13	Fishing	25.00
	Use of bait on sports fishing stream	50.00
	Exceeding creel limit	25.00
	Each fish in excess of creel limit	10.00
2.14	Fraudulently obtaining accommodations	25.00
2.17	Lost and found articles	15.00
2.18	Picnicking	25.00
2.19	Portable engines and motors	25.00
2.20	Preservation of public property, natural features, curiosities, and resources (minor such as flower picking)	15.00

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
2.21	Public assemblies, meetings	50.00
2.22	Report of injury or damage	25.00
2.23	Saddle and pack animals	25.00
2.24	Sanitation	25.00
2.25	Scientific specimens	25.00
2.26	Skating, skateboards	25.00
2.27	Special events	25.00
2.28	Swimming and bathing	25.00
2.29	Tampering with vehicle or vessel	100.00
2.30	Travel on trails	50.00
2.31	Water skiing	25.00
2.32(a)(2)	Feeding bears, etc.	25.00
2.33	Winter sports	25.00
4.3	Bicycles	25.00
4.4	Commercial towing services	25.00
4.7	Entrances and exits	25.00
4.8	Excessive acceleration	75.00
4.9	False report	25.00
4.13	Obstructing traffic	50.00
4.15	Report of vehicle accident	25.00
4.16	Right-of-way	50.00
4.18	Traffic control and signs	25.00
4.19	Travel on roads	25.00
5.1	Advertisements	75.00
5.2	Alcoholic beverages; sale of intoxicants	75.00
5.3	Business operations	25.00
5.4	Commercial passenger-carrying motor vehicles	25.00
5.5	Commercial photography	100.00
5.6	Commercial vehicles:	
	Pickup trucks, station wagons, vans, and cars	25.00
	Trucks over one and one-half tons and semitrailers	100.00
5.7	Construction of buildings or other facilities	100.00
5.8	Discrimination in employment practices	50.00
5.9	Discrimination in furnishing public accommodations and transportation services	50.00
5.10	Eating, drinking or lodging establishments	50.00
5.11	Impounding of animals	
	(Plus costs of capturing and feeding)	50.00
5.12	Memorialization	25.00
5.13	Nuisances	25.00
5.14	Prospecting, mining and mineral leasing	50.00
5.15	Residence on federal lands	50.00
5.16	Trespass on federal lands	50.00
6.7	Wrongful entry	10.00
7.14(b)	Beer and alcoholic beverages (1)	25.00
	(2)	50.00
7.34(b)	Fishing	25.00
7.34(d)	Parking and crossing permits for hunters	25.00
7.34(f)	Commercial hauling	50.00
7.34(g)	Commercial automobiles and buses	50.00
7.34(k)	Bicycles	15.00
7.34(l)	Boating	25.00
7.58	Cape Hatteras National Seashore Recreational Area; hunting	25.00

MANDATORY APPEARANCE VIOLATIONS

<i>Section Number</i>	<i>Offense</i>	
2.7	Disorderly conduct.	
2.8(c-e)	Dogs, cats and other pets.	
2.9(a)	Explosives.	
2.11	Firearms, traps and other weapons.	
2.12(c)(d)	Fires.	
2.16	Intoxication; drug incapacitation.	
2.20	Preservation of public property, natural features, curiosities, and resources (major such as destruction of government property).	
2.32	Wildlife; hunting:	
	Small game,	
	Bear, boar or deer hunting.	

2. NATIONAL PARK SERVICE VIOLATIONS

(Title 36, Chapter II, Code of Federal Regulations)

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
251.25(a)	Failure to pay entrance fees as directed by Forest Supervisor	\$ 10.00
251.86	Driving in Wilderness Area	50.00
251.92	Sanitation	25.00
251.93(b)	Destroying or removing natural feature or plant	25.00
251.93(d)	Selling merchandise	25.00
251.93(e)	Distributing literature	25.00
251.94	Audio devices	25.00
251.95	Occupancy of developed recreation sites	25.00
251.96(b)	Parking in unauthorized places	25.00
251.96(d)	Motorcycles on trails	50.00
251.96(e)	Driving vehicles for other than ingress or egress	25.00
251.96(g)	Excessively accelerating engine	75.00
261.8	Hunting, trapping and fishing:	
	Exceeding creel limit	25.00
	Each fish in excess of creel limit	10.00
	All other hunting, trapping and fishing violations	25.00
261.11(a)	Squatting	50.00
261.11(b)	Conducting business enterprise	25.00
261.11(d)	Littering	25.00
261.11(e)	Discharging firearms	100.00
261.11(h)	Reckless driving—boating	100.00
261.11(i)	Entering permanently closed area	100.00
261.11(j)	Violation of Supervisor Regulations	25.00
261.11(k)	Trespass in closed areas	25.00
261.11(l)	Blocking passage	25.00
261.11(m)	Entering Wilderness without permit	25.00

MANDATORY APPEARANCE VIOLATIONS

251.93(a)	Indecent conduct.
251.93(c)	Destroying government property.
251.93(f)	Discharging firearms.
261.1	Interfering with Forest Officers.
261.2	Fire uses restricted.
261.4	Protection of property.

<i>Section Number</i>	<i>Offense</i>
261.6	Timber uses restricted.
261.7	Unauthorized livestock use.
261.8	Fishing out of season.
	Illegal possession of big game (bear, boar, deer and/or turkey).
	Illegal possession of small game (rabbits, squirrel, and/or birds).
	Spotlighting.
	Trespass firearms.
261.11(c)	Placing stock in enclosure without permit.
261.11(f)	Illegal grazing.

3. NATIONAL FISH AND WILDLIFE VIOLATIONS

(Title 50, Chapter I, Code of Federal Regulations & Title 16, United States Code)

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
THE MIGRATORY BIRD TREATY ACT		
16 U.S.C. 703	Take or possess migratory nongame birds	\$ 50.00
	Each nongame bird	10.00
	Sell, barter, or trade nongame birds	150.00
MIGRATORY GAME BIRDS		
10.3(b)(1)	Take with illegal device	100.00
10.3(b)(2)	Take with unplugged shotgun	100.00
10.3(b)(3-9)	Take with unlawful methods or devices	200.00
10.4(c)(d)	Exceed daily bag or possession limit	100.00
	Each bird in excess of limit	25.00
10.4(f)(g)	Hunt along or in National Wildlife Refuge	100.00
10.7-8	Unlawful importation	100.00
10.9(a)	Possess or transport in excess of daily bag in field	100.00
	Each bird in excess of limit	25.00
10.9(b-d)	Violation of tagging regulations	100.00
10.11	Possess live wounded birds	100.00
	Each bird so possessed	25.00
10.14	Failure to retrieve	100.00
	Each bird not retrieved	25.00
10.41-53	Take before or after legal hours	100.00
	Miscellaneous regulations adopted for special areas or conditions	50.00
MIGRATORY BIRD HUNTING STAMP ACT		
16 U.S.C. 718	Take migratory waterfowl without duck stamp	25.00
MIGRATORY BIRD CONSERVATION ACT—NATIONAL WILDLIFE REFUGES		
16 U.S.C. 715		
26.2-32	Unlawful entry or use	\$ 25.00
28.1	Special regulations or posted notices	25.00
28.21(a-g)	Boating violations other than operating under the influence of alcohol or drugs	25.00
28.22	Water skiing	25.00
32.2(d)	Violation of State Game Law on National Wildlife Refuge ..	25.00
32.2(e)	Failure to comply with terms or conditions of access	25.00
33.2(d)		

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
32.2(f)	Failure to comply with special regulations	50.00
33.2(e)		
33.2(c)	State Fish Law violations on National Wildlife Refuge	25.00
	FISH AND WILDLIFE ACT—NATIONAL FISH HATCHERIES	
16 U.S.C. 742		
70.4(b)	Unlawful taking of fish	100.00
70.4(c)	Unlawful hunting	100.00
70.4(d)	Disturbing spawning fish	100.00
71.2(d)	Violation of State Game Law on National Fish Hatchery ..	25.00
71.2(e)	Failure to comply with terms or conditions of access	25.00
71.12(d)		
71.2(f)	Failure to comply with special regulations	50.00
71.12(e)		
71.12(c)	Violation of State Fish Law on National Fish Hatchery ..	25.00

MANDATORY APPEARANCE VIOLATIONS

<i>Section Number</i>	<i>Offense</i>	
	MIGRATORY GAME BIRDS	
10.4(a)	Possess freshly killed birds, closed season	
10.41-53	Take more than one hour before or after hours	
	Take during closed season	
16.2	Take, sell, import, export, transport, possess or dispose of without permit	
16 U.S.C. 851	Unlawful interstate transportation of fish	
	LACEY ACT	
16 U.S.C. 667(e)	Unlawful interstate transportation of game	
13	Unlawful importation of prohibited species of fish or game or birds	
	Unlawful possession or transportation of prohibited species of fish or animals or birds	
	BALD EAGLE ACT	
16 U.S.C. 668	Unlawfully sell or take	
11	Unlawful possession or transportation	
	MIGRATORY BIRD CONSERVATION ACT—NATIONAL WILDLIFE REFUGES	
28.8	Unlawful trespassing with firearms	

4. GENERAL SERVICES ADMINISTRATION VIOLATIONS

(Title 41, Chapter 101, Code of Federal Regulations)

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
19.301	Recording presence	\$ 25.00
19.302	Preservation of property	15.00
19.303	Conformity with signs and emergency directions	15.00
19.304	Disturbances	25.00
19.305	Gambling	25.00

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
19.307	Soliciting, vending, and debt collection	25.00
19.307(a)	Distribution of handbills	15.00
19.308	Photographs for news, advertising or commercial purposes ..	15.00
19.309	Dogs and other animals	15.00
19.310	Vehicular and pedestrian traffic	15.00
19.312	Nondiscrimination	50.00
19.311	Weapons and explosives	
19.306	Alcoholic beverages and narcotics	

5. NORTH CAROLINA TRAFFIC OFFENSES PUNISHABLE UNDER ASSIMILATIVE CRIMES STATUTE (18 U.S.C. 13)

Collateral

A. Speeding violations:

0-5 mph over applicable limit	\$ 15.00
6-10 mph over applicable limit	20.00
11-15 mph over applicable limit	25.00

B. Other violations:

Driving without, or with expired, operator's or chauffeur's license (except when revoked or suspended), or knowingly permitting an owned vehicle to be so operated	40.00
Driving the wrong way on a dual-lane highway	40.00
Litterbugging	30.00
Improper passing	25.00
Failure to dim lights	25.00
Height and width violations	25.00
Illegal transportation one quart or less taxpaid alcoholic beverage with seal broken in passenger area of motor vehicle (G.S. 18-51(1))	25.00
Driving too slowly	20.00
Any parking violation	15.00
Violation of vehicle inspection law	15.00
Exceeding a safe speed	15.00
Following too closely	15.00
Failure to stop for a red light or stop sign	15.00
Failure to yield right-of-way	15.00
Improper turn and/or improper signal	15.00
Driving the wrong way on a one-way city street	15.00
Improper vehicle equipment	15.00
Violation of the vehicle registration laws, except involving stolen or altered registration plates or certificates	15.00
Any other traffic violation for which court appearance is not mandatory	15.00

MANDATORY APPEARANCE VIOLATIONS

All pleas of not guilty.

All felonies.

Any violation resulting in personal injury.

Driving under the influence. G.S. 20-138; G.S. 20-139.

Careless and reckless driving. G.S. 20-140; G.S. 20-140.1.

Exceeding the applicable speed limit by over 15 mph.

Racing (prearranged, spontaneous, permitting such use of an owned vehicle, betting on prearranged racing). G.S. 20-141.3.

Passing stopped school, school activity, or church bus.

Failure to yield right-of-way to emergency vehicles.

Failure to obey directions of a traffic officer, or of a fireman at the scene of a fire.

Illegal transportation of liquor (more than one quart).

Leaving the scene of an accident in which involved, or failing to report such an accident. G.S. 20-166; G.S. 20-166.1.

Driving while license suspended or revoked, or permitting an owned vehicle to be so operated. G.S. 20-28; G.S. 20-34.

Driving with false, forged or altered driver's license, or permitting an owned vehicle to be so operated.

Any violation of the financial responsibility laws. (Chapter 20, Articles 9A and 13).

Any violation of the vehicle registration laws involving stolen or altered registration plates or certificates.

Any violation involving a false affidavit, or false statement under oath, or perjury. G.S. 20-17(5); G.S. 20-31; G.S. 20-313.1.

Any violation charged in the same warrant or summons with a mandatory appearance violation.

6. VIOLATIONS OF WATER RESOURCE DEVELOPMENT PROJECT REGULATIONS APPLICABLE TO W. KERR SCOTT DAM AND RESERVOIR AND NEW HOPE LAKE—CORPS OF ENGINEERS

(Title 36, Part 327, Code of Federal Regulations)

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
327.1(c)	Discrimination by lessee, licensee or concessionaire	\$ 25.00
327.2(a)	Operation or parking of vehicles on roadways designated by signs	25.00
327.2(b)	Operation of off-road vehicle except in area and at time designated by sign	25.00
327.3(a)	Unauthorized operation of vessel for fee	25.00
327.3(b)	Operation of vessel in prohibited area	15.00
327.3(c)	Operation of vessel in careless and reckless manner	25.00
327.3(d)	Unauthorized construction or habitation of mooring facilities	25.00
327.3(e)	Failure to remove or securely moor vessel not in use	25.00
327.5	Swimming in area marked by posted sign	15.00
327.6	Picknicking in area marked by posted sign	15.00
327.7(a)	Camping in area not designated for camping	25.00
327.7(b)	Camping at fee site without paying designated fee	25.00
327.7(c)	Exceeding 14-day camp-grounds occupancy limit	25.00
327.7(d)	Leaving camping equipment unattended at campsite to hold for future use	25.00
327.7(e)	Unauthorized digging ground or construction of facilities—damage not exceeding \$25.00	25.00
327.7(f)	Failure to remove camping equipment or clean campsites ..	25.00
327.8	Hunting, fishing, and trapping in restricted area	25.00
327.9(a)	Dumping or disposal of refuse, garbage, litter, etc., except in designated places	25.00
327.9(b)	Bringing refuse, garbage, litter, etc., onto development area for purpose of dumping or disposal	50.00
327.10(a)	Unauthorized storage of gasoline and other fuels	25.00
327.10(b)	Failure to confine fires to designated facilities and areas	25.00
327.10(c)	Gathering of wood for use as fuel	25.00
327.11(a)	Bringing or having horses in certain areas	15.00
327.11(b)	Bringing uncontrolled dogs, cats, or pets into recreation areas	15.00
327.12(a)	Failure to observe posted visiting hours restrictions	25.00
327.12(b)	Making excessive, disturbing noise during quiet hours	25.00
327.12(c)	Operation of disturbing noise producing devices	25.00
327.13(b)	Unauthorized possession or use of fireworks	25.00

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
327.14	Unauthorized destruction of public property—damage not exceeding \$25.00	25.00
327.15(a)	Abandonment of personal property	25.00
327.17	Unauthorized advertising	25.00
327.18	Unauthorized business or commercial activities	25.00
327.19(a)	Refusing to comply with terms or conditions of permit	50.00
327.20	Unauthorized placing of structures within project area	50.00
327.21	Unauthorized conducting of special events	25.00
327.22(b)	Unauthorized ranging, grazing, or watering livestock	25.00
327.22(c)	Unauthorized use of land or water for agricultural purposes ..	50.00
327.23	Violation of state or local law applicable to outgranted lands	25.00

MANDATORY APPEARANCE VIOLATIONS

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
327.2(c)	Careless or reckless operation of vehicles	
327.4(a)	Operation of aircraft on land or water at other than at landing areas	
327.4(b)	Unauthorized delivery by air of any person or thing	
327.7(e)	Unauthorized digging ground or construction of facilities—damage \$25.00 or more	
327.13(a)	Possession of loaded firearms, certain weapons and explosives	
327.14	Unauthorized destruction of public property—damage \$25.00 or more	
327.22(a)	Unauthorized occupation of land or facilities as residence	
327.26	Interference with government employee in conduct of official duties	

7. VETERANS ADMINISTRATION FACILITIES VIOLATIONS

(Rules and Regulations made pursuant to 38 U.S.C. Sections 218 and 219; published in the Federal Register, Volume 38, Number 173, September 7, 1973)
(Veterans Administration referred to as VA)

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
1.218(b)	Entry upon, or failure to leave, closed premises by unauthorized persons	\$ 5.00
1.218(c)	Littering, willful damage or destruction, or unauthorized removal of Government property from VA premises or national cemeteries causing loss to Government not exceeding \$50.00	10.00
1.218(d)	Refusal to comply with prohibitory signs or directions of officials during emergencies	15.00
1.218(e)	Failure to leave premises when so ordered as a result of creating disturbances	15.00
1.218(f)	Gambling, conducting lottery, selling or purchasing numbers tickets	25.00
1.218(h)	Unauthorized soliciting, vending, commercial advertising, and collecting private debts	5.00
1.218(i)	Unauthorized distribution of advertising material	5.00
1.218(j)	Unauthorized photography; photography for commercial purposes	5.00
1.218(k)	Bringing animals (except seeing-eye dogs) onto VA property without authorization	5.00

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
1.218(l)	Parking in or blocking emergency vehicle spaces or entrances; blocking access to fire hydrants or spaces reserved for physically disabled persons	15.00
1.218(l)	Failure to comply with traffic signals and directions or posted signs; blocking entrances, driveways, walks, or loading platforms; creating excessive noise	10.00
1.218(l)	Unauthorized parking in reserved locations; parking in excess of posted time limits	5.00
1.218(n)	Conducting unauthorized service, ceremony, or demonstration	15.00

MANDATORY APPEARANCE VIOLATIONS

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
1.218(c)	Willful destruction, damage or unauthorized removal of Government property from VA premises or national cemeteries causing loss to Government of \$50.00 or more	
1.218(g) (1)	Careless and reckless driving; operating motor vehicle under the influence of alcohol or drugs; unauthorized use or possession of alcohol or drugs (not prescribed for use as medicine)	
1.218(m)	Carrying firearms, dangerous or deadly weapons or explosives, except for official purposes	
1.218(o)	Unauthorized opening or attempting to open locks or card-operated barrier mechanisms; unauthorized possession, manufacture, or use of keys or barrier cards which operate locks to rooms or areas	
1.218(p)	Prostitution, solicitation and sexual misconduct	

Editor's Note.—This rule was adopted by order dated Dec. 2, 1970, and was formerly designated Rule 36. It was renumbered Rule 52 by amendment adopted Sept. 17, 1971, effective Jan. 1, 1972.

The amendment adopted April 20, 1972, which was rescinded by the amendment adopted Aug. 2, 1973, added to the forfeiture-of-collateral schedule a paragraph relating to the Corps of Engineers, Department of the Army.

The amendment adopted Aug. 2, 1973,

substituted "Assimilative Crimes Statute" for "Assimilated Crimes Act" in the first paragraph, changed the heading of paragraph 5 in the forfeiture-of-collateral schedule from "Traffic Offenses to Which North Carolina Law Is Applicable," rescinded the amendment adopted April 20, 1972, and added paragraph 6 of the forfeiture-of-collateral schedule.

The amendment adopted Nov. 8, 1973, added section 7, Veterans Administration Facilities Violations.

Appendix of Forms

FORM 2 (Bankruptcy)

(See Local Rule 42)

Official Caption and Verification

IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA
In Bankruptcy No.

In the Matter of }
..... } PETITION
Bankrupt }

To the Honorable Referee in Bankruptcy:
(CONTENTS OF PETITION)

.....
Petitioner
.....
Attorney for Petitioner
[As to requirement of verification see Local Rule 42(b)]
STATE OF
COUNTY OF

I,, the Petitioner named in the foregoing petition,
do hereby make solemn oath that the statements contained therein are true ac-
cording to the best of my knowledge, information and belief.
.....
Petitioner

Sworn to and subscribed before me this the day of 196...
.....
Notary Public (or other official)
My commission expires

FORM 3 (Bankruptcy)

[See Local Rule 40(b)]

Division of Attorneys' Fees, Affidavit

(Caption as in Form No. 2)

....., being duly sworn deposes and says:
That he is a petitioner in the above bankruptcy proceeding for compensation
as; that no agreement has been made
directly or indirectly by him, and no understanding exists between him and any
other person for a division of compensation except as follows:;
and that no division of fees prohibited in Section 62 c of the Bankruptcy Act will
be made by the applicant.

.....
Applicant
(Verification)
See Form No. 2

FORM 4 (Bankruptcy)

(See Local Rule 44)

Specification of Objections to Discharge

(Caption as in Form No. 2)

....., of in the County of
State of, the trustee of the estate (or a
creditor) of the above named bankrupt (or the United States attorney for said
district or the attorney designated by the Attorney General of the United States),
having examined into the acts and conduct of said bankrupt and being satisfied
that probable grounds exist for the denial of the discharge of said bankrupt and
that the public interest so warrants, does hereby oppose the granting to said
bankrupt of a discharge from his debts, and specifies the following as grounds
of objection: (Here specify in separately numbered paragraphs the grounds of
objection).

.....
Trustee (or creditor, etc.)

(Verification)
See Form No. 2

The United States District Court for the Eastern District of North Carolina

Rules of Court

I. General Rules

RULE

17. Procedure in Habeas Corpus and Motions Under 28 U.S.C.A. § 2255.

B. State Prisoners.

19. United States Magistrates.

1. Habeas Corpus—State Prisoners.

2. Civil Rights Statute—42 U.S.C. § 1983.

3. Motions under 28 U.S.C. § 2255.

4. Pre-trial and discovery.

5. Miscellaneous.

6. Forfeiture of Collateral in Lieu of Appearance.

7. Central Violations Bureau.

8. Violation Notices.

RULE

9. Reference of a Minor Offense Case to a Magistrate.

(a) Information Filed in the District.

(b) Transfer Under Rule 20 of the Federal Rules of Criminal Procedure.

II. Civil Rules

2. Filing Fee and Security for Costs.

A. Initiating Civil Actions.

B. Bond for Costs.

3. Filing of Papers and Service.

E. Pro se Civil Actions by Persons in State or Federal Custody.

I. General Rules

Rule 17. Procedure in Habeas Corpus and Motions Under 28 U.S.C.A. § 2255

B. State Prisoners. Upon the filing by a state prisoner of an application for a writ of habeas corpus under 28 U.S.C.A. § 2242, the clerk shall cause one copy of the application to be served immediately on the respondent, and the respondent shall file answer to each claim asserted and shall admit or deny the allegations or contentions upon which the petitioner relies, and shall set forth affirmatively any other reason for denying relief. The respondent shall attach to his answer certified copies of the indictment, plea of petitioner, and the judgment, or such of them, and such other records, including the records of any post-conviction proceedings, as may be material to the issues joined.

The original and a copy of the answer and attachments shall be filed with the clerk and a copy served on the petitioner or his counsel within forty days after service of the application, unless a shorter time is ordered by the court.

Editor's Note.—The amendment adopted March 20, 1973, substituted "forty days" for "twenty days" in the second paragraph of section B. As section A was not changed by the amendment, it is not set out.

Rule 19. United States Magistrates.

In accordance with the provisions of 28 U.S.C. § 636(b), the judges of the United States District Court for the Eastern District of North Carolina hereby establish this rule specifying the additional duties to be performed by the part-time United States magistrates specially designated by the court within the Eastern District of North Carolina.

1. Habeas Corpus—State Prisoners

(a) In conformity with a practice heretofore established, all petitions for writs of habeas corpus shall be filed with or transmitted to the clerk at Raleigh, North Carolina, who shall forthwith assign the petitions in rotation to the judges of the district and mark the record accordingly. However, at the direction or under the supervision of the judges of the district, the clerk shall transmit and deliver forthwith any number or percentage of the total number or all of the petitions before the

court, along with supporting documents to any magistrate specially designated by the court for his consideration as set out below.

(b) The magistrate is specifically authorized to enter orders permitting the filing of said petition in forma pauperis. If the magistrate deems the petition to be frivolous, or otherwise inappropriate for filing in forma pauperis, the magistrate shall report, verbally or in writing as directed by the judge to whom the case has been assigned, and said judge shall enter his order thereon.

(c) The magistrate shall thereafter report and recommend, either orally or in writing, to the judge whether, in the opinion of the magistrate, it is proper to grant a plenary hearing. If the magistrate is of the opinion that no plenary hearing is required, he shall submit in writing an outline of the facts and conclusions which support his opinion, or a report in the form of a proposed order, to the judge to whom the case has been assigned, which said facts and conclusions may be adopted, modified or rejected or, in the discretion of the judge, used merely as a guide for independent findings and conclusions by the judge. In any event, all orders granting plenary hearings or dismissing petitions shall be entered by the judge.

(d) In the discretion of the judge to whom said case has been assigned the magistrate may be requested to attend any plenary hearing for the purpose of preparing an outline of the facts and conclusions, or a report in the form of a proposed order, for the submission thereof to the judge who shall ultimately prepare same.

2. *Civil Rights Statute—42 U.S.C. § 1983*

State prisoner complaints seeking relief under 42 U.S.C. § 1983, are to be assigned by the clerk to the judges under the rotation system of the district. However, under the direction or supervision of the judges of the district, the clerk shall transmit the complaint along with supporting documents to any magistrate for his consideration and for proceedings substantially as prescribed in habeas corpus matters.

The magistrate is specifically authorized to enter orders permitting the filing of said complaint in forma pauperis. If the magistrate deems the complaint to be frivolous, or otherwise inappropriate for filing in forma pauperis, the magistrate shall report, verbally or in writing, as directed by the judge to whom the case has been assigned and said judge shall enter his order thereon.

3. *Motions under 28 U.S.C. § 2255*

These motions are to be assigned by the clerk to the trial judge or, if the trial judge is not available, to any other judge. However, at the direction of the judge to whom the motion has been assigned, the clerk shall transmit the motion along with supporting documents to any magistrate for his consideration and for proceedings substantially as prescribed in habeas corpus matters.

The magistrate is specifically authorized to enter orders permitting the filing of said motion in forma pauperis. If the magistrate deems the motion to be frivolous, or otherwise inappropriate for filing in forma pauperis, the magistrate shall report, verbally or in writing, as directed by the judge to whom the case has been assigned and said judge shall enter his order thereon.

4. *Pre-trial and Discovery*

(a) In civil actions authority is given to the magistrates specially designated for that purpose to conduct pre-trial conferences, and to enter such orders thereon as would have otherwise been entered by the judge with respect to discovery, simplification of issues, stipulation of facts, scheduling of prescribed dates for various stages of proceedings, and other matters pertaining thereto, as prescribed by the Federal Rules of Civil Procedure and Civ. Rule 7, U.S. Dist. Ct., E.D.N.C. The magistrate shall not enter any order granting a continuance of any case pending before a district judge, but may grant continuances of matters pending before the magistrate. The action taken hereunder shall be upon the written authority of the judge to whom the case is assigned.

(b) In criminal actions authority is given to the magistrates specially designated for that purpose to hear and determine all motions relating solely to pre-trial discovery. Motions to suppress shall be heard by the judge. The action taken hereunder shall be upon the written authority of the judge to whom the case is assigned.

(c) *Warrant of Removal.* The magistrates are specially designated and authorized to issue a warrant of removal under Rule 40(b)(3), Federal Rules of Criminal Procedure.

5. *Miscellaneous*

The judges may, in their discretion, request the magistrates to perform such other duties as may be authorized by law and which are not inconsistent with the Constitution and laws of the United States.

6. *Forfeiture of Collateral in Lieu of Appearance*

Pursuant to Rule 9, Rules of Procedure, United States magistrates, in the interest of justice, good court administration and sound law enforcement, for the petty offenses listed below, whether originating under the applicable federal statute or regulations or applicable state statute by virtue of the Assimilated Crimes Act, 18 U.S.C. § 13, occurring within the territorial jurisdiction of the United States magistrate, collateral may be posted in lieu of the appearance of the offender unless (1) the offense is denominated as one for which appearance is mandatory or (2) it is the opinion of the arresting or citing officer that the offense charged was aggravated.

Upon the failure of the person charged with an offense or offenses to appear before the United States magistrate for trial of the offense or offenses listed below, except those offenses denominated "mandatory appearance," and not aggravated, as provided above, the collateral in the amount listed opposite the offense shall be forfeited to the United States. The posting of said collateral shall signify that the offender does not contest the charge nor request a hearing before the United States magistrate, and said collateral shall be administratively forfeited.

The clerk shall certify the record of any forfeiture of collateral for a traffic violation to the proper state authority.

No forfeiture of collateral will be permitted for a subsequent offense or offenses not arising out of the same facts or sequence of events resulting in the original offense or offenses.

There shall be maintained in the office of the clerk and with each United States magistrate a current list of the petty offenses and fines applicable thereto for which forfeiture of collateral security may be accepted.

Pursuant to the foregoing provisions, the offenses for which collateral may be posted in lieu of appearance by the person charged with the said offense are :

NATIONAL PARK SERVICE VIOLATIONS
Title 36, Chapter I, Code of Federal Regulations

Section Number	Offense	Collateral
2.1	Abandoned and unattended property	\$ 25.00
2.2	Aircraft	25.00
2.3	Audio devices	25.00
2.4	Begging and soliciting	25.00
2.5	Camping	25.00
2.6	Closing of areas	25.00
2.8(a)(b)	Dogs, cats and other pets	25.00
2.9(b)	Explosives	15.00
2.10	False report	25.00

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
2.12	Fires	25.00
2.13	Fishing	25.00
	Use of bait on sports fishing stream	50.00
	Exceeding creel limit	25.00
	Each fish in excess of creel limit	10.00
2.14	Fraudulently obtaining accommodations	25.00
2.17	Lost and found articles	15.00
2.18	Picnicking	25.00
2.19	Portable engines and motors	25.00
2.20	Preservation of public property, natural features, curiosities, and resources (minor such as flower picking)	15.00
2.21	Public assemblies, meetings	50.00
2.22	Report of injury or damage	25.00
2.23	Saddle and pack animals	25.00
2.24	Sanitation	25.00
2.25	Scientific specimens	25.00
2.26	Skating, skateboards	25.00
2.27	Special events	25.00
2.28	Swimming and bathing	25.00
2.29	Tampering with vehicle or vessel	100.00
2.30	Travel on trails	50.00
2.31	Water skiing	25.00
2.32(a)(2)	Feeding bears, etc.	25.00
2.33	Winter sports	25.00
4.3	Bicycles	25.00
4.4	Commercial towing services	25.00
4.7	Entrances and exits	25.00
4.8	Excessive acceleration	75.00
4.9	False report	25.00
4.13	Obstructing traffic	50.00
4.15	Report of vehicle accident	25.00
4.16	Right-of-way	50.00
4.18	Traffic control and signs	25.00
4.19	Travel on roads	25.00
5.1	Advertisements	75.00
5.2	Alcoholic beverages; sale of intoxicants	75.00
5.3	Business operations	25.00
5.4	Commercial passenger-carrying motor vehicles	25.00
5.5	Commercial photography	100.00
5.6	Commercial vehicles:	
	Pickup trucks, station wagons, vans, and cars	25.00
	Trucks over one and one-half tons and semitrailers	100.00
5.7	Construction of buildings or other facilities	100.00
5.8	Discrimination in employment practices	50.00
5.9	Discrimination in furnishing public accommodations and transportation services	50.00
5.10	Eating, drinking or lodging establishments	50.00
5.11	Impounding of animals (Plus costs of capturing and feeding)	50.00
5.12	Memorialization	25.00
5.13	Nuisances	25.00
5.14	Prospecting, mining and mineral leasing	50.00
5.15	Residence on federal lands	50.00
5.16	Trespass on federal lands	50.00

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
6.7	Wrongful entry	10.00
7.14(b)	Beer and alcoholic beverages (1)	25.00
	(2)	50.00
7.34(b)	Fishing	25.00
7.34(d)	Parking and crossing permits for hunters	25.00
7.34(f)	Commercial hauling	50.00
7.34(g)	Commercial automobiles and buses	50.00
7.34(k)	Bicycles	15.00
7.34(l)	Boating	25.00
7.58	Cape Hatteras National Seashore Recreational Area; hunting	25.00

MANDATORY APPEARANCE VIOLATIONS

<i>Section Number</i>	<i>Offense</i>
2.7	Disorderly conduct.
2.8(c-e)	Dogs, cats and other pets.
2.9(a)	Explosives.
2.11	Firearms, traps and other weapons.
2.12(c)(d)	Fires.
2.16	Intoxication; drug incapacitation.
2.20	Preservation of public property, natural features, curiosities, and resources (major such as destruction of government property).
2.32	Wildlife; hunting: Small game, Bear, boar or deer hunting.

NATIONAL FOREST SERVICE VIOLATIONS

Title 36, Chapter II, Code of Federal Regulations

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
251.25(a)	Failure to pay entrance fees as directed by Forest Super- visor	\$ 10.00
251.86	Driving in Wilderness Area	50.00
251.92	Sanitation	25.00
251.93(b)	Destroying or removing natural feature or plant	25.00
251.93(d)	Selling merchandise	25.00
251.93(e)	Distributing literature	25.00
251.94	Audio devices	25.00
251.95	Occupancy of developed recreation sites	25.00
251.96(b)	Parking in unauthorized places	25.00
251.96(d)	Motorcycles on trails	50.00
251.96(e)	Driving vehicles for other than ingress or egress	25.00
251.96(g)	Excessively accelerating engine	75.00
261.8	Hunting, trapping and fishing: Exceeding creel limit	25.00
	Each fish in excess of creel limit	10.00
	All other hunting, trapping and fishing violations	25.00
261.11(a)	Squatting	50.00
261.11(b)	Conducting business enterprise	25.00
261.11(d)	Littering	25.00
261.11(e)	Discharging firearms	100.00
261.11(h)	Reckless driving—boating	100.00

*Section
Number*

*Offense**Collateral*

261.11(i)	Entering permanently closed area	100.00
261.11(j)	Violation of Supervisor Regulations	25.00
261.11(k)	Trespass in closed areas	25.00
261.11(l)	Blocking passage	25.00
261.11(m)	Entering Wilderness without permit	25.00

MANDATORY APPEARANCE VIOLATIONS

*Section
Number*

Offense

251.93(a)	Indecent conduct.
251.93(c)	Destroying Government property.
251.93(f)	Discharging firearms.
261.1	Interfering with Forest Officers.
261.2	Fire uses restricted.
261.4	Protection of property.
261.6	Timber uses restricted.
261.7	Unauthorized livestock use.
261.8	Fishing out of season.
	Illegal possession of big game (bear, boar, deer and/or turkey).
	Illegal possession of small game (rabbits, squirrel, and/or birds).
	Spotlighting.
	Trespass firearms.
261.11(c)	Placing stock in enclosure without permit.
261.11(f)	Illegal grazing.

NATIONAL FISH AND WILDLIFE VIOLATIONS

Title 50, Chapter I, Code of Federal Regulations & Title 16 United States Code

*Section
Number*

*Offense**Collateral*

THE MIGRATORY BIRD TREATY ACT:

16 U.S.C. 703	Take or possess migratory nongame birds	\$ 50.00
	Each nongame bird	10.00
	Sell, barter, or trade nongame birds	150.00

MIGRATORY GAME BIRDS:

10.3(b)(1)	Take with illegal device	100.00
10.3(b)(2)	Take with unplugged shotgun	100.00
10.3(b)(3-9)	Take with unlawful methods or devices	200.00
10.4(c)(d)	Exceed daily bag or possession limit	100.00
	Each bird in excess of limit	25.00
10.4(f)(g)	Hunt along or in National Wildlife Refuge	100.00
10.7-8	Unlawful importation	100.00
10.9(a)	Possess or transport in excess of daily bag in field	100.00
	Each bird in excess of limit	25.00
10.9(b-d)	Violation of tagging regulations	100.00
10.11	Possess live wounded birds	100.00
	Each bird so possessed	25.00
10.14	Failure to retrieve	100.00
	Each bird not retrieved	25.00

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
10.41-53	Take before or after legal hours	100.00
	Miscellaneous regulations adopted for special areas or conditions	50.00
MIGRATORY BIRD HUNTING STAMP ACT:		
16 U.S.C. 718	Take migratory waterfowl without duck stamp	25.00
MIGRATORY BIRD CONSERVATION ACT—NATIONAL WILDLIFE REFUGES:		
16 U.S.C. 715		
26.2-32	Unlawful entry or use	25.00
28.1	Special regulations or posted notices	25.00
28.21(a-g)	Boating violations other than operating under the influence of alcohol or drugs	25.00
28.22	Water skiing	25.00
32.2(d)	Violation of State Game Law on National Wildlife Refuge	25.00
32.2(e)	Failure to comply with terms or conditions of access	25.00
33.2(d)		
32.2(f)	Failure to comply with special regulations	50.00
33.2(e)		
33.2(c)	State Fish Law violations on National Wildlife Refuge	25.00
FISH AND WILDLIFE ACT—NATIONAL FISH HATCHERIES:		
16 U.S.C. 742		
70.4(b)	Unlawful taking of fish	100.00
70.4(c)	Unlawful hunting	100.00
70.4(d)	Disturbing spawning fish	100.00
71.2(d)	Violation of State Game Law on National Fish Hatchery	25.00
71.2(e)	Failure to comply with terms or conditions of access	25.00
71.12(d)		
71.2(f)	Failure to comply with special regulations	50.00
71.12(e)		
71.12(c)	Violation of State Fish Law on National Fish Hatchery	25.00

MANDATORY APPEARANCE VIOLATIONS

<i>Section Number</i>	<i>Offense</i>
MIGRATORY GAME BIRDS:	
10.4(a)	Possess freshly killed birds, closed season
10.41-53	Take more than one hour before or after hours
	Take during closed season
16.2	Take, sell, import, export, transport, possess or dispose of without permit
BLACK BASS ACT:	
16 U.S.C. 851	Unlawful interstate transportation of fish
LACEY ACT:	
16 U.S.C. 667(e)	Unlawful interstate transportation of game
13	Unlawful importation of prohibited species of fish or game or birds
	Unlawful possession or transportation of prohibited species of fish or animals or birds
BALD EAGLE ACT:	
16 U.S.C. 668	Unlawfully sell or take
11	Unlawful possession or transportation

Section
Number

Offense

MIGRATORY BIRD CONSERVATION ACT—NATIONAL WILDLIFE REFUGES:
28.8 Unlawful trespassing with firearms

TRAFFIC OFFENSES TO WHICH NORTH CAROLINA
LAW IS APPLICABLE

Collateral

A. Speeding violations:	
0-5 mph over applicable limit	\$ 15.00
6-10 mph over applicable limit	20.00
11-15 mph over applicable limit	25.00
B. Other violations:	
Driving without, or with expired, operator's or chauffeur's license (except when revoked or suspended), or knowingly permitting an owned vehicle to be so operated	40.00
Driving the wrong way on a dual-lane highway	40.00
Litterbugging	30.00
Improper passing	25.00
Failure to dim lights	25.00
Height and width violations	25.00
Illegal transportation one quart or less taxpaid alcoholic beverage with seal broken in passenger area of motor vehicle (G.S. 18-51 (1))	25.00
Driving too slowly	20.00
Any parking violation	15.00
Violation of vehicle inspection law	15.00
Exceeding a safe speed	15.00
Following too closely	15.00
Failure to stop for a red light or stop sign	15.00
Failure to yield right-of-way	15.00
Improper turn and/or improper signal	15.00
Driving the wrong way on a one-way city street	15.00
Improper vehicle equipment	15.00
Violation of the vehicle registration laws, except involving stolen or altered registration plates or certificates	15.00
Any other traffic violation for which court appearance is not mandatory	15.00

MANDATORY APPEARANCE VIOLATIONS

- All pleas of not guilty.
- All felonies.
- Any violation resulting in personal injury.
- Driving under the influence. G.S. 20-138; G.S. 20-139.
- Careless and reckless driving. G.S. 20-140; G.S. 20-140.1.
- Exceeding the applicable speed limit by over 15 mph.
- Racing (prearranged, spontaneous, permitting such use of an owned vehicle, betting on prearranged racing). G.S. 20-141.3.
- Passing stopped school, school activity, or church bus.
- Failure to yield right-of-way to emergency vehicles.
- Failure to obey directions of a traffic officer, or of a fireman at the scene of a fire.
- Illegal transportation of liquor (more than one quart).
- Leaving the scene of an accident in which involved, or failing to report such an accident. G.S. 20-166; G.S. 20-166.1.
- Driving while license suspended or revoked, or permitting an owned vehicle to be so operated. G.S. 20-28; G.S. 20-34.
- Driving with false, forged or altered driver's license, or permitting an owned vehicle to be so operated.

Any violation of the financial responsibility laws.

(Chapter 20, Articles 9A and 13).

Any violation of the vehicle registration laws involving stolen or altered registration plates or certificates.

Any violation involving a false affidavit, or false statement under oath, or perjury. G.S. 20-17(5); G.S. 20-31; G.S. 20-313.1.

Any violation charged in the same warrant or summons with a mandatory appearance violation.

GENERAL SERVICES ADMINISTRATION VIOLATIONS

Title 41, Chapter 101, Code of Federal Regulations

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
19.301	Recording presence	\$ 25.00
19.302	Preservation of property	15.00
19.303	Conformity with signs and emergency directions	15.00
19.304	Disturbances	25.00
19.305	Gambling	25.00
19.307	Soliciting, vending, and debt collection	25.00
19.307 (a)	Distribution of handbills	15.00
19.308	Photographs for news, advertising or commercial purposes ..	15.00
19.309	Dogs and other animals	15.00
19.310	Vehicular and pedestrian traffic	15.00
19.312	Nondiscrimination	50.00

GENERAL SERVICES ADMINISTRATION VIOLATIONS MANDATORY APPEARANCE VIOLATIONS

<i>Section Number</i>	<i>Offense</i>
19.311	Weapons and explosives.
19.306	Alcoholic beverages and narcotics.

VETERANS ADMINISTRATION FACILITIES VIOLATIONS

Title 38, Chapter 1, Code of Federal Regulations

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
1.218(b)	Unauthorized entry into areas posted closed to the public ...	\$ 10.00
1.218(b)	Failure to depart premises by unauthorized persons	5.00
1.218(c)	Improper disposal of rubbish on property	40.00
1.218(c)	Spitting on property	5.00
1.218(c)	Throwing of articles from a building or the unauthorized climbing upon any part of a building	5.00
1.218(d)	Failure to comply with signs of a directive and restrictive nature posted for safety purposes	10.00
1.218(e)	Disorderly conduct which creates loud, boisterous, and unusual noise, or which obstructs the normal use of entrances, exits, foyers, offices, corridors, elevators, and stairways, or which tends to impede or prevent the normal operation of a service or operation of the facility	25.00
1.218(f)	Gambling — participating in games of chance for monetary gain or personal property; the operation of gambling devices, a pool or lottery; or the taking or giving of bets	40.00

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
1.218(g)	Entering premises under the influence of alcoholic beverages or nonprescribed narcotic drugs, hallucinogens, marijuana, barbiturates or amphetamines	\$ 50.00
1.218(h)	Unauthorized solicitation of alms and contributions on premises ..	5.00
1.218(h)	Commercial soliciting or vending, or the collection of private debts on property	5.00
1.218(i)	Unauthorized display of placards or posting of material on property	5.00
1.218(i)	Unauthorized distribution of pamphlets, handbills and flyers ..	5.00
1.218(j)	Unauthorized photography on premises	10.00
1.218(l)	Failure to comply with traffic directions of hospital police ...	15.00
1.218(l)	Parking in spaces posted as "reserved for physically disabled persons"	25.00
1.218(l)	Parking in spaces posted as "reserved" or in excess of a posted time limit	5.00
1.218(l)	Parking in no-parking areas, lanes or crosswalks so posted or marked by yellow borders or yellow stripes	10.00
1.218(l)	Parking in emergency vehicle spaces, areas and lanes bordered in red or posted as EMERGENCY VEHICLES ONLY or FIRE LANE, or parking within 15 feet of a fire hydrant	25.00
1.218(l)	Failing to yield to a pedestrian in a marked and posted crosswalk ..	10.00
1.218(l)	Failing to come to a complete stop at a STOP sign	10.00
1.218(l)	Driving in the wrong direction on a posted one-way street	10.00
1.218(l)	Operation of a vehicle in a reckless or unsafe manner, drag racing, overriding curbs, or leaving the roadway	35.00

VETERANS ADMINISTRATION FACILITIES VIOLATIONS MANDATORY APPEARANCE VIOLATIONS

All offenses on property under the charge and control of the Veterans Administration (and not under the charge and control of the General Services Administration) as prescribed by Section 1.218 of the rules and regulations of the Veterans Administration, Title 38, Chapter I, Code of Federal Regulations, for which no provision is made above for forfeiture of collateral in lieu of appearance shall be deemed to be mandatory appearance violations.

7. *Central Violations Bureau*

A Central Violations Bureau is hereby established, under the jurisdiction of the clerk of court at Raleigh and staffed by designated employees in his office, to serve all magistrates and divisions within the district. The Bureau is authorized and empowered to perform all functions prescribed for the Central Violations Bureau by Section XVI, Disposition of Petty Offense, Operations Manual for United States Magistrates, dated January, 1971.

8. *Violation Notices*

In both mandatory and voluntary court appearance cases, the law-enforcement officer shall transmit copies 1 and 2 of the Violation Notice to the Central Violations Bureau, Clerk, U. S. District Court, P. O. Box 25670, Raleigh, North Carolina, 27611, within 24 hours. The officer keeps copy 3 for his agency files and copy 4 is given to the alleged violator. In voluntary court appearance cases the alleged violator may indicate on copy 4 that he wishes to have a hearing, and mail copy 4 to the Central Violations Bureau. The Central Violations Bureau will determine which magistrate is to conduct the hearing, based upon: (a) instructions from the court; (b) agreed upon arrangements with the magistrates; (c) the place where the violation occurred; (d) the availability to the magistrates of a reporter or sound recording equipment; and (e) the convenience of the alleged violator.

The Central Violations Bureau will send the designated magistrate a list of scheduled appearance which will serve as the magistrate's calendar. The magistrate shall notify the alleged violator, the officer, and any other necessary persons the date, time and place of the hearing.

9. *Reference of a Minor Offense Case to a Magistrate*

(a) *Information Filed in the District.* Where an information charging a minor offense is pending in this court, the clerk is authorized and directed to refer the case immediately to a magistrate to be designated by the clerk based upon: (a) instructions from the court; (b) agreed-upon arrangements with the magistrates; (c) the place where the alleged offense occurred; (d) the availability to the magistrate of a reporter or sound recording equipment; and (e) the convenience of the defendant. The designated magistrate shall proceed in the manner prescribed by the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates.

(b) *Transfer Under Rule 20 of the Federal Rules of Criminal Procedure.* Upon the transfer, under Rule 20 of the Federal Rules of Criminal Procedure, of an information or indictment charging a minor offense, the clerk is authorized and directed to refer the case immediately to a magistrate to be designated by the clerk as prescribed in subsection (a). The designated magistrate shall proceed in the manner prescribed by the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates.

Editor's Note.—This rule was adopted by order dated Jan. 26, 1971, and made effective May 1, 1971.

The amendment adopted March 25, 1971 added subdivisions 7 and 8.

The first amendment adopted April 15, 1971 added subdivision 9.

The second amendment adopted April 15, 1971 added to subdivision 6 the sched-

ules headed "General Services Administration Violations" and headed "General Services Administration Violations—Mandatory Appearance Violations."

The amendment adopted Sept. 3, 1973, added subsection (c) of subdivision 4.

The amendment adopted Aug. 15, 1974, added to subdivision 6 the schedule headed "Veterans Administration Facilities Violations."

II. Civil Rules

Rule 2. Filing Fee and Security for Costs

A. Initiating Civil Actions. The parties instituting any civil action, suit or proceeding in this court, whether by original process, removal or otherwise, shall pay a filing fee of \$15, except that on application for a writ of habeas corpus the filing fee shall be \$5. 28 U.S.C. § 1914. Prepayment of fees or costs or security therefor shall not be required in seamen's suits. 28 U.S.C. § 1916.

B. Bond for Costs. The parties instituting any civil action, suit or proceeding in this court shall not be required to post a bond or cash deposit as security for costs, except: (1) upon issuance of a restraining order or preliminary injunction as required by Rule 65(c), F.R. Civ. P.; (2) in petitions for removal of civil actions from state court as required by 28 U.S.C. § 1446(d); (3) in Admiralty and Maritime actions as authorized by Rule E(b) and Rule F(1); and (4) when express provision is made therefor either in a statute of the United States or in the Civil, Appellate, or Supplemental Rules of Federal Procedure.

Editor's Note. — The amendment adopted Jan. 2, 1974, rewrote this rule.

Rule 3. Filing of Papers and Service

E. Pro se Civil Actions by Persons in State or Federal Custody.

1. In all *pro se* civil actions by persons in state or federal custody, other than proceedings under 28 U.S.C. §§ 2241 through 2255, (See, Gen. Rule 18 D,

U.S. Dist. Ct., E.D.N.C.), the plaintiff shall file with the clerk one copy of the complaint, including all exhibits and other attachments, for each defendant, in addition to the original and one copy required by subsection A of this rule.

2. Where the person in state or federal custody seeks leave to proceed *in forma pauperis*, he shall submit an affidavit setting forth information which establishes that he is unable to pay the fee and costs of the action, and shall attach to the complaint a statement from prison officials showing the amount of money in plaintiff's prison trust fund account.

Editor's Note. — The amendment adopted
Aug. 12, 1974, added section E.

As the rest of the rule was not changed by
the amendment, only section E is set out.

The United States District Court for the Western District of North Carolina

Rules of Court

I. General Rules

Rule

2. Sessions.

11. Fair Trial and Free Press in Criminal Cases.

Rule

12. Forfeiture of Collateral Security in Lieu of Appearance.

I. General Rules

Rule 2. Sessions.

The court shall be in continuous session in all divisions of the district, and all matters, criminal and civil, shall be subject to being called for hearing and trial at any time upon reasonable notice to the parties.

Regular terms for the disposition of criminal cases shall be as follows:

Charlotte Division:

First Monday, January, April, July and October

Statesville Division:

Third Monday, January, April, July and October

Asheville Division:

First Monday, February, May, August and November

Shelby Division (Rutherfordton):

Fourth Monday, February, May, August and November

Bryson City Division:

Second Monday, March, June, September and December

(When the first day of any scheduled term falls on a legal holiday, court will convene the following day.)

Additional criminal sessions will be scheduled from time to time in all divisions as may be required to dispose of the criminal dockets promptly.

Trial calendars in civil cases will be prepared by the court, usually at the time of the Motion, Pre-trial and Settlement conference, or soon thereafter. Civil sessions of court will be held as often as necessary to accomplish, insofar as possible and except in the unusual cases, the following *illustrative* schedule of disposition of cases.

(a) In the unusual case where *both* sides press for trial and *both* counsel are diligent in preparation—not more, and usually less, than six months should elapse between filing of complaint and trial.

(b) When *one* side presses for an early trial, the time lapse from filing complaint to trial should not exceed nine months.

(c) Where neither side presses for an early trial, the time lapse from filing complaint to trial should not exceed fifteen months.

(d) If any case becomes two years old—regardless of its difficulty—it will be treated as a judicial emergency, unless, for good cause, an order is entered putting the case on the inactive docket.

If necessary to promote the efficient administration of justice, all hearings and trials of civil cases may be transferred from any division to any other division within the district. With the consent of the parties, the judges may conduct hearings and trials at any place within the district.

Editor's Note.—The amendment adopted Aug. 12, 1971, rewrote the second paragraph. As to the Charlotte and Statesville Divisions, the amendment was made effective Jan. 1, 1972.

The amendment adopted Mar. 12, 1973, again rewrote the second paragraph. In addition to changing the dates of the terms

and providing for additional terms, the amendment added the sentence in parentheses at the end of the paragraph.

An order adopted Mar. 14, 1973, provides for additional sessions of grand juries to pass upon indictments for the new criminal terms.

Rule 11. Fair Trial and Free Press in Criminal Cases.

A. It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence of contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer during this period, in the proper discharge of his official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

Nothing in this rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

B. All courthouse personnel, including among others, marshals, deputy marshals, court clerks, bailiffs, and court reporters shall not disclose to any person, without authorization by the court, information concerning arguments and hearings in criminal cases held in chambers or otherwise outside the presence of the public, or disclose any other information relating to a pending criminal case that is not a part of the public records of this court.

C. In a widely publicized or sensational case, the court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the court may deem appropriate for inclusion in such an order.

Editor's Note.—This rule was adopted by order dated April 29, 1969.

Rule 12. Forfeiture of Collateral Security in Lieu of Appearance.

Pursuant to Rule 8, Rules of Procedure, United States magistrates, in the interest of justice, good court administration and sound law enforcement, for the petty offenses listed below, whether originating under the applicable federal statutes or regulations or applicable state statute by virtue of the Assimilated Crimes Act, 18 U.S.C. § 13, occurring within the territorial jurisdiction of the United States magistrate, collateral may be posted in lieu of the appearance of the offender unless (1) the offense is denominated as one for which appearance is mandatory or (2) it is the opinion of the arresting or citing officer that the offense charged was aggravated.

Upon the failure of the person charged with an offense or offenses to appear before the United States magistrate for trial of the offense or offenses listed below, except those offenses denominated "mandatory appearance," and not aggravated, as provided above, the collateral in the amount listed opposite the offense shall be forfeited to the United States. The posting of said collateral shall signify that the offender does not contest the charge nor request a hearing before the United States magistrate, and said collateral shall be administratively forfeited.

The clerk shall certify the record of any forfeiture of collateral for a traffic violation to the proper state authority.

No forfeiture of collateral will be permitted for a subsequent offense or offenses not arising out of the same facts or sequence of events resulting in the original offense or offenses.

There shall be maintained in the office of the clerk and with each United States magistrate a current list of the petty offenses and fines applicable thereto for which forfeiture of collateral security may be accepted.

Pursuant to the foregoing provisions, the offenses for which collateral may be posted in lieu of appearance by the person charged with the said offense are:

NATIONAL PARK SERVICE VIOLATIONS

Title 36, Chapter I, Code of Federal Regulations

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
2.1	Abandoned and unattended property	\$ 25.00
2.2	Aircraft	25.00
2.3	Audio devices	25.00
2.4	Begging and soliciting	25.00
2.5	Camping	25.00
2.6	Closing of areas	25.00
2.8(a)(b)	Dogs, cats and other pets	25.00
2.9(b)	Explosives	15.00
2.10	False report	25.00
2.12	Fires	25.00
2.13	Fishing	25.00
	Use of bait on sports fishing stream	50.00
	Exceeding creel limit	25.00
	Each fish in excess of creel limit	10.00
2.14	Fraudulently obtaining accommodations	25.00
2.17	Lost and found articles	15.00
2.18	Picnicking	25.00
2.19	Portable engines and motors	25.00
2.20	Preservation of public property, natural features, curiosities, and resources (minor such as flower picking)	15.00
2.21	Public assemblies, meetings	50.00
2.22	Report of injury or damage	25.00
2.23	Saddle and pack animals	25.00
2.24	Sanitation	25.00
2.25	Scientific specimens	25.00
2.26	Skating, skateboards	25.00
2.27	Special events	25.00
2.28	Swimming and bathing	25.00
2.29	Tampering with vehicle or vessel	100.00
2.30	Travel on trails	50.00
2.31	Water skiing	25.00
2.32(a)(2)	Feeding bears, etc.	25.00
2.33	Winter sports	25.00
4.3	Bicycles	25.00
4.4	Commercial towing services	25.00
4.7	Entrances and exits	25.00
4.8	Excessive acceleration	75.00
4.9	False report	25.00
4.13	Obstructing traffic	50.00
4.15	Report of vehicle accident	25.00
4.16	Right-of-way	50.00
4.18	Traffic control and signs	25.00
4.19	Travel on roads	25.00
5.1	Advertisements	75.00
5.2	Alcoholic beverages; sale of intoxicants	75.00

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
5.3	Business operations	25.00
5.4	Commercial passenger-carrying motor vehicles	25.00
5.5	Commercial photography	100.00
5.6	Commercial vehicles:	
	Pickup trucks, station wagons, vans and cars	25.00
	Trucks over one and one-half tons and semitrailers	100.00
5.7	Construction of buildings or other facilities	100.00
5.8	Discrimination in employment practices	50.00
5.9	Discrimination in furnishing public accommodations and transportation services	50.00
5.10	Eating, drinking or lodging establishments	50.00
5.11	Impounding of animals (Plus costs of capturing and feeding)	50.00
5.12	Memorialization	25.00
5.13	Nuisances	25.00
5.14	Prospecting, mining and mineral leasing	50.00
5.15	Residence on federal lands	50.00
5.16	Trespass on federal lands	50.00
6.7	Wrongful entry	10.00
7.14(b)	Beer and alcoholic beverages (1)	25.00
	(2)	50.00
7.34(b)	Fishing	25.00
7.34(d)	Parking and crossing permits for hunters	25.00
7.34(f)	Commercial hauling	50.00
7.34(g)	Commercial automobiles and buses	50.00
7.34(k)	Bicycles	15.00
7.34(l)	Boating	25.00
7.58	Cape Hatteras National Seashore Recreational Area; hunting	25.00

MANDATORY APPEARANCE VIOLATIONS

Section Number	Offense
2.7	Disorderly conduct.
2.8(c-e)	Dogs, cats and other pets.
2.9(a)	Explosives.
2.11	Firearms, traps and other weapons.
2.12(c) (d)	Fires.
2.16	Intoxication; drug incapacitation.
2.20	Preservation of public property, natural features, curiosities, and resources (major such as destruction of government property).
2.32	Wildlife; hunting: Small game, Bear, boar or deer hunting.

NATIONAL FOREST SERVICE VIOLATIONS

Title 36, Chapter II, Code of Federal Regulations

Section Number	Offense	Collateral
251.25(a)	Failure to pay entry fees as directed by Forest Supervisor	\$ 10.00
251.86	Driving in Wilderness Area	50.00
251.92	Sanitation	25.00

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
251.93(b)	Destroying or removing natural feature or plant	25.00
251.93(d)	Selling merchandise	25.00
251.93(e)	Distributing literature	25.00
251.94	Audio devices	25.00
251.95	Occupancy of developed recreation sites	25.00
251.96(b)	Parking in unauthorized places	25.00
251.96(d)	Motorcycles on trails	50.00
251.96(e)	Driving vehicles for other than ingress or egress	25.00
251.96(g)	Excessively accelerating engine	75.00
261.8	Hunting, trapping and fishing:	
	Exceeding creel limit	25.00
	Each fish in excess of creel limit	10.00
	All other hunting, trapping and fishing violations	25.00
261.11(a)	Squatting	50.00
261.11(b)	Conducting business enterprises	25.00
261.11(d)	Littering	25.00
261.11(e)	Discharging firearms	100.00
261.11(h)	Reckless driving—boating	100.00
261.11(i)	Entering permanently closed area	100.00
261.11(j)	Violation of Supervisor Regulations	25.00
261.11(k)	Trespass in closed areas	25.00
261.11(l)	Blocking passage	25.00
261.11(m)	Entering Wilderness without permit	25.00

MANDATORY APPEARANCE VIOLATIONS

251.93(a)	Indecent conduct.
251.93(c)	Destroying government property.
251.93(f)	Discharging firearms.
261.1	Interfering with Forest Officers.
261.2	Fire uses restricted.
261.4	Protection of property.
261.6	Timber uses restricted.
261.7	Unauthorized livestock use.
261.8	Fishing out of season.
	Illegal possession of big game (bear, boar, deer and/or turkey).
	Illegal possession of small game (rabbits, squirrel, and/or birds).
	Spotlighting.
	Trespass firearms.
261.11(c)	Placing stock in enclosure without permit.
261.11(f)	Illegal grazing.

NATIONAL FISH AND WILDLIFE VIOLATIONS

Title #0, Chapter I, Code of Federal Regulations and Title 16 United States Code

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
THE MIGRATORY BIRD TREATY ACT:		
16 U.S.C. 703	Take or possess migratory nongame birds	\$ 50.00
	Each nongame bird	10.00
	Sell, barter, or trade nongame birds	150.00

<i>Section Number</i>	<i>Offense</i>	<i>Collateral</i>
MIGRATORY GAME BIRDS:		
10.3(b)(1)	Take with illegal device	100.00
10.3(b)(2)	Take with unplugged shotgun	100.00
10.3(b)(3-9)	Take with unlawful methods or devices	200.00
10.4(c)(d)	Exceed daily bag or possession limit	100.00
	Each bird in excess of limit	25.00
10.4(f)(g)	Hunt along or in National Wildlife Refuge	100.00
10.7-8	Unlawful importation	100.00
10.9(a)	Possess or transport in excess of daily bag in field	100.00
	Each bird in excess of limit	25.00
10.9(b-d)	Violation of tagging regulations	100.00
10.11	Possess live wounded birds	100.00
	Each bird so possessed	25.00
10.14	Failure to retrieve	100.00
	Each bird not retrieved	25.00
10.41-53	Take before or after legal hours	100.00
	Miscellaneous regulations adopted for special areas or conditions	50.00
MIGRATORY BIRD HUNTING STAMP ACT:		
16 U.S.C. 718	Take migratory waterfowl without duck stamp	25.00
MIGRATORY BIRD CONSERVATION ACT—NATIONAL WILDLIFE REFUGES:		
16 U.S.C. 715		
26.2-32	Unlawful entry or use	25.00
28.1	Special regulations or posted notices	25.00
28.21(a-g)	Boating violations other than operating under the influence of alcohol or drugs	25.00
28.22	Water skiing	25.00
32.2(d)	Violation of State Game Law on National Wildlife Refuge	25.00
32.2(e)	Failure to comply with terms or conditions of access	25.00
33.2(d)		
32.2(f)	Failure to comply with special regulations	50.00
33.2(e)		
33.2(c)	State Fish Law violations on National Wildlife Refuge ..	25.00
FISH AND WILDLIFE ACT—NATIONAL FISH HATCHERIES:		
16 U.S.C. 742		
70.4(b)	Unlawful taking of fish	100.00
70.4(c)	Unlawful hunting	100.00
70.4(d)	Disturbing spawning fish	100.00
71.2(d)	Violation of State Game Law on National Fish Hatchery ..	25.00
71.2(e)	Failure to comply with terms or conditions of access	25.00
71.12(d)		
71.2(f)	Failure to comply with special regulations	50.00
71.12(e)		
71.12(c)	Violation of State Fish Law on National Fish Hatchery	25.00
MANDATORY APPEARANCE VIOLATIONS		
MIGRATORY GAME BIRDS:		
10.4(a)	Possess freshly killed birds, closed season	
10.41-53	Take more than one hour before or after hours	
	Take during closed season	

Section Number	Offense
16.2	Take, sell, import, export, transport, possess or dispose of without permit

BLACK BASS ACT:

16 U.S.C. 851 Unlawful interstate transportation of fish

LACEY ACT:

16 U.S.C. 667(e) Unlawful interstate transportation of game

13 Unlawful importation of prohibited species of fish or game or birds

Unlawful possession or transportation of prohibited species of fish or animals or birds

BALD EAGLE ACT:

16 U.S.C. 668 Unlawfully sell or take

11 Unlawful possession or transportation

MIGRATORY BIRD CONSERVATION ACT—NATIONAL WILDLIFE REFUGES:

28.8 Unlawful trespassing with firearms

TRAFFIC OFFENSES TO WHICH NORTH CAROLINA
LAW IS APPLICABLE

A. Speeding violations:	<i>Collateral</i>
0-5 mph over applicable limit	\$ 15.00
6-10 mph over applicable limit	20.00
11-15 mph over applicable limit	25.00
B. Other violations:	
Driving without, or with expired, operator's or chauffeur's license (except when revoked or suspended), or knowingly permitting an owned vehicle to be so operated	40.00
Driving the wrong way on a dual-lane highway	40.00
Litterbugging	30.00
Improper passing	25.00
Failure to dim lights	25.00
Height and width violations	25.00
Illegal transportation one quart or less taxpaid alcoholic beverage with seal broken in passenger area of motor vehicle (G.S. 18-51(1))	25.00
Driving too slowly	20.00
Any parking violation	15.00
Exceeding a safe speed	15.00
Following too closely	15.00
Failure to stop for a red light or stop sign	15.00
Failure to yield right-of-way	15.00
Improper turn and/or improper signal	15.00
Driving the wrong way on a one-way city street	15.00
Violation of the vehicle registration laws, except involving stolen or altered registration plates or certificates	15.00
Any other traffic violation for which court appearance is not mandatory	15.00

MANDATORY APPEARANCE VIOLATIONS

- All pleas of not guilty.
- All felonies.
- Any violation resulting in personal injury.

Driving under the influence. G.S. 20-138; G.S. 20-139.

Careless and reckless driving. G.S. 20-140; G.S. 20-140.1.

Exceeding the applicable speed limit by over 15 mph.

Racing (prearranged, spontaneous, permitting such use of an owned vehicle, betting on prearranged racing). G.S. 20-141.3.

Passing stopped school, school activity, or church bus.

Failure to yield right-of-way to emergency vehicles.

Failure to obey directions of a traffic officer, or of a fireman at the scene of a fire.

Illegal transportation of liquor (more than one quart).

Leaving the scene of an accident in which involved, or failing to report such an accident. G.S. 20-166; G.S. 20-166.1.

Driving while license suspended or revoked, or permitting an owned vehicle to be so operated. G.S. 20-28; G.S. 20-34.

Driving with false, forged or altered driver's license, or permitting an owned vehicle to be so operated.

Any violation of the financial responsibility laws.

(Chapter 20, Articles 9A and 13).

Any violation of the vehicle registration laws involving stolen or altered registration plates or certificates.

Editor's Note.—This rule was adopted by order made effective for all offenses listed which arise on or after Jan. 1, 1971.

Appendix V. Extradition

(The following publication, "State of North Carolina Extradition Manual, Requirements and Forms," was issued by the Governor's Office in 1973.)

STATE OF NORTH CAROLINA
EXTRADITION MANUAL

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INTRODUCTION

EXTRADITION is the surrender by one state or nation to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which being competent to try and punish him, demands the surrender. Rendition is the return of such individual to the demanding state or nation.

In September 1787, Article IV of the Constitution of the United States was adopted.

Article IV, Sec. 2 reads:

“A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.”

Chiefly because the constitutional provision requiring extradition was not self-executing in that it provided no machinery for its execution, Congress, in 1793, passed the Federal Act (18 U.S.C.A. Sec. 3182, 3194, 3195), which provides as follows:

§ 3182. Fugitives from State or Territory to State, District or Territory

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

§ 3194. Transportation of fugitive by receiving agent

Any agent appointed as provided in section 3182 of this title who receives the fugitive into his custody is empowered to transport him to the State or Territory from which he has fled.

§ 3195. Payment of fees and costs

All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.

The above section of the Constitution and the above federal law form the basis of the interstate extradition of fugitive criminals in all the states. The Constitution establishes the right to demand the fugitive, and the federal law creates the machinery.

The states can, by statute, promulgate any additional procedural requirements they desire — as long as such requirements are not contrary to the Federal Act.

In an effort to erase the confusion and uncertainty as to what was required in order to extradite a person from another state, because of each state's own

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peculiar set of rules, the Commissioners on Uniform State Laws prepared an Act, known as the Uniform Criminal Extradition Act, embracing the best features of the various laws of the several states as well as the judicial law applicable, and offered it as a practicable law for all of the states to adopt, thus codifying the practice and promoting uniformity at the same time. This uniform law has now been adopted and passed by 45 states, including the District of Columbia, the Panama Canal Zone, the Virgin Islands, Guam and Puerto Rico. The law was passed in North Carolina in 1937, ratified on March 20, 1937, and is now North Carolina General Statutes 15-55 through 15-84. In all 45 states which have adopted the Uniform Law, the extradition proceedings are normally identical in each.

Therefore, in each of the remaining jurisdictions that have not adopted the Uniform Act, the extradition procedure varies somewhat. However, a safe rule to follow is: Anything which will satisfy the requirements of the Uniform Act will probably also be sufficient in the states which have not adopted the Act.

BASIC STEPS IN EXTRADITING A FUGITIVE

- I. Location and arrest of the fugitive in the asylum state.
- II. Request to Governor of demanding state for issuance of requisition and commission of agent.
- III. Issuance by Governor of demanding state of requisition and commission of agent.
- IV. Presentation of these papers to the Governor of the asylum state and approval of the papers by him or his legal counsel.
- V. Possibly, a hearing before the Governor of [or] his authorized agent in the asylum state.
- VI. Issuance of Governor's warrant by Governor of the asylum state, and arrest of the fugitive under this warrant.
- VII. Possibly, habeas corpus proceedings in the asylum state to test the sufficiency of the Governor's warrant.
- VIII. Possibly, file for review with the appellate court if the writ of habeas corpus is denied.

THE ROLE OF THE LOCAL LAW ENFORCEMENT OFFICER AND THE SOLICITOR BEFORE THE ACTUAL PREPARATION OF THE APPLICATION FOR REQUISITION BY THE SOLICITOR

- I. The Law Enforcement Officer Must First Know What Crimes Are Extraditable.
 - A. Misdemeanors and felonies are extraditable.
 - B. Each misdemeanor case, of course, should be considered on its own merits.
 - C. The following are policy statements which most states will follow in considering whether to grant extradition from their state. It is recommended that all prosecutors consider the following resolutions before initiating their request for extradition.

Nonsupport:

1. The Uniform Reciprocal Enforcement of Support Act should be employed prior to seeking extradition. If it has not been employed, and [an] affidavit from the prosecutor or appropriate law enforcement officer should be filed with the papers, explaining in detail the reason why the uniform act has not been employed. This is intended to apply also to similar charges such as abandonment of minor children, etc. The term "nonsupport" is used in its generic sense.

Worthless Checks:

1. Extradition on the charge of writing checks with insufficient funds should not be instituted unless the check or aggregate of checks total more than \$100 or unless special circumstances exist showing that the accused is a chronic violator.
2. Extradition should issue automatically in these cases: forgery, uttering, and issuing a check with no account.

Removing Mortgaged Property:

1. The amount of money involved in this type of case is felt to be of little importance. Only in exceptional circumstances should extradition be sought under this type of statute. For example, if the accused has made regular payments on the merchandise and perhaps owes only a reasonable balance, extradition should not be sought as this is clearly a civil matter. However, if the accused has purchased a vehicle or merchandise and departed the jurisdiction without making any payments the intent would seem to be clearly established and extradition should issue.

Rental Property:

1. When the accused fails to return the property, such as a motor vehicle, the same is located, and no intent to steal can be established, it would appear that this is a civil matter and extradition should not issue.
2. If, however, the accused rents the property and leaves the jurisdiction immediately or shortly thereafter for parts unknown, extradition should issue.
3. Other statutes should be employed other than the rental property statutes whenever possible, and when extradition is sought in this type of situation, a detailed affidavit should be filed with the papers supporting the request.

Misdemeanors:

1. Because of the terminology in many jurisdictions a misdemeanor may be punishable by as little as 10 days or as much as life. Consequently, the mere fact that the charge is a misdemeanor in the demanding state does not in any way restrict the Governor's right to extradite. Each case, of course, should be considered on its own merits.

II. Law Enforcement Procedure for Preparation of Complaint or Affidavit Warrant of Arrest, and Fugitive Warrant.

- A. An affidavit (or complaint) must positively charge the commission of the crime by the accused, citing the North Carolina General Statutes

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Section providing for the crime and must be sworn to before a magistrate. The affidavit must be more specific than "upon information and belief" or the extradition request will be denied by the asylum state.

B. The warrant of arrest is usually attached or made a part of the complaint, and made out to the appropriate law enforcement officers in North Carolina, signed by the magistrate, whose signature must be certified by the clerk of the superior court of the county wherein the crime allegedly occurred.

C. The fugitive warrant

1. Ordinarily the alleged fugitive is located and arrested in the asylum state before the Governor enters into the proceedings. The location and arrest of the fugitive is a matter between law enforcement agencies in the demanding state and the asylum state. The fugitive warrant issued in the asylum state upon receipt of satisfactory information from the pertinent law enforcement agency in the demanding state.
2. The alleged fugitive may be arrested in the asylum state through an identification check, or the demanding state may forward a criminal warrant or satisfactory information to the local law enforcement officers with an address for the fugitive.
3. The fugitive is taken into custody, and the demanding state is notified.
4. The fugitive may, in writing, waive extradition before a court of record or clerk of the superior court.
5. If the fugitive waives, the law enforcement agency of the demanding state is notified to appear and receive him.
6. If the fugitive does not waive, the demanding state is notified of his refusal and advised to forward the Governor's request for rendition.
7. A fugitive warrant is prepared by the local law enforcement officials of the asylum state, and the fugitive is arraigned on that warrant. Bond may be set if it is a bondable offense and the matter is continued pending receipt of request for rendition from the Governor of the demanding state.
8. If the accused is not arrested under warrant of the Governor by expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed 60 days. If recommitted the judge or magistrate may again take bail for his appearance and surrender within the period specified.

III. Steps Taken By the Law Enforcement Officer of the Demanding State When The Fugitive Refuses to Waive Extradition.

- A. Officer should interview witnesses before taking case to the solicitor to ascertain if:
1. Witnesses have changed their testimony.
 2. Witnesses have received restitution.
 3. Witnesses are willing to testify in court.
 4. The complaint alleges the facts in the case.

- a. All complaints used in extradition must be on direct allegation and sworn to before a magistrate.
 - b. The correctness of the complaint with regard to names and the spelling thereof, facts, dates and figures must be thoroughly checked.
5. The witnesses can identify the fugitive by photograph or other means.
- B. Officer should then have an interview with the solicitor and should be prepared to present the following:
1. The facts in the case which are supported by the testimony of available witnesses.
 2. The fugitive's record and information as to other outstanding charges against the fugitive.
 3. Admissions made by the fugitive or co-defendants.
 4. Particulars as to investigation and search.
- IV. The Solicitor, In Authorizing or Refusing Applications for Extradition Must Take Certain Factors Into Consideration.
- A. The various factors which should be taken into consideration are as follows:
1. The basic circumstances.
 2. The character of the offense.
 3. The magnitude of the offense.
 4. The evidence by which it is claimed that the crime may be proved.
 5. The substantive and procedural law applicable to the circumstances.
 6. The character of the defendant.
 7. The number of his prior convictions and the nature of the crimes there involved.
 8. The probability of his committing similar crimes in other communities.
 9. The probable length of time he will be incarcerated and effect of that imprisonment upon the defendant after his release in deterring further acts of crime in North Carolina as opposed to the value of an anticipated arrest, conviction and imprisonment if he returns, in keeping him away from the State of North Carolina.
- These facts are all weighed against:
1. The probability of a warrant of rendition being authorized by the Governor of the state of refuge.
 2. The financial cost of the defendant's return to North Carolina for prosecution.
 3. Effect of a refusal upon those who may contemplate the commission of crime in this community.
- B. The officer should keep the solicitor advised of new developments in the case if the solicitor agrees to prepare an application for the requisition of the fugitive.

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- C. The solicitor should request that the officers appointed as agents either be the investigating officer or officers who are completely familiar with the case. Officers appointed as agents are expected to hold themselves in readiness to travel at any time they receive word from the asylum state that the papers have been approved, or that they are expected to attend a hearing in the asylum state.
1. The agent should not go to the asylum state to pick up the fugitive until notified that the fugitive is ready to be delivered.
 2. North Carolina will not pay for the expenses for an agent to attend a hearing before the extradition request is honored, except in the case where the District of Columbia requires that the agent be at the hearing. (See attached copy of instructions from the District of Columbia)

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
METROPOLITAN POLICE DEPARTMENT
WASHINGTON, D. C. 20001

This is to notify you that _____, wanted by your department for _____, has been apprehended here. _____ refused to return to your jurisdiction without requisition papers and has demanded an extradition hearing which our court has set for _____.

Please have your Governor's requisition papers prepared to read, and forwarded to: "The Chief Judge of the Superior Court for the District of Columbia", Fourth and E Streets N.W., Washington, D. C., 20001. These papers should include a certified copy of the statute under which the defendant is charged and the agent named in the papers to receive the defendant must personally be present at the time of the extradition hearing.

This agent and all necessary witnesses should report to the Fugitive Section, Municipal Center Building, Room 3058, 300 Indiana Avenue N. W. at 9:00 A. M. on the date specified above for the extradition hearing, and will be accompanied to the proper court. The agent should be prepared to pay a case fee of \$10.00 for the Court Filing Fee and an additional \$3.00 fee to the U. S. Marshall for each prisoner.

"For your information in the preparation of the Extradition Papers"

- I. Where the Governor's papers are based upon an indictment; you must be prepared to prove the following at a court hearing in this jurisdiction:
 1. That the defendant is substantially charged with a crime in your state: An indictment is usually sufficient in itself to establish this.
 2. That the defendant is a fugitive from justice: That is, proof that the defendant was in your state on the date of the commission of the crime charged. An indictment establishes a presumption of fugitivity and the burden is upon the defendant to overcome the presumption.
 3. Identity: That the defendant named in the Governor's papers is the person who is before the court in this jurisdiction. This is best done by sending a witness who can personally identify the defendant as the person charged in the indictment. It might also be done by a picture and other identifying information.
- II. Where, in the absence of an indictment, the Governor's papers are based upon an affidavit made before a magistrate charging the demanded person with a crime, you must be prepared to prove the same elements as above:
 1. That the defendant is substantially charged with a crime in your state: The affidavit must set forth sufficient facts, not mere conclusions, to establish probable cause under the Federal Fourth Amendment; that is, the affidavit must show facts within the personal knowledge of the affiant and of which he had reasonably trustworthy information to warrant a man of reasonable caution to believe that an offense had been committed and that the demanded person committed it.
 2. That the defendant is a fugitive from justice: Proof of fugitive would usually be satisfied by an adequate showing of probable cause under paragraph 1.
 3. Identity: The same as in the case of an indictment.
- III. Where the defendant's extradition is being sought because he has violated his parole or probation, the crime with which he is charged for extradition purposes is the original crime for which he was convicted and sentence imposed, not "Violation of Parole" or "Violation of Probation"; and the Governor's papers should include copies of indictment, judgment, docket entries, etc., to show clearly that the judgment of your court has not been satisfied.
- IV. In desertion and nonsupport cases, the wife of defendant, or other person seeking support, should be present at the extradition hearing. In addition, our Court usually requires some showing that proper relief would not be available under our Uniform Reciprocal Enforcement Support Act.

Please acknowledge receipt of this notice. If for any reason you decide not to extradite the defendant, please notify us immediately.

Sincerely,

In reply refer to:
C. I. D. No. _____

Deputy Chief of Police
Commander, Criminal Investigations Division

RULES CONCERNING APPLICATIONS FOR REQUISITION

- I. Where Subject is Wanted for Trial: In requesting the extradition of a fugitive from justice (or other person subject to extradition) from another state to North Carolina for trial, the following documents must be transmitted to the Governor of North Carolina:
 - A. Application: Application for Requisition, prepared by the solicitor for the solicitorial district wherein the offense was allegedly committed. The application and supporting documents must be submitted in quadruplicate. The following must appear in the solicitor's application for requisition if a person is wanted for trial in North Carolina:
 1. The full name of the subject for whom extradition is asked, properly spelled.
 2. That in his opinion the ends of public justice require that the subject be brought to this state for trial, in accordance with North Carolina General Statutes 15-55 et seq.
 3. The [That] he believes that he has sufficient information to:
 - a. secure the conviction of the subject, or
 - b. prove that said subject has violated a condition of probation, suspended sentence, parole, or conditional release.
 4. The name and address of the agent or agents proposed to receive custody of the subject and escort him to North Carolina, and a statement that the person recommended is a proper person and has no private interest in the arrest and conviction of the subject.
 5. If there has been any former application for requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reason for the present request, together with the date of such prior application.
 6. If the subject is known to be under either civil or criminal arrest in the asylum state, the fact of such arrest and the nature of the proceedings on which it is based, the place (with complete address) where he is in custody, and the name and address of the officer who has custody of him must be stated, if known. If out on bail, the date of hearing should be stated. If business or home address is known, it should be given. The grounds for this belief should also be stated.
 7. That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceeding will not be used for any of said objects.
 8. The nature of the crime charged (with a reference to the particular statute defining and punishing the same), and the approximate time, place, and circumstances of its occurrence.
 9. If the subject was in North Carolina at the time the crime was allegedly committed and has since fled the state, that fact must be stated. If, on the other hand, the subject committed an act while in another state which intentionally resulted in a crime in North Carolina and is now in the state upon which requisition is asked, that fact must likewise be stated.

10. If the offense charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.
11. The application must be verified by the officer who makes it before the clerk of the superior court, or other proper official, of the county wherein the crime allegedly occurred or the subject escaped confinement or violated the terms of his probation or bail. To this verification must be attached the certificate of the clerk of court as to the official character of the solicitor or other officer making the application, the certificate of a judge of superior or district courts as to the official character of the clerk, and the certificate of the clerk as to the official character of the judge. (The certificates of the clerk and that of the judge may be combined with their certificates as to other matters in connection with the supporting documents). (While the Uniform Extradition Act requires no certification of the application for requisition beyond the verification by the solicitor, it is considered advisable to attach the clerk's and judge's certificates because some states refuse to honor a requisition when these certificates are not attached, and some judges in other states will not permit the extradition of a person when these certificates are not attached to the application for requisition).

B. Supporting Documents: A certified copy of the following must be attached to each application:

1. The indictment returned, or
2. The complaint or affidavit made before a judge or magistrate, stating the offense with which the subject is charged, showing probable cause, together with a certified copy of the warrant which was issued thereon.

A *capias* alone will not suffice. Where a warrant accompanies the application, the official character of the official who took the affidavit or complaint and issued the warrant, must be certified by the clerk of superior court of the county wherein the crime allegedly occurred.

The official character of the clerk must be certified by a judge of the superior court, and the official character of the judge must be certified by the clerk.

The authenticity of the copies of the indictment or of the complaint or affidavit and warrant must be certified by the clerk with custody of the original records; or in the case of a complaint or affidavit and warrant, it may be certified by the judge or magistrate who took the complaint or affidavit and issued the warrant. The official character of the magistrate or judge must be certified by the clerk of superior court, that of the clerk by the judge, and that of the judge by the clerk.

Where the supporting document is a complaint or affidavit made before a judge or magistrate, the warrant must be filled out and directed to a North Carolina officer, even if the subject is known to be in another state. The judge or magistrate issuing the warrant has no authority to order an arrest to be made by an officer of another state, and where the warrant is directed to an officer outside of North Carolina, the asylum state may refuse to honor the accompanying requisition of the Governor of North Carolina.

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The indictment or the affidavit or complaint made before the magistrate must substantially charge the person demanded with having committed a crime under the laws of North Carolina. General Statutes of North Carolina should be cited.

- C. Special Affidavits: In all cases of fraud, false pretense, embezzlement, or forgery, when made a crime by the common law or any penal code or statute, there must be included the affidavit of the principal complaining witness or informant
 1. that the application is made in good faith, for the sole purpose of punishing the accused, and
 2. that he does not desire or expect to use the prosecution for the purpose of collecting a debt or for any private purpose, and will not directly or indirectly use the same for any of said purposes, or a sufficient reason must be given for the absence of such affidavit.
- D. Additional affidavits: The solicitor may attach to his application for requisition such additional affidavits as he may think necessary; such as, affidavits from any persons who are familiar with the details of the crime and who can thus corroborate the allegations made in the complaint or indictment.
- E. In addition to the foregoing, certain additional items often prove of aid in securing extradition, and may well be included with the application. Among these items are the following:
 1. A photograph of the fugitive. This will be of special aid in connection with the identification feature hereinafter discussed. With the photograph should be an affidavit to the effect that the person there depicted is the one who is charged with the crime.
 2. A sworn statement, which may well form a part of the solicitor's application, to the effect that the fugitive was physically present in the demanding state at the time of the commission of the crime. This is important because many states refuse extradition in cases like conspiracy, desertion or nonsupport where the offender was not physically present in the state wherein the crime is charged.
 3. A copy of the criminal statute under which the accused is charged. This affords the Governor of the asylum state easy reference to the statute involved and allows him to see whether or not the indictment or complaint substantially charges a violation of such statute.

II. Where Subject Escapes Custody: (Escapees may also be Violators of Parole by Absconding and Violators of Conditional Release)

Where it is necessary to extradite a person who has been convicted of any crime and has thereafter escaped to another state, the application for requisition may be made by the solicitor if the fugitive was in jail ready to be transferred to serve a term in the Department of Correction, or if the fugitive was out of jail on appeal. Where the fugitive escapes from the Department of Correction while serving his term, the warden or the Commissioner of Correction, or proper official, may make the application for his return. The application in such case shall be accompanied by four certified copies of each of the following:

- A. The indictment (or the warrant, if the subject was tried on the warrant).

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- B. The judgment of conviction and sentence upon which the person was being held at the time of his escape.
- C. The affidavit of the officer from whose custody he escaped, showing such escape and the circumstances attending the same.
- D. The record of escape, which includes the transcript and fingerprints.

The authenticity of the indictment (or warrant) and the record of conviction and sentence upon which the person is being held must be certified by the clerk having custody of the original records, and the character of the official making affidavit as to the subject's escape must be certified by the clerk of superior court or proper official. The official character of the certifying clerk must be certified by a judge of superior court, and that of the judge by the clerk.

III. Probationers: Where it is necessary to bring back to North Carolina a person on probation who has violated the terms of his probation and left the state, the application for requisition and accompanying papers may be prepared by the solicitor of the district which embraces the county wherein the subject was serving his probation, or may be prepared by the State Probation Commission in behalf of the solicitor of the proper district, and for his signature.

IV. Air Force, Army, Marine or Naval Personnel: Where it is desired to requisition a person who is on active duty with the Air Force, Army, Marine Corps or Navy, it is necessary that the requisition also be accompanied by an agreement by the appropriate authorities:

- A. That the officer in charge of the subject will be informed of the outcome of any trial, and
- B. That if the Armed Forces authorities desire his return, the subject will, on acquittal or completion of sentence
 - 1. Be returned to the Armed Forces authorities at the place of delivery, or
 - 2. Be issued transportation to the nearest receiving ship, station, or barracks at the expense of the authority asking requisition.

In all cases where the costs and expenses incident to requisition would be borne by the county, i.e., where the crime charged is a misdemeanor or where no requisition is used, the solicitor or other officer making application for requisition must prepare and execute an agreement to this effect. If the crime is a felony and a requisition is issued by the Governor's Office, then the agreement will be prepared and executed by the Governor. The agreement may take the form of a letter to the Secretary of the appropriate branch of service, setting out the required promises. The requisition and the Governor's papers are mailed to the Governor's office of the asylum state. (See attached agreement)

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AGREEMENT BETWEEN THE GOVERNOR OR SOLICITOR
AND THE ARMED FORCES

EXAMPLE

February 30, 1975

TO WHOM IT MAY CONCERN:

In consideration of the delivery of (*name of fugitive, grade, service number, and branch of service of armed forces*) to (*county*) at (*city and state*), for trial upon the charge of (*list charge or charges*), I hereby agree, pursuant to the authority vested in me as (*Governor or Solicitor*), that the commanding officer in charge of the (*branch of service, location of base or station, city and state*), and the Secretary of the (*branch of military service*) will be informed of the outcome of the trial and that said (*name of fugitive*) will be returned to the (*list appropriate branch of service*) authorities at the aforesaid place of his delivery or to such other place as may be designated by the (*name of armed forces involved*) or issued transportation to the nearest receiving (*ship, station or base*) without expense to the United States or the person delivered immediately upon the completion of his trial upon the charge aforesaid in the event that he is acquitted upon said trial, or immediately upon satisfying the sentence of the court in the event that he is convicted and a sentence imposed, or upon other disposition of his case, provided that the (*name of armed forces involved*) authorities shall then desire his return.

Governor of North Carolina
or

Solicitor

- V. Fugitives Out of the United States (International Extradition): The solicitor sends his demand to the Governor's office. It is processed, the Governor's endorsement added, addressing it to the Secretary of State, and mailed to the Secretary of State, Washington, D. C.
- VI. Fugitives from Justice in Possessions: The solicitor sends his demand to the Governor's office. It is processed, the Governor's endorsement added, addressing it to the Governor of the Possession, and mailed directly to the Governor of the Possession.
- VII. Fugitives from Justice in the District of Columbia: The solicitor sends his demand to the Governor's office where it is processed, the Governor's endorsement added, and addressed to the Chief Judge of the Superior Court for the District of Columbia. The District of Columbia has given instructions it wishes to be followed in the letter shown in Section IV.
- VIII. Renewal of Application: Upon renewal of an application (for example, where prior requisition has proved ineffective because the subject was not to be found in the state upon which requisition was made), new or re-certified copies of papers in conformity with these rules must be furnished.
- IX. Nonsupport Cases: Solicitors are requested not to send papers to the Governor for charges of nonsupport unless the Uniform Reciprocal Enforcement of Support Act (G.S. 52A-1 et seq.) has been used unsuccessfully. If it has, and [an] affidavit to this effect should be attached to each set of papers. There are always exceptions to the rule, however, and if the solicitor feels that he has a good enough case, he can present it. In cases where a man has been sentenced for nonsupport

and escapes before he serves the sentence, usually the solicitor goes ahead and sends his demand to the Governor, who considers it favorably. In cases where a man violates probation in connection with non-support, the solicitor should feel free to go ahead and send his papers to the Governor. In any case involving nonsupport where a court of competent jurisdiction has been used without effect, the Governor would normally consider a request in such case favorably. All of the states have adopted the Act.

- X. **Additional Agents:** When it is deemed necessary for more than one extradition agent to be designated to escort a subject from another state to this state in a case of felony, the solicitor or other officer making the application must file with his written application for requisition an affidavit setting forth in detail the reasons why it is necessary to have more than one extradition agent so designated. Among other things (but not by way of limitation), the affidavit must set forth whether or not the subject is a dangerous person, his previous criminal record (if any), and any record of the subject on file with the Federal Bureau of Investigation or with the prison authorities of this state. As a further reason for more than one extradition agent to be designated, it may be shown in the affidavit the number of subjects to be brought to this state. If the Governor finds from his own investigation and from the information made available to him that more than one extradition agent is necessary, he may designate more than one extradition agent for the purpose. If the fugitive is a female, one of the two agents must be a female, if two are sent; if one is sent, she must be a female.
- XI. **Agent Must Await Notice:** The agent or agents named in the requisition should not go to the state on which demand is made until action has been taken by the Governor of that state and the agent is so notified by the office of the Governor of North Carolina or proper authorities of the state on which the demand is being made. The State of North Carolina will not be liable for any expenses incurred by the agent or agents in the way of travel and subsistence costs prior to the date action is taken by the Governor of the state on which the demand is made. Exceptions are made if the District of Columbia demands it.
- XII. **Return of the Agent's Commission:** Immediately after the agent has completed his assignment by delivering the subject to the proper officer in North Carolina, he must make return on the form printed on the back of his commission, and must have the officer into whose custody the subject was delivered fill in and sign the accompanying receipt. If the subject is not taken into custody and brought back to North Carolina by the agent, he must make return of that fact and the reasons therefore [therefor] on the back of his commission. The agent's commission must be returned to the Governor's office with proper return made thereon before the agent will be reimbursed by the Governor's office for his expenses.
- XIII. **Costs and Expenses**
 - A. **When the State Pays:**
 1. If the crime charged against the subject is a felony and requisition is issued by the Governor of North Carolina, reimbursement for expenses incurred in bringing the subject back to this state will be made out of the state treasury on a voucher paid out of the fugitives from justice fund, Code 14101, by the North Carolina Governor's Office budget officer.

APPENDIX V—EXTRADITION

2. The state will also be responsible for expenses incurred in the return of fugitives charged with felonies if the extradition process is not used. The Governor's requisition is issued, but thereafter extradition is waived by the subject, a copy of the waiver should be sent to this office, together with the agent's commission, attached to the expense account, submitted in triplicate; and the state will pay the expense. Copy of waiver and agent's commission are at the end of this article. Copy of expense account form is also attached, which can be secured from the Governor's office. A copy of extradition fees list charged by the various states is also attached to this article.
3. The law enforcement agencies in the cities or counties of North Carolina are required to contact the Governor's office for permission to send two agents if necessary, instead of the usual one agent. If two agents have to be sent, the Sheriff, Chief of Police, or the solicitor must, in the form of an affidavit, state the necessity for two agents, to return the fugitive, which must be attached to the expense account in triplicate. The State Auditor, who approves all expense accounts in this respect, will in turn return the expense account to the Governor's office for payment. The Governor's office will pay the expenses of one agent at all times if the expense account is in order, but will pay for two agents only if the affidavit of explanation is satisfactory. The guard's fees should be included on the agent's expense account.
4. The Governor's office will pay for only one trip to return the fugitive to North Carolina, except in extreme cases where a second trip is necessary or in the special case of Washington, D. C., where the agent is required to attend a hearing.
5. The agent must attach a copy of the waiver of extradition by the felon to each copy of the expense account.
6. The agent must provide proof that he returned the fugitive; and this could be in the form of an affidavit or a form provided by the office of the law enforcement agency. If the extradition process is used, the agent should make return on the back of the agent's commission, and return it to the Governor's office with his expense account.
- B. When county pays: In all other cases (i.e., where the crime charged is a misdemeanor), reimbursement will be made out of the treasury of the county wherein the crime is alleged to have been committed, according to such regulations as the board of county commissioners of that county may promulgate.
- C. Expenses allowed: If the extradition agent or agents or person or persons designated to return a fugitive or fugitives from another state to this state shall elect to travel by automobile, a sum not exceeding eleven (11¢) per mile may be allowed in lieu of all travel expense, and will be paid upon a basis of mileage for the complete trip. If travel is by train, bus, or other public conveyances, including use of taxis, the actual fare is allowed. This will include pullman fare. If a county of [or] city-owned car is used, only ordinary auto expenses, such as gas and oil, will be allowed. No expenses for witnesses are allowed. The maximum allowance by the State of North Carolina for out-of-state expenses for hotel and meals (and tips) is actual cost, not to exceed \$25.00 per day for each person, including the fugitive. Telephone calls will be paid for if necessary in connection with the State's business. Calls costing over \$1.00 must be explained. In all cases, the expenses for which repayment or reimbursement may be claimed shall consist of the reasonable and necessary travel expense and subsistence costs of the

extradition agent or fugitive office, as well as the fugitive, subject to the limitations indicated above, together with such legal fees as were paid to the officials of the state on whose governor the requisition is made. The Governor's office pays requisition fees in cases of felonies only; in cases of misdemeanors, the county is responsible for payment of requisition fees. As previously mentioned, the agent should put the expenses of the fugitive and/or guard on his expense account.

- XIV. **Expense Accounts:** Expense accounts must be submitted to the Governor's office in triplicate. The person or persons designated to return the fugitive will not be reimbursed for any expenses in connection with any requisition or extradition proceedings unless the expenses are itemized properly on the required expense forms, and the statement thereof sworn to under oath. The agent will not be reimbursed unless the receipts for the following are attached: Lodging (hotel), tolls, airplane fares, train fares or bus fares, or auto expenses. The Governor has the authority, upon investigation, to increase or decrease any item or expenses shown in the sworn statement, or to include items of expense omitted by mistake or inadvertence. The decision of the Governor as to the correct amount to be paid for such expenses or reimbursements is final. At the time the expense account is filed, the agent must return his commission with the proper return made thereon, in order to be reimbursed by the Governor's office for his expenses. As requested previously, the waiver of extradition must be attached, if the agent's commission is not used, to the expense account, along with the requested receipts mentioned above. The Governor's office submits the expense account for approval to the State Auditor in the Administration Building. Recommended copy of travel expense form to be used is attached. These forms can be obtained from the State Budget Officer, or law enforcement agencies can have some printed in their own locality.

EXTRADITION FEES

REQUIRED BY THE VARIOUS STATES

The North Carolina Governor's Office pays for the fee required by the other states in all cases where the extradition process is used. If the process is not used, in cases of felonies where the fugitive waives, the agent can include this fee under other expenses on his expense account.

MISSOURI	\$ 2.50
MONTANA	\$ 5.00
NORTH DAKOTA	\$ 5.00
OKLAHOMA	\$ 2.50
SOUTH DAKOTA	\$ 3.00
WEST VIRGINIA	\$ 2.00
WYOMING	\$ 5.00
*DISTRICT OF COLUMBIA...	\$10.00 + \$3.00

*In the case of D. C., the agent is required to pay cash fee of \$10.00 for court filing fee, and an additional \$3.00 cash fee to the U. S. Marshall for each prisoner. North Carolina will reimburse the agent for this fee if he will provide for it in his expense account.

APPENDIX V—EXTRADITION

NORTH CAROLINA

In the _____ Court

_____ COUNTY

WAIVER OF EXTRADITION

I, _____, having been arrested in this State and charged with having committed the crime of _____ in the County of _____ in the State of _____, and understanding that authorities from such State are demanding my return for trial in said State, do hereby waive the issuance and service of warrants provided for in Sections 15-61 and 15-62 of the North Carolina General Statutes, and all other procedure incidental to extradition, and further have stated personally before the undersigned Clerk (Judge) that I consent to return to the demanding State upon arrival of authorities from said demanding State, and do thus waive extradition; and that before this waiver was executed and subscribed, the undersigned Clerk (Judge) did inform me of my rights to the issuance and service of a warrant of extradition and of my right to obtain a writ of habeas corpus as provided in Section 15-64 of the North Carolina General Statutes.

_____ (SEAL)

I, _____, Clerk of the Superior Court (Judge of _____ Court) of _____ County, State of North Carolina, the same being a court of record, do certify that _____ appeared personally before me this day and signed the above waiver of extradition in my presence, after being informed by me of his legal rights with respect thereto.

Witness my hand and seal of court this _____ day of _____, 19 ____.

Clerk of Superior Court (Judge of _____

Court) of _____ County
State of North Carolina

Ref: G.S. 15-80

NOTE: Original copy goes to the Office of Governor of North Carolina; a copy must be given to agents of the demanding State.

Also, it is always preferred that a Waiver be signed before a Judge; however, the Clerk's signature is acceptable.

1974 CUMULATIVE SUPPLEMENT

DC-127
Rev. 2-71

STATE OF NORTH CAROLINA



AFFIDAVIT AND REQUEST

FOR DETENTION OF FUGITIVE FROM JUSTICE

PURSUANT TO SECTION 13 OF THE UNIFORM CRIMINAL EXTRADITION ACT
(ARREST PRIOR TO REQUISITION)

STATE OF NORTH CAROLINA

COUNTY OF _____

This day _____, personally
appeared before me, _____, Clerk of the
Superior Court of _____ County, North Carolina, and after
first being duly sworn, stated that in the _____ Court for
the County (City) of _____, in the State of North
Carolina, on the _____, 19____, the subject
_____, alias _____
was convicted of _____, and was sentenced
to confinement in the State Department of Correction, for a term of _____
_____ as shown by certified copy of fingerprint and
transcript attached, that the subject was accordingly confined in the _____
_____, from which
he escaped on the _____ day of _____, 19____, without having
completed his sentence; and that the subject is now in the State of _____
_____.

Officer In Charge

Sworn to and subscribed before me this
the ____ day of _____, 19____.

Clerk of Superior Court

County, North Carolina

APPENDIX V—EXTRADITION

Form BD-403S
50M—5-73

STATE OF NORTH CAROLINA

REQUEST FOR

REIMBURSEMENT OF TRAVEL AND OTHER EXPENSES INCURRED IN THE DISCHARGE OF OFFICIAL DUTY—INCLUDING PER DIEM

INSTRUCTIONS TO CLAIMANT: Prepare in three (3) copies. Attach all necessary receipts and other supporting documents to this form and submit the original and one (1) copy to your Budget or Business office. Retain one (1) copy.

Department or Institution		Division	
Payee's Name		Title	Headquarters (City)
Payee's Address		Date	Total Cost
From	Period covered by this voucher	To	Less Advance
		Date of Out-of-State Travel Auth.	Reimbursement

This is a true and accurate statement of expenses incurred in the service of the State.

I certify that the expenses incurred are necessary and proper and amounts claimed are just and reasonable.

(CLAIMANT)

(HEAD)

TRAVEL (SHOW EACH CITY VISITED)			TRANSPORTATION			SUBSISTENCE		OTHER EXPENSES	
DAY	FROM	TO	(1) MODE	DAILY PRIVATE CAR MILEAGE		(2) TYPE	AMOUNT	(3) DAILY TOTALS	EXPLANATION
			P			B			
			A	→		L			
			O	→		D			
			R	→		H			
			P			G			
			P			B			
			A	→		L			
			O	→		D			
			R	→		H			
			P			G			
			P			B			
			A	→		L			
			O	→		D			
			R	→		H			
			P			G			
			P			B			
			A	→		L			
			O	→		D			
			R	→		H			
			P			G			
			P			B			
			A	→		L			
			O	→		D			
			R	→		H			
			P			G			
			P			B			
			A	→		L			
			O	→		D			
			R	→		H			
			P			G			
					TOTAL TRANS.			TOTAL AUTH. SUB.	TOTAL OTHER EXP.

- (1) Mode of travel:
P—Pri.-owned car (11¢/mile)
A—Air
O—Other, rail or bus
R—Rental Car

- (2) Type of subsistence:
B—Breakfast
L—Lunch
D—Dinner
H—Hotel
G—Gratuities

- (3) Daily total for subsistence not to exceed \$19.00 for in-state or \$25.00 for out-of-state travel.

1974 CUMULATIVE SUPPLEMENT

FORM GOV. 1

State of North Carolina



APPLICATION FOR REQUISITION (NORMAL)

TO THE GOVERNOR OF THE STATE OF NORTH CAROLINA, _____:
THE UNDERSIGNED, _____, SOLICITOR (or ASSISTANT
SOLICITOR) of the _____ Solicitorial District of North Carolina,
_____, hereby makes this verified application for the
requisition of _____ Address _____, a Fugitive from Justice of this State, charged with
the CRIME of _____, in the COUNTY of _____

IN SUPPORT OF SUCH APPLICATION, YOUR PETITIONER HEREBY SHOWS THE FOLLOWING FACTS:

1. That the FULL NAME of the person for whom requisition is asked is _____
2. That in his opinion, the ends of public justice require that the subject be arrested and brought back to the State of North Carolina for trial at public expense.
3. That he believes that he has sufficient evidence to secure the conviction of the subject.
4. That the name of the AGENT... proposed to receive the subject from the proper authorities of the State of _____ and bring said subject to the State of North Carolina for trial is (are) _____
Name and Address _____;
AND that the person... named as AGENT... is (are) a proper person... and that he (they) has (have) no private interest in the arrest and conviction of the subject.
- 5a. That, according to information and belief, there HAS NOT BEEN a former request for the requisition of the subject, growing out of the same transaction herein alleged.
- 5b. That, there HAS BEEN a former request for the requisition of the subject growing out of the same transaction herein alleged: _____
Date of Prior Application _____
Explanation of Reasons for Present Request for Requisition _____
6. That the subject is now under ARREST in the State of _____, and in the custody of _____
Name and Address _____, and the grounds for such belief is as follows: _____
(and has been released on bail from this custody, is scheduled for a hearing in _____ Place _____ at _____ Time _____, and is presently residing at _____ Home Address or Business Address _____);
AND that if the subject is under either civil or criminal arrest in the State of _____ for other than the crime herein charged, the facts are unknown to the maker of this application.
7. That this application is not made for the purpose of serving the fugitive with civil process, or for the purpose of collecting a debt or enforcing a private claim, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings will not be used for any of said objects.
8. That the extradition of the subject to the State of North Carolina is hereby requested for the purpose of trial on the charge of committing the CRIME of _____, as defined in North Carolina GENERAL STATUTES _____, as set forth in: _____
Code—Section _____
- a. WARRANT, heretofore issued against him, accompanied by COMPLAINT (Affidavit to the facts thereof by a person having actual knowledge thereof), as per quadruplicate copies hereto attached.

APPENDIX V—EXTRADITION

FORM GOV. 1

APPLICATION FOR REQUISITION (NORMAL)

PAGE TWO

- b. INDICTMENT, heretofore found against subject on the _____ day of _____, 19____, by the Grand Jurors for the State of North Carolina in and for the County of _____, attending the Superior Court of the said county, which Indictment is now pending against the subject, and quadruplicate original copies of which indictment are hereto attached.
- 9a. That the alleged Crime was committed in _____; and
That said subject was personally and physically present in _____
North Carolina, at the time of the commission of the alleged crime, and thereafter the subject fled from the State of North Carolina to avoid arrest and prosecution.
- 9b. That said subject, insofar as is known, WAS NOT IN THE STATE OF NORTH CAROLINA at the time of the commission of the crime of which he is charged, and has not since that time fled from this State, but that this requisition is sought under Section 6 of the Uniform Extradition Act, G. S. 15-60, which your Applicant is informed has been adopted by the State of _____; and that the subject, while in the State of _____, committed an Act, to wit _____, which intentionally resulted in the commission of a crime, to wit _____, in the State of North Carolina.
- 10a. That this application was made as soon as the subject could be located.
- 10b. That there has been a considerable lapse of time since the date of the alleged crime, explanation of which is as follows: _____
- 11a. That this application is verified by _____
Name of Solicitor or Assistant Solicitor
as aforesaid, and is executed in quadruplicate, and is accompanied by certified copies of the WARRANT heretofore issued against the said subject by _____, a duly appointed, qualified, and acting _____, and COMPLAINT, Affidavit of identification, and other certifications by proper authorities that the Signers of the Documents are qualified.
- 11b. That this application is verified by _____
Name of Solicitor or Assistant Solicitor
as aforesaid, and is executed in quadruplicate, and is accompanied by certified copies of the INDICTMENT heretofore found against the said subject by the Grand Jurors in the State of North Carolina in and for the County of _____, attending the Superior Court of said county, which indictment is now pending against the subject; and other certifications by proper authorities that the Signers of the Documents are qualified.

Solicitor (Assistant Solicitor) of the
_____ Solicitorial District of North Carolina

SEAL

Sworn to and subscribed to before me, this the

_____ day of _____, 19____

Clerk, Superior Court or Proper Official

County and Address

- (1) This application may be used for all fugitives with exception of: Violators of Conditions of Probation, Parole, or Conditional Release; Escapees or Bail Violators after confinement.
- (2) Select the (a) or (b) which applies in your case, as follows: 5a. b.; 6a. b.; 9a. b.; 10a. b.; 11a. b. Leave what you do not use vacant.
- (3) Attach copy of applicable Statute.

1974 CUMULATIVE SUPPLEMENT

FORM GOV. 2

State of North Carolina



APPLICATION FOR REQUISITION (After Conviction)

TO THE GOVERNOR OF THE STATE OF NORTH CAROLINA, _____

THE UNDERSIGNED, _____

Commissioner of Correction, Solicitor (Assistant Solicitor)

District and Address

hereby makes this verified application for the requisition of _____

Fugitive from Justice of this State, charged in the County of _____

with the _____

Crime of Escape or Violation of terms of Parole, Conditional Release, Probation, Bail,
as defined in North Carolina General Statutes _____, and who is now in the jurisdiction
of the State of _____

IN SUPPORT OF SUCH APPLICATION, YOUR PETITIONER HEREBY SHOWS THE FOLLOWING FACTS:

1. That the FULL NAME of the person for whom requisition is asked is _____
2. That in his opinion, the ends of public justice require that the subject be arrested and brought back to the State of North Carolina at state or county expense in accordance with N. C. General Statutes 15-55 et seq.
3. That he believes that he has sufficient evidence to secure (a) the conviction of the subject; OR (b) to prove that said subject has violated the conditions of _____
4. That the name of the AGENT _____ proposed to receive the subject from the proper authorities of the State of _____ and bring said subject to the State of North Carolina for (a) trial OR (b) hearing is (are) _____

Name & Address

AND that the person _____ named as AGENT _____ is (are) a proper person _____ and that he (they) has (have) no private interest in the arrest and disposition of said fugitive.

- 5a. That, according to information and belief, there HAS NOT BEEN a former request for the requisition of the subject, growing out of the same transaction herein alleged.
- 5b. That, there HAS BEEN a former request for the requisition of the subject growing out of the same transaction herein alleged: _____

Date of Prior Application

Explanation of Reasons for Present Request for Requisition

6. That the subject is now under ARREST in the State of _____ and in the custody of _____
Name & Address
and the grounds for such belief is as follows: _____
(and has been released on bail from this custody, is scheduled for a hearing in _____ Place
at _____ Time, and is presently residing at _____ Home Address or Business Address
_____); AND that if the subject is under either civil or criminal
arrest in the State of _____ for other than the crime herein charged, the facts are unknown to the maker of this application.
7. That this application is not made for the purpose of serving the fugitive with civil process, or for the purpose of collecting a debt or enforcing a private claim, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings, or hearing, will not be used for any of said objects.

APPENDIX V—EXTRADITION

FORM GOV. 2

APPLICATION FOR REQUISITION

PAGE TWO

(After Conviction)

8. That the extradition of the subject to the State of North Carolina is hereby requested for the purpose of (a) TRIAL or (b) HEARING on the charge of (a) _____ (Escape)

OR for violation of the conditions of (b) _____ Parole, Conditional Release, Probation, Bail as defined in North Carolina General Statutes _____, and as set forth in, and attached in quadruplicate hereto:

(a) Warrant and Affidavit for Escape (Solicitor), dated _____; OR Certified Statement of Officer from whose custody Fugitive escaped (Dept. of Social Rehabilitation and Control), dated _____;

(b) Probation Judgment imposed and dated _____;

(c) Conditional Release imposed and dated _____;

(d) Certificate of Parole dated _____;

(e) Allowance of Bail dated _____;

Details (Escape Date; Revocation Date)

AFTER HAVING BEEN CONVICTED OF THE FOLLOWING CRIME (Show Name of Crime; N.C.G.S. citation; Date; Place; Judgment; Sentence):

- 9a. That said subject was personally and physically present in _____ County or City

North Carolina, at the time of the commission of the alleged crime or violation; and thereafter, the subject fled from the State of North Carolina to avoid arrest and prosecution.

- 9b. That said subject, insofar as is known, WAS NOT IN THE STATE OF NORTH CAROLINA, at the time of the alleged VIOLATION, and has not since that time fled from this State, but that this requisition is sought under Section 6 of the Uniform Extradition Act, G. S. 15-60, which your Applicant is informed has been adopted by the State of _____; and that the subject, while in the State of _____, committed an Act, to wit: _____

_____, which intentionally resulted in the violation of _____ in the State of North Carolina.

- 10a. That this application was made as soon as the subject could be located.

- 10b. That there has been a considerable lapse of time since the date of the alleged crime or charge, explanation of which is as follows: _____

11. That this application is verified, as aforesaid; is executed in quadruplicate; and is accompanied by the following certified documents:

(a) Warrant and Affidavit or Indictment, Organization of Court, Judgment upon Conviction and Sentence upon which subject was being held at time of escape or violation of conditions of bail. In addition, Solicitor: Warrant and Affidavit for Escape; Department of Social Rehabilitation and Control; Statement of Officer from whose custody fugitive escaped, and other records, if available, certified to by the Division of Correction of the Department of Social Rehabilitation and Control. (Fingerprint, FBI Transcript) — Escapees; Bail Violators.

1974 CUMULATIVE SUPPLEMENT

FORM GOV. 2

APPLICATION FOR REQUISITION (After Conviction)

PAGE THREE

- (b) Warrant and Affidavit or Indictment, Organization of Court, Judgment upon Conviction and Sentence; (certified to by Clerk of Court). (And other records, certified to by the Division of Correction of the Department of Social Rehabilitation and Control, such as: Fingerprints, FBI Transcript; and Other Records, certified to by the Board of Paroles, such as: (a) Certificate of Parole and Revocation of Parole; (b) Certificate of Conditional Release and Revocation of Conditional Release.)—Violators of Parole and Conditional Release.
- (c) Warrant and Affidavit or Indictment; Organization of Court; Probation Judgment; Probation Violation Warrant and Order for Capias; and Capias Instantner.—Violators of Probation.

Name and Title of Proper Official

SEAL

Sworn to and subscribed to before me, this the

_____ day of _____, 19____.

Clerk, Superior Court or Proper Official

County and Address

- (1) This application may be used for: Escapees from the Division of Correction of the Department of Social Rehabilitation and Control, G. S. 148-45; Escapees, County and Municipal, G. S. 14-256; Violators of terms of: Probation, G. S. 15-200; Parole by Absconding, G. S. 148-61.1; Conditional Release, G. S. 148-42, or violation of conditions of bail, all of which have been committed after conviction or confinement.
- (2) Select the appropriate subsection which applies in Sections 3, 4, 5, 8, 9, 10, and 11.
- (3) Attach copy of applicable Statute for Escape or Violation.

APPENDIX V—EXTRADITION

Agreement on Detainers: Form 1

NOTICE OF UNTRIED INDICTMENT, INFORMATION OR COMPLAINT AND OF RIGHT TO REQUEST DISPOSITION

Inmate _____ No. _____ Inst. _____

Pursuant to the Agreement on Detainers, you are hereby informed that the following are the untried indictments, informations, or complaints against you concerning which the undersigned has knowledge, and the source and contests of each.

You are hereby further advised that by the provisions of said Agreement you have the right to request the appropriate prosecuting officer of the jurisdiction in which any such indictment, information or complaint is pending and the appropriate court that a final disposition be made thereof. You shall then be brought to trial within 180 days, unless extended pursuant to provisions of the Agreement, after you have caused to be delivered to said prosecuting officer and said court written notice of the place of your imprisonment and your said request, together with a certificate of the custodial authority as more fully set forth in said Agreement. However, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Your request for final disposition will operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against you from the state to whose prosecuting official your request for final disposition is specifically directed. Your request will also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein and a waiver of extradition to the state of trial to serve any sentence there imposed upon you, after completion of your term of imprisonment in this state. Your request will also constitute a consent by you to the production of your body in any court where your presence may be required in order to effectuate the purposes of the Agreement on Detainers and a further consent voluntarily to be returned to the institution in which you are now confined.

Should you desire such a request for final disposition of any untried indictment, information or complaint, you are to notify _____ of the institution in which you are confined.

You are also advised that under provisions of said Agreement the prosecuting officer of a jurisdiction in which any such indictment, information or complaint is pending may institute proceedings to obtain a final disposition thereof. In such event, you may oppose the request that you be delivered to such prosecuting officer or court. You may request the Governor of this state to disapprove any such request for your temporary custody but you cannot oppose delivery on the grounds that the Governor has not affirmatively consented to or ordered such delivery.

DATED: _____
(insert name and title of custodial authority)

BY: _____
Warden - Superintendent - Director

RECEIVED

DATE _____

INMATE _____ NO. _____

In Triplicate White copy signed by inmate and unit head to be returned to Records Section, yellow copy signed by inmate and unit head for field jacket, pink copy for inmate.

Agreement on Detainers: Form 2

**INMATE'S NOTICE OF PLACE OF IMPRISONMENT AND REQUEST FOR
DISPOSITION OF INDICTMENTS, INFORMATIONS OR COMPLAINTS**

(inmate's signature)

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APPENDIX V—EXTRADITION

Agreement on Detainers: Form 3

CERTIFICATE OF INMATE STATUS

RE: _____
(inmate) (number) (institution) (location)

The [N C Prison Department] hereby certifies:

1. The term of commitment under which the prisoner above named is being held:
2. The time already served:
3. Time remaining to be served on the sentence:
4. The amount of good time earned:
5. The date of parole eligibility of the prisoner:
6. The decisions of the Board of Parole relating to the prisoner: (if additional space is needed use reverse side)
7. Maximum expiration date under present sentence:
8. Detainers currently on file against this inmate from your state are as follows:

DATED: _____

N. C. PRISON DEPARTMENT

BY: _____
DIRECTOR

Five Copies in case of an inmate's request for disposition under Article III, copies of this Form should be attached to all copies of Form 2. In the case of a request initiated by a prosecutor under Article IV, copy of this Form should be sent to the prosecutor upon receipt by the Consolidated Record Section of Form 5. Copies also should be sent to all other prosecutors in the same state who have lodged detainers against the inmate. One copy for the inmate. One copy main jacket, one copy field jacket.

1974 CUMULATIVE SUPPLEMENT

Agreement on Detainers: Form IV
OFFER TO DELIVER TEMPORARY CUSTODY

Date _____

TO: _____ Prosecuting Officer
(Insert Name and Title if Known)

(Jurisdiction)

and to all other prosecuting officers and courts of jurisdictions listed below from which indictments, informations or complaints are pending.

RE: _____ Number _____
(Inmate)

Dear Sir:

Pursuant to the provisions of Article V of the Agreement on Detainers between this state and your state, the undersigned hereby offers to deliver temporary custody of the above-named prisoner to the appropriate authority in your state in order that speedy and efficient prosecution may be had of the indictment, information or complaint which is [described in the attached inmate's request] [described in your request for custody of _____].
(Date)

[The required Certificate of Inmate Status is enclosed.] [The required Certificate of Inmate Status was sent to you with out letter of _____]
(Date)

If proceedings under Article IV (d) of the Agreement are indicated, an explanation is attached.

Indictments, informations or complaints charging the following offenses also are pending against the inmate in your state and you are hereby authorized to transfer the inmate to custody of appropriate authorities in these jurisdictions for the purposes of disposing of these indictments, informations or complaints.

Offense	County or Other Jurisdiction
---------	------------------------------

_____	_____
_____	_____
_____	_____

If you do not intend to bring the inmate to trial, will you please inform us as soon as possible?

Kindly acknowledge.

State Department of Correction

(Name and Title of Custodial Authority)

By: _____

(Director)

(Institution and address)

A. My counsel is _____
(Name of Counsel)

whose address is _____
(Street, City and State)

B. I request the court to appoint counsel.

(Inmate's Signature)

In the case of an inmate's request for disposition under Article III, copies of this Form should be attached to all copies of Form II. In the case of a request initiated by a prosecutor, this Form should be completed after the Governor has indicated his approval of the request for temporary custody or after the expiration of the 30 day period. Copies of this Form should then be sent to all officials who previously received copies of Form III. One copy also should be given to the prisoner and one copy should be retained by the warden. Copies mailed to the prosecutor should be sent by certified or registered mail, return receipt requested.

APPENDIX V—EXTRADITION

Agreement on Detainers: Form V REQUEST FOR TEMPORARY CUSTODY

TO: _____
(Warden, Superintendent, Director) (Institution)

(Address)

Please be advised that _____, who is presently an inmate of your institution, is under [indictment] [information] [complaint] in the _____ of which I am the _____
(Jurisdiction) (Title of Prosecuting Officer)

Said inmate is therein charged with the [offense] [offenses] enumerated below:

Offense

I propose to bring this person to trial on this [indictment] [information] [complaint] within the time specified in Article IV (c) of the Agreement.

In order that proceedings in this matter may be properly had, I hereby request temporary custody of such person pursuant to Article IV (a) of the Agreement on Detainers.

I hereby agree that immediately after trial is completed in this jurisdiction I will return the prisoner directly to you or allow any jurisdiction you have designated to take temporary custody. I agree also to complete Form IX, the Notice of Disposition of a Detainer, immediately after trial.

Signed _____

Title _____

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV (a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with its terms and the provisions of the Agreement on Detainers.

DATED: _____ Signed _____
(Judge)

Five copies. Signed copies must be sent to the prisoner and to the official who has the prisoner in custody. A copy should be sent to the Agreement Administrator of the state which has the prisoner incarcerated. Copies should be retained by the person filing the request and the judge who signs the request.

1974 CUMULATIVE SUPPLEMENT

Agreement on Detainers: Form 6

EVIDENCE OF AGENT'S AUTHORITY TO ACT FOR RECEIVING STATE

TO: _____
Administrator of the Agreement on Detainers _____
_____ is confined in _____ (institution)
_____, and will be taken into custody at the institution on _____
(address) _____
_____ for return to this jurisdiction for
trial on or about _____. In accordance with Article V (b), I have designated _____
_____ whose signature appears below as agent to return the prisoner.

(prosecuting official)

(agent's signature)

TO: Warden

In accordance with the above representation and the provisions of the Agreement on Detainers, _____
_____ is hereby designated as agent for this state to return _____
(agent) _____
_____ for trial
(inmate)

Administrator

In quadruplicate. All copies, signed by the prosecutor and the agent should be sent to the Administrator in the receiving state. After signing all copies, the Administrator should retain one for his files, send one to the warden of the institution in which the prisoner is located and return two copies to the prosecutor who will give one to the agent for use in establishing his authority and place one in his files.

APPENDIX V—EXTRADITION

Agreement on Detainers: Form VII

PROSECUTOR'S ACCEPTANCE OF TEMPORARY CUSTODY OFFERED IN CONNECTION WITH A PRISONER'S REQUEST FOR DISPOSITION OF A DETAINEE

TO: _____
(Warden, Superintendent, Director) (Institution)

(Address)

In response to your letter of _____ and offer of temporary custody
(Date)
regarding _____ who is presently
(Name of Prisoner)
under indictment, information, complaint in the _____ of which
(Jurisdiction)

I am _____, please be advised that I accept temporary custody and that
(Title of Prosecuting Officer)
I propose to bring this person to trial on the indictment, information or complaint named in the offer within the
time specified in Article III (a) of the Agreement on Detainers.

I hereby agree that immediately after trial is completed in this jurisdiction, I will return the prisoner directly to you or allow any jurisdiction you have designated to take temporary custody. I agree also to complete Form IX, the Notice of Disposition of a Detainer, immediately after trial.

COMMENTS: [If your jurisdiction is the only one named in the offer of temporary custody, use the space below to indicate when you would like to send your agents to conduct the prisoner to your jurisdiction. If the offer of temporary custody has been sent to other jurisdictions in your state, use the space below to make inquiry as to the order in which you will receive custody, or to indicate any arrangements you have already made with other jurisdictions in your state in this regard.)

Signed: _____

Title: _____

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV (a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with its terms and the provisions of the Agreement on Detainers.

DATED: _____

Signed: _____
(Judge)

(Court)

IMPORTANT: This form should only be used when an offer of temporary custody has been received as the result of a prisoner's request for disposition of a detainer. If the offer has been received because another prosecutor in your state has initiated the request, use Form VIII. Copies of Form VII should be sent to the warden, the prisoner, the other jurisdictions in your state listed in the offer of temporary custody, and the Agreement Administrator of the state which has the prisoner incarcerated. Copies should be retained by the person filing the acceptance and the judge who signs it.

1974 CUMULATIVE SUPPLEMENT

Agreement on Detainers: Form VIII

PROSECUTOR'S ACCEPTANCE OF TEMPORARY CUSTODY OFFERED IN CONNECTION
WITH ANOTHER PROSECUTOR'S REQUEST FOR DISPOSITION OF A DETAINER

TO: _____
(Warden, Superintendent, Director) (Institution)

(Address)

According to your letter of _____,
(Date) (Name of Prisoner)

_____ is being returned to this state at the request of
_____ of _____
(Title of Prosecuting Officer) (Jurisdiction)

I hereby accept your offer of temporary custody of _____
(Name of Prisoner)

who also is under indictment, information or complaint in the _____
(Jurisdiction)

_____ of which I am the _____
(Title of Prosecuting Officer)

I plan to bring this person to trial on said indictment, information or complaint within the time specified in Article IV (c) of the Agreement on Detainers.

I hereby agree that immediately after trial is completed in this jurisdiction, I will return the prisoner directly to you or allow any jurisdiction you have designated to take temporary custody. I agree also to complete Form IX, the Notice of Disposition of a Detainer immediately after trial.

COMMENTS: [Use the space below to make inquiry as to order in which your jurisdiction will receive custody or to inform the warden of arrangements you have already made with other jurisdictions in your state in this regard.]

Signed: _____

Title: _____

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV (a), and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with its terms and the provisions of the Agreement on Detainers.

Dated: _____ Signed: _____
(Judge)

IMPORTANT: This form should only be used when an offer of temporary custody has been received as the result of another prosecutor's request for disposition of a detainer. If the offer has been received because a prisoner has initiated the request, use Form VII to accept such an offer. Copies of Form VIII should be sent to the warden, the prisoner, the other jurisdictions in your state listed in the offer of temporary custody, and the Agreement Administrator of the state which has the prisoners incarcerated. Copy should be retained by the person filing the acceptance and the judge who signs it.

APPENDIX V—EXTRADITION

Agreement on Detainers: Form IX PROSECUTOR'S REPORT ON DISPOSITION OF CHARGES

TO: _____
(Superintendent) (Date)

(Name of Institution in which the Prisoner was originally imprisoned)

(Street Address)

(City)

(State)

(Zip Code)

(Name of Inmate)

(Number)

was transferred to the State of _____ pursuant to the Interstate
(Name of State)

Agreement on Detainers for trial based on the pending charge or charges contained in the Agreement on Detainers, Form II (if transfer was at the request of inmate) or in Forms IV and V (if transfer was at request of the prosecutor).

The disposition of the pending charge or charges in this jurisdiction was as follows:

Disposition: _____

Prosecuting Officer

Jurisdiction

In quadruplicate—One copy to be retained by the prosecutor; one copy to be sent to the warden of the state of original imprisonment, one copy to be sent to the compact administrator of the state of original imprisonment, one copy to be sent to the warden or agency who will have jurisdiction over the prisoner when he returns to the state which placed the detainer to serve his new sentence.

INTERSTATE AGREEMENT ON DETAINERS

North Carolina General Statutes 148-89 To 148-95

The Interstate Agreement on Detainers was prepared by the Council of State Governments and has a three-fold purpose. This Agreement makes it possible for Detainers to be cleared, at the instance of the prisoner, in states which are parties to the Agreement. It gives the prisoner a way to test the substantiality of Detainers placed against him and to secure final judgment on any indictments, informations, or complaints outstanding against him in the member states. As a result, a prisoner has a greater degree of knowledge of his own future, and he is also able to make better plans for his treatments.

The Agreement also provides methods whereby the Prosecuting Attorney, or Solicitor, may secure prisoners incarcerated in other jurisdictions for trial before the expiration of their sentences. At the same time, a Governor's right to refuse to make a prisoner available is retained.

Under the Agreement, wardens and other custodial officials are requested to inform all prisoners of all indictments, informations, or complaints on the basis of which Detainers have been lodged against them by members of the jurisdiction. Prisoners may then request trial on such pending charges. These requests are transmitted through the warden to the proper official in the other jurisdiction who then has 180 days to bring the prisoner to trial. For this purpose, the solicitor, or prosecutor, can obtain temporary custody of the prisoner and take him to the jurisdiction in which trial is to be held. Upon completion of the trial, the prisoner is returned to the institution in which he was incarcerated. If convicted on these charges, any sentence imposed is served in the second jurisdiction following the completion of the original sentence.

If the prisoner is not brought to trial within the 180-day period, the indictment, information or complaint is dismissed with prejudice, and the Detainer is no longer valid. However, the time limit can be extended for good cause when in open court with the prisoner or with his counsel present.

Prosecutors, or solicitors, can also initiate actions to obtain trials of prisoners in other member jurisdictions against whom they have indictments, informations, or complaints pending and the detainers have been lodged. The prosecutor can make a request to the appropriate officials in the jurisdiction where the prisoner is being held. Unless the request is denied by the Governor of the State within 30 days, temporary custody is given to the prosecutor having and holding trial. Trial must be commenced within 120 days of the date the prisoner arrives in the jurisdiction seeking him unless extended for good cause. Provisions concerning service of the sentence and failure to begin trial in the allotted time period are as noted above.

When a request is made by a prisoner to clear a detainer, this constitutes a request to clear all detainers emanating from the same state and based upon indictments, informations, or complaints, so repeated trips to the same state are not necessary.

The agreement may be joined by any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the U. S. Government. The word "State" as defined in the Agreement includes all of these jurisdictions. To date, thirty-nine (39) states, the District of Columbia, and the U. S. Government have joined the Agreement. The following states have not adopted the Interstate Agreement on Detainers: Alabama, Alaska, Florida, Indiana, Kentucky, Louisiana, Mississippi, Oklahoma, Rhode Island, South Dakota, and Texas.

APPENDIX V—EXTRADITION

The Council of State Governments, in drafting the suggested legislation for the Agreement, also has drafted rules, regulations and forms to be used under the Agreement on Detainers. These forms consist of the following:

- (1) Notice of untried indictment, information or complaint and of right of request for disposition.
- (2) Inmate's notice of place of imprisonment and request for disposition of indictments, informations or complaints.
- (3) Certificate of inmate status.
- (4) Officer to deliver temporary custody.
- (5) Request for temporary custody.
- (6) Evidence of agent's authority to act for receiving state.
- (7) Prosecutor's acceptance of temporary custody offered in connection with a prisoner's request for disposition of a detainer.
- (8) Prosecutor's acceptance of temporary custody offered in connection with another prosecutor's request for disposition of a detainer.
- (9) Prosecutor's report on disposition of charges.

Each of the forms contains instructions as to the number to be prepared and the distribution.

The Council of State Governments also has distributed suggested instructions for prosecutors and suggested instructions for wardens. (See below.)

SUGGESTED INSTRUCTIONS FOR PROSECUTING OFFICIALS UNDER THE INTERSTATE AGREEMENT ON DETAINERS

When an untried indictment, information or complaint is lodged against an inmate in our custody by a member of the Interstate Agreement on Detainers, a Form #1 is completed and sent to the inmate. All indictments, informations or complaints on the basis of which there are detainers from the state involved are listed on the form.

An inmate on receipt of Form #1 may request final disposition of any untried indictment, information or complaint. He does this by filing a Form #2. Upon filing Form #2, the custodian completes Forms #3 and #4, and sends the three forms to the prosecuting officer and court clerk in the jurisdiction in which the untried indictment, information or complaint is pending. At the same time, signed carbons of these forms are sent to the prosecuting officer and court clerk in any other jurisdiction within the same state which has lodged a detainer based on untried indictments, informations or complaints pending against the inmate. These officials are informed by letter that all such indictments, informations and complaints are listed on Form #4 and must be disposed of in accordance with the provisions of Article III of the Agreement. This letter will request a prompt reply indicating the action which the jurisdiction intends to take on the indictment, information or complaint.

The inmate is notified when Form #7 is received from a prosecutor indicating that he intends to bring the inmate to trial under the provisions of the Agreement.

If within 90 days a reply is not obtained to the inmate's request for disposition or to any letters of notification, the Administrator of the

Agreement in the custodial state is to be requested to seek the assistance of the Administrator of the other state involved.

If the inmate is not brought to trial within 180 days and no continuance is granted by the court of appropriate jurisdiction, all indictments, informations or complaints listed on Form #4 become invalid as far as custodial responsibility is concerned. A notation to this effect is placed on the detainer from the indictment, information or complaint and the detainer shall be disregarded in further decisions regarding the inmate's status of privileges. The detainer is not returned to the lodging jurisdiction. If uncertain as to the granting of a continuance, the prosecutor will be asked. If no reply is received, the detainer will be considered invalid. However, since there may have been a continuance granted about which the custodian has not been informed, no communication will be sent to the jurisdiction in the other state which might prevent further action on their part.

REQUESTS FROM PROSECUTORS FOR TEMPORARY CUSTODY OF AN INMATE

A prosecutor who has lodged a detainer, based on an untried indictment, information or complaint against an inmate, may initiate action to bring him to trial. This action commences with a request for temporary custody which is made through the use of Form #5.

Upon receipt of a copy of Form #5 from a prosecuting officer, the custodian sends a copy to the inmate. The Governor is notified of this request for temporary custody so that he may have an opportunity to disapprove it if he so desires. Form #3 is completed and sent to the prosecuting officer who has filed the request and to all officials in the State who have filed detainers based on untried indictments, informations or complaints. In an accompanying letter each official is notified of the request for temporary custody and they are informed that the inmate must be brought to trial in their jurisdiction in accordance with the provisions of Article IV of the Agreement. The letter will request the prosecutor to promptly complete and forward Form #8, as a request for temporary custody, if he intends to take action in the case, and to notify the custodian if he does not intend to do so.

If the Governor of the Custodian State notifies the custodian that he approves the request for temporary custody, or if he takes no action on the request within 30 days, a completed Form #4 is sent by the custodian to the prosecuting officer who made the request. Signed carbons are also sent to any other officials in the same state who have previously received copies of Form #3. A copy is given to the inmate. If the Governor disapproves the request, all officials are notified immediately.

If no replies are received after 60 days from any of the jurisdictions concerned, the Administrator of the Agreement in the custodian state is to be notified and requested to seek the assistance of the Administrator in the other state. If replies are received from any jurisdiction indicating intention to bring the inmate to trial, he is notified immediately. Failure to bring an inmate to trial when a prosecutor has initiated the action does not invalidate the indictment, information or complaint unless the inmate is taken to that state for trial in which case trial must be commenced within 120 days.

IDENTIFICATION OF AGENT TAKING CUSTODY OF INMATE

Before an agent is sent to another state to take custody of an inmate for return to North Carolina for trial, Form #6 must be completed in quadruplicate and all copies must be signed by the prosecutor and the agent. These are then sent to the Administrator in our state. After signing all copies, our Administrator will retain one copy, shall send one copy to the warden of the institution where the inmate is located and will return two copies to you. One of these will be given to the agent for use in establishing his authority and one copy is for your files.

As soon as you have completed your trial of the inmate, you should notify any other prosecutors in this state, who may have untried indictments, informations or complaints in order that they may take custody and try the inmate. All such prosecutors will be shown on your copy of the Form #4. If there are no other untried indictments, informations or complaints in our state, the inmate is returned to the sending state to complete his sentence there. The prosecutor makes a report on the disposition of the charges on Form #9.

Appendix VII. Code of Professional Responsibility of the North Carolina State Bar

PREAMBLE AND PRELIMINARY STATEMENT.

CANON 1. A LAWYER SHOULD ASSIST IN MAINTAINING THE INTEGRITY AND COMPETENCE OF THE LEGAL PROFESSION.

Ethical Considerations.

Disciplinary Rules.

- DR 1-101 Maintaining Integrity and Competence of the Legal Profession.
- DR 1-102 Misconduct.
- DR 1-103 Disclosure of Information to Authorities.

CANON 2. A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE.

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Recognition of Legal Problems.

Selection of a Lawyer: Generally.

Selection of a Lawyer: Professional Notices and Listings.

Financial Ability to Employ Counsel:

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Financial Ability to Employ Counsel:

Persons Unable to Pay Reasonable Fees.

Acceptance and Retention of Employment.

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- DR 2-101 Publicity in General.
- DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.
- DR 2-103 Recommendation of Professional Employment.
- DR 2-104 Suggestion of Need of Legal Services.
- DR 2-105 Limitation of Practice.
- DR 2-106 Fees for Legal Services.
- DR 2-107 Division of Fees among Lawyers.
- DR 2-108 Agreements Restricting the Practice of a Lawyer.
- DR 2-109 Acceptance of Employment.
- DR 2-110 Withdrawal from Employment.

CANON 3. A LAWYER SHOULD ASSIST IN PREVENTING THE UNAUTHORIZED PRACTICE OF LAW.

Ethical Considerations.

Disciplinary Rules.

- DR 3-101 Aiding Unauthorized Practice of Law.
- DR 3-102 Dividing Legal Fees with a Non-Lawyer.
- DR 3-103 Forming a Partnership with a Non-Lawyer.

CANON 4. A LAWYER SHOULD PRESERVE THE CONFIDENCES AND SECRETS OF A CLIENT.

Ethical Considerations.

Disciplinary Rules.

- DR 4-101 Preservation of Confidences and Secrets of a Client.

CANON 5. A LAWYER SHOULD EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF A CLIENT.

Ethical Considerations.

Interests of a Lawyer That May Affect His Judgment.

Interests of Multiple Clients.

Desires of Third Persons.

APPENDIX VII—CODE OF PROFESSIONAL RESPONSIBILITY

Disciplinary Rules.

- DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.
- DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.
- DR 5-103 Avoiding Acquisition of Interest in Litigation.
- DR 5-104 Limiting Business Relations with a Client.
- DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.
- DR 5-106 Settling Similar Claims of Clients.
- DR 5-107 Avoiding Influence by Others Than the Client.

CANON 6. A LAWYER SHOULD REPRESENT A CLIENT COMPLETELY.

Ethical Considerations.

Disciplinary Rules.

- DR 6-101 Failing to Act Competently.
- DR 6-102 Limiting Liability to Client.

CANON 7. A LAWYER SHOULD REPRESENT A CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW.

Ethical Considerations.

Duty of the Lawyer to a Client.

Duty of the Lawyer to the Adversary System of Justice.

Disciplinary Rules.

- DR 7-101 Representing a Client Zealously.
- DR 7-102 Representing a Client within the Bounds of the Law.
- DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.
- DR 7-104 Communicating with One of Adverse Interest.
- DR 7-105 Threatening Criminal Prosecution.
- DR 7-106 Trial Conduct.
- DR 7-107 Trial Publicity.
- DR 7-108 Communication with or Investigation of Jurors.
- DR 7-109 Contact with Witnesses.
- DR 7-110 Contact with Officials.

CANON 8. A LAWYER SHOULD ASSIST IN IMPROVING THE LEGAL SYSTEM.

Ethical Considerations.

Disciplinary Rules.

- DR 8-101 Action as a Public Official.
- DR 8-102 Statements Concerning Judges and Other Adjudicatory Officers.

CANON 9. A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY.

Ethical Considerations.

Disciplinary Rules.

- DR 9-101 Avoiding Even the Appearance of Impropriety.
- DR 9-102 Preserving Identity of Funds and Property of a Client.

Editor's Note. — The Code of Professional Responsibility was adopted by the Council of the North Carolina State Bar on Jan. 12, 1973, amended April 13, 1973, and approved by the Supreme Court April 30, 1973. Effective Jan. 1, 1974, it replaces the Canons of Ethics in Appendix VII in the Replacement Volume.

Preamble and Preliminary Statement

Preamble

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the everchanging relationships of society.

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

Preliminary Statement

In furtherance of the principles stated in the Preamble, the North Carolina State Bar has promulgated this Code of Professional Responsibility, consisting of three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules. The Code is designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules.

Obviously the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment. A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client.

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system and with the legal profession. They embody the general concepts from which the Ethical Consideration and the Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which

no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities. The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances. An enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations.

CANON 1

A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession

ETHICAL CONSIDERATIONS

EC1-1 A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.

EC1-2 The public should be protected from those who are not qualified to be lawyers by reason of a deficiency in education or moral standards or of other relevant factors but who nevertheless seek to practice law. To assure the maintenance of high moral and educational standards of the legal profession, lawyers should affirmatively assist courts and other appropriate bodies in promulgating, enforcing, and improving requirements for admission to the bar. In like manner, the bar has a positive obligation to aid in the continued improvement of all phases of pre-admission and post-admission legal education.

EC1-3 Before recommending an applicant for admission, a lawyer should satisfy himself that the applicant is of good moral character. Although a lawyer should not become a self-appointed investigator or judge of applicants for admission, he should report to proper officials all unfavorable information he possesses relating to the character or other qualifications of an applicant.

EC1-4 The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. A lawyer should, upon request serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

EC1-5 A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

EC1-6 An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such person is not granted a license or, if licensed, is not permitted to practice. In like manner, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.

DISCIPLINARY RULES**DR1-101 Maintaining Integrity and Competence of the Legal Profession.**

- (A) A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar.
- (B) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.

DR1-102 Misconduct.

- (A) A lawyer shall not:
 - (1) Violate a Disciplinary Rule.
 - (2) Circumvent a Disciplinary Rule through actions of another.
 - (3) Engage in illegal conduct involving moral turpitude.
 - (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
 - (5) Engage in professional conduct that is prejudicial to the administration of justice.
 - (6) Engage in any other professional conduct that adversely reflects on his fitness to practice law.

DR1-103 Disclosure of Information to Authorities.

- (A) A lawyer possessing unprivileged knowledge of a clear violation of DR1-102 should report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
- (B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

CANON 2**A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available****ETHICAL CONSIDERATIONS**

EC2-1 The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

Recognition of Legal Problems

EC2-2 The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers acting under proper auspices should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of permissible activities include preparation of institutional advertisements and professional articles for

lay publications and participation in seminars, lectures, and civic programs. But a lawyer who participates in such activities should shun personal publicity.

EC2-3 Whether a lawyer acts properly in volunteering advice to a layman to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. Hence, the advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. Obviously, a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation.

EC2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

EC2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laymen should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

Selection of a Lawyer: Generally

EC2-6 Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laymen to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laymen have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers.

EC2-8 Selection of a lawyer by a layman often is the result of the advice and recommendation of third parties—relatives, friends, acquaintances, business associates or other lawyers. A layman is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations.

Selection of a Lawyer: Professional Notices and Listings

EC2-9 The traditional ban against advertising by lawyers, which is subject to certain limited exceptions, is rooted in the public interest. Competitive advertising would encourage extravagant, artful, self-laudatory brashness in seeking business

and thus could mislead the layman. Furthermore, it would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such advertisements of professional services. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deceptions. History has demonstrated that public confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising.

EC2-10 Methods of advertising that are subject to the objections stated above should be and are prohibited. However, the Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer while avoiding such objections. For example, a lawyer may be identified in the classified section of the telephone directory, in the office building directory, and on his letterhead and professional card. But at all times the permitted notices should be dignified and accurate.

EC2-11 The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laymen concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC2-12 A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his name to remain in the name of the firm if he actively continues to practice law as a member thereof. Otherwise, his name should be removed from the firm name, and he should not be identified as a past or present member of the firm; and he should not hold himself out as being a practicing lawyer.

EC2-13 In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of his professional status. He should not hold himself out as being a partner or associate of a law firm if he is not one in fact, and thus should not hold himself out as a partner or associate if he only shares offices with another lawyer.

EC2-14 In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having special training or ability, other than in the historically excepted fields of admiralty, trademark, and patent law.

EC2-15 The legal profession has developed lawyer referral system designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

EC2-16 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

Financial Ability to Employ Counsel:

Persons Able to Pay Reasonable Fees

EC2-17 The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC2-18 The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

EC2-19 As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

EC2-20 Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a **res** out of which the fee can be paid. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a **res** with which to pay the fee.

EC2-21 A lawyer should not accept compensation or any thing of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure.

EC2-22 Without the consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm. A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed and the responsibility assumed by each lawyer and if the total fee is reasonable.

EC2-23 A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject.

Financial Ability to Employ Counsel:**Persons Unable to Pay Reasonable Fees**

EC2-24 A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

EC2-25 Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

Acceptance and Retention of Employment

EC2-26 A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally.

EC2-27 History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.

EC2-28 The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment.

EC2-29 When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.

EC2-30 Employment should not be accepted by a lawyer when he is unable to render competent service or when he knows or it is obvious that the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another. Likewise, a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client. If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment.

EC2-31 Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved. Trial counsel for a convicted defendant should continue to represent his client by advising whether to take an appeal and, if the appeal is prosecuted, by representing him through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.

EC2-32 A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.

DISCIPLINARY RULES

DR2-101 Publicity in General.

- (A) A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, "public communication" includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine or book, except as authorized in subparagraph (B).
- (B) A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf except as permitted under DR2-103. This does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:
 - (1) In political advertisements when his professional status is germane to the political campaign or to a political issue.
 - (2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.
 - (3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.
 - (4) In and on legal documents prepared by him.
 - (5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.
 - (6) In an unpaid newsstory in a local paper stating the opening of an office for the practice of law by an attorney or the association by an attorney with an established law firm, together with photograph and a brief and dignified statement of his background and education.
- (C) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

DR2-102 Professional Notices, Letterheads, Offices, and Law Lists.

- (A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:
- (1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification but may not be published in periodicals, magazines, newspapers, or other media.
 - (2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional office of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR2-105.
 - (3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR2-105.
 - (4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.
 - (5) A listing of the office of a lawyer or law firm in the alphabetical and classified sections of the telephone directory or directories for the geographical area or areas in which the lawyer resides or maintains offices and in the city directory of the city in which his or the firm's office is located; but the listing may give only the name of the lawyer or law firm, the fact he is a lawyer, addresses, and telephone numbers. The listing shall not be in distinctive form or type. A law firm may have a listing in the firm name separate from that of its members and associates. The listing in the classified section shall not be under a heading or classification other than "Attorneys" or "Lawyers," except that additional headings or classifications descriptive of the types of practice referred to in DR2-105 are permitted.

- (6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice but only if authorized under DR2-105 (A) (4); date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section membership in bar association; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references, and with their consent, names of clients regularly represented.
- (B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.
- (C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners.
- (D) No partnership name, or the name of any professional corporation formed to practice law, or list of firm members or shareholders in a professional corporation or associates of either shall include the name of any person or persons not licensed to practice in North Carolina.
- (E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.
- (F) Nothing contained herein shall prohibit a lawyer from using or per-

mitting the use of, in connection with his name in an approved law list, an earned degree or title derived therefrom indicating his training in the law.

DR2-103 Recommendation of Professional Employment.

- (A) A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.
- (B) Except as permitted under DR2-103 (C), a lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client.
- (C) A lawyer shall not request a person or organization to recommend employment, as a private practitioner, of himself, his partner, or associate, except that he may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists and may pay its fees incident thereto.
- (D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:
 - (1) A legal aid office or public defender office:
 - (a) Operated or sponsored by a duly accredited law school.
 - (b) Operated or sponsored by a bona fide non-profit community organization.
 - (c) Operated or sponsored by a governmental agency.
 - (d) Operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.
 - (2) A military legal assistance office.
 - (3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.
 - (4) A bar association representative of the general bar of the geographical area in which the association exists.
 - (5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met.
 - (a) The primary purposes of such organization do not include the rendition of legal services.
 - (b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.
 - (c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

- (d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.
 - (e) Such lawyer, his partners or associates prior to the initiation of such legal services activities, and annually in January of each year thereafter, shall disclose to the Secretary of The North Carolina State Bar on forms to be requested of him and furnished by him the identity of and other relevant information concerning such non-profit organization which shall so recommend, furnish or pay for legal services to its members or beneficiaries.
- (E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

DR2-104 Suggestion of Need of Legal Services.

- (A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:
- (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.
 - (2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR2-103 (D) (1) through (5), to the extent and under the conditions prescribed therein.
 - (3) A lawyer who is furnished or paid by any of the offices or organizations enumerated in DR2-103 (D) (1), (2), or (5) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.
 - (4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.
 - (5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

DR2-105 Limitation of Practice.

- (A) A lawyer shall not hold himself out publicly as a specialist or as limiting his practice, except as permitted under DR2-102 (A) (6) or as follows:
- (1) A lawyer admitted to practice before the United States Patent Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms, on his letterhead and office sign. A lawyer engaged in the trademark practice may use the designation "Trademarks," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms, on his letterhead and office sign, and

a lawyer engaged in the admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or "Admiralty Lawyer," or any combination of those terms, on his letter-head and office sign.

- (2) A lawyer may permit his name to be listed in lawyer referral service offices according to the fields of law in which he will accept referrals.
- (3) A lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience. The announcement shall not be distributed to lawyers more frequently than once in a calendar year but it may be published periodically in legal journals.
- (4) A lawyer who is certified as a specialist in a particular field of law or law practice by the authority having jurisdiction under state law over the subject of specialization by lawyers may hold himself out as such specialist but only in accordance with the rules prescribed by that authority.

DR2-106 Fees for Legal Services.

- (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
- (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence experienced in the area of the law involved would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
 - (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
 - (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
 - (3) The fee customarily charged in the locality for similar legal services.
 - (4) The amount involved and the results obtained.
 - (5) The time limitations imposed by the client or by the circumstances.
 - (6) The nature and length of the professional relationship with the client.
 - (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
 - (8) Whether the fee is fixed or contingent.
- (C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

DR2-107 Division of Fees among Lawyers.

- (A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
 - (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
 - (2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not prohibit payment pursuant to a separation or retirement agreement.

DR2-108 Agreements Restricting the Practice of a Lawyer.

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

DR2-109 Acceptance of Employment.

(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:

(1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

DR2-110 Withdrawal from Employment.

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

- (3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.
- (4) He is discharged by his client.

(C) Permissive withdrawal.

If DR2-110 (B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

- (a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.
 - (b) Personally seeks to pursue an illegal course of conduct.
 - (c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.
 - (d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.
 - (e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.
 - (f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.
- (2) His continued employment is likely to result in a violation of a Disciplinary Rule.
 - (3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.
 - (4) His mental or physical condition renders it difficult for him to carry out the employment effectively.
 - (5) His client knowingly and freely assents to termination of his employment.
 - (6) He believes in good faith in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

CANON 3

A Lawyer Should Assist in Preventing the Unauthorized Practice of Law

ETHICAL CONSIDERATIONS

EC3-1 The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.

EC3-2 The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment

is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.

EC3-3 A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards. The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client.

EC3-4 A layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.

EC3-5 It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

EC3-6 A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.

EC3-7 The prohibition against a non-lawyer practicing law does not prevent a layman from representing himself, for then he is ordinarily exposing only himself to possible injury. The purpose of the legal profession is to make educated legal representation available to the public; but anyone who does not wish to avail himself of such representation is not required to do so. Even so, the legal profession should help members of the public to recognize legal problems and to understand why it may be unwise for them to act for themselves in matters having legal consequences.

EC3-8 Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in his firm or practice may not be paid to his estate or specified persons such as his widow or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include non-lawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law.

EC3-9 Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

DISCIPLINARY RULES

DR3-101 Aiding Unauthorized Practice of Law.

- (A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.
- (B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

DR3-102 Dividing Legal Fees with a Non-Lawyer.

- (A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:
 - (1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.
 - (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.
 - (3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

DR3-103 Forming a Partnership with a Non-Lawyer.

- (A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

CANON 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

EC4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the

relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC4-6 The obligation of lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets. A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death,

disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

DISCIPLINARY RULES

DR4-101 Preservation of Confidences and Secrets of a Client.

- (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (B) Except when permitted under DR4-101 (C), a lawyer shall not knowingly:
 - (1) Reveal a confidence or secret of his client.
 - (2) Use a confidence or secret of his client to the disadvantage of the client.
 - (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
- (C) A lawyer may reveal:
 - (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
 - (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
 - (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
 - (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.
- (D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR4-101 (C) through an employee.

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

ETHICAL CONSIDERATIONS

EC5-1 The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Interests of a Lawyer That May Affect His Judgment

EC5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a

property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

EC5-3 The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

EC5-4 If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.

EC5-5 A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

EC5-6 A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

EC5-7 The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice.

EC5-8 A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client. Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his

cause of action, but the ultimate liability for such costs and expenses must be that of the client.

EC5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC5-10 Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

EC5-11 A lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. In like manner, his personal interests should not deter him from suggesting that additional counsel be employed; on the contrary, he should be alert to the desirability of recommending additional counsel when, in his judgment, the proper representation of his client requires it. However, a lawyer should advise his client not to employ additional counsel suggested by the client if the lawyer believes that such employment would be a disservice to the client, and he should disclose the reasons for his belief.

EC5-12 Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action to be taken.

EC5-13 A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.

Interests of Multiple Clients

EC5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem

arises whenever a lawyer is asked to represent two or more clients who may have conflicting interests.

EC5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with conflicting interests and there are few situations in which he would be justified in representing in litigation multiple clients with potentially conflicting interests. If a lawyer accepted such employment and the interests did become actually conflicting, he would have to withdraw from employment with the likelihood of resulting hardship on the clients; and for this reason, it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involved in litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become conflicting, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC5-16 In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

EC5-17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely.

EC5-18 A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

EC5-19 A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

EC5-20 A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

Desires of Third Persons

EC5-21 The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client, and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

EC5-22 Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

EC5-23 A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

EC5-24 To assist a lawyer in preserving his professional independence, a number of courses are available to him. For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a non-lawyer. Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

DISCIPLINARY RULES**DR5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.**

- (A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.
- (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
- (1) If the testimony will relate solely to an uncontested matter.
 - (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
 - (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
 - (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

- (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR5-101 (B)(1) through (4).
- (B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

DR5-103 Avoiding Acquisition of Interest in Litigation.

- (A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:
- (1) Acquire a lien granted by law to secure his fee or expenses.
 - (2) Contract with a client for a reasonable contingent fee in a civil case.
- (B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

DR5-104 Limiting Business Relations with a Client.

- (A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.
- (B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

DR5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

- (A) A lawyer should decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR5-105 (C).
- (B) A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105 (C).
- (C) In the situations covered by DR5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
- (D) If a lawyer is required to decline employment or to withdraw from employment under DR5-105, no partner or associate of his or his firm may accept or continue such employment.

DR5-106 Settling Similar Claims of Clients.

- (A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

DR5-107 Avoiding Influence by Others Than the Client.

- (A) Except with the consent of his client after full disclosure, a lawyer shall not:
 - (1) Accept compensation for his legal services from one other than his client.
 - (2) Accept from one other than his client anything of value related to his representation of or his employment by his client.
- (B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.
- (C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

- (1) **A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;**
- (2) **A non-lawyer is a corporate director or officer thereof; or**
- (3) **A non-lawyer has the right to direct or control the professional judgment of a lawyer.**

CANON 6

A Lawyer Should Represent a Client Competently

ETHICAL CONSIDERATIONS

EC6-1 Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

EC6-2 A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.

EC6-3 While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not or does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.

EC6-4 Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

EC6-5 A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

EC6-6 A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.

DISCIPLINARY RULES**DR6-101 Failing to Act Competently.****(A) A lawyer shall not:**

- (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
- (2) Handle a legal matter without preparation adequate in the circumstances.
- (3) Neglect a legal matter entrusted to him.

DR6-102 Limiting Liability to Client.**(A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.****CANON 7****A Lawyer Should Represent a Client Zealously
within the Bounds of the Law****ETHICAL CONSIDERATIONS**

EC7-1 The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

EC7-2 The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent.

EC7-3 Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

Duty of the Lawyer to a Client.

EC7-4 The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal

of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

EC7-5 A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision. He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.

EC7-6 Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is contemplating a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action. Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motive, intent, or desire; obviously, he may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.

EC7-7 In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

EC7-8 A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

EC7-9 In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.

EC7-10 The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

EC7-11 The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.

EC7-12 Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

EC7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

EC7-14 A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceedings has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

EC7-15 The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or quasi-judicial, or a combination of both. They may be ex parte in character, in which event they may originate either at the instance of the agency or upon motion of an interested party. The scope of an inquiry may be purely investigative or it may be truly adversary looking toward the adjudication of specific rights of a party or of classes of parties. The foregoing are but examples of some of the types of proceedings conducted

by administrative agencies. A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law. Where the applicable rules of the agency impose specific obligations upon a lawyer, it is his duty to comply therewith, unless the lawyer has a legitimate basis for challenging the validity thereof. In all appearances before administrative agencies, a lawyer should identify himself, his client if identity of his client is not privileged, and the representative nature of his appearance. It is not improper, however, for a lawyer to seek from an agency information available to the public without identifying his client.

EC7-16 The primary business of a legislative body is to enact laws rather than to adjudicate controversies, although on occasion the activities of a legislative body may take on the characteristics of an adversary proceeding, particularly in investigative and impeachment matters. The role of a lawyer supporting or opposing proposed legislation normally is quite different from his role in representing a person under investigation or on trial by a legislative body. When a lawyer appears in connection with proposed legislation, he seeks to affect the lawmaking process, but when he appears on behalf of a client in investigatory or impeachment proceedings, he is concerned with the protection of the rights of his client. In either event, he should identify himself and his client, if identity of his client is not privileged, and should comply with applicable laws and legislative rules.

EC7-17 The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

EC7-18 The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person. If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer.

Duty of the Lawyer to the Adversary System of Justice.

EC7-19 Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

EC7-20 In order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice, promptly and efficiently according to procedures that command public confidence and respect. Not only must there be competent, adverse presentation of evidence and issues, but a tribunal must be aided by rules appropriate to an effective and dignified process. The procedures under which tribunals operate in our adversary system have been prescribed largely by legislative enactments, court rules and decisions, and administrative rules. Through the years certain concepts of proper professional

conduct have become rules of law applicable to the adversary adjudicative process. Many of these concepts are the bases for standards of professional conduct set forth in the Disciplinary Rules.

EC7-21 The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

EC7-22 Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.

EC7-23 The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.

EC7-24 In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client. However, a lawyer may argue, on his analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

EC7-25 Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

EC7-26 The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

EC7-27 Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce. In like manner, a lawyer should not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

EC7-28 Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.

EC7-29 To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerably and with deference to the personal feelings of the juror.

EC7-30 Vexations or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

EC7-31 Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

EC7-32 Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror or a member of the family of either should make a prompt report to the court regarding such conduct.

EC7-33 A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

EC7-34 The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in

making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

EC7-35 All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

EC7-36 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears. He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

EC7-37 In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal references to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

EC7-38 A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

EC7-39 In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just, without impinging upon the obligation of lawyers to represent their clients zealously within the framework of the law.

DISCIPLINARY RULES

DR7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

- (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR7-101 (B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.**
- (2) Fail to carry out a contract of employment entered into with**

a client for professional services, but he may withdraw as permitted under DR2-110, DR5-102, and DR5-105.

- (3) Prejudice or damage his client during the course of the professional relationship, except as required under DR7-102 (B).

(B) In his representation of a client, a lawyer may:

- (1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.
- (2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR7-102 Representing a Client within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

- (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
- (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
- (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
- (4) Knowingly use perjured testimony or false evidence.
- (5) Knowingly make a false statement of law or fact.
- (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
- (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
- (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if the client refuses or is unable to do so, he shall discontinue his representation of the client in that matter; and if the representation involves litigation, the lawyer shall (if applicable rules require) request the tribunal to permit him to withdraw but without necessarily revealing his reason for wishing to withdraw.
- (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

DR7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.

- (A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.
- (B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR7-104 Communicating with One of Adverse Interest.

- (A) During the course of his representation of a client a lawyer shall not:
- (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of lawyer representing such other party or is authorized by law to do so.
 - (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

DR7-105 Threatening Criminal Prosecution.

- (A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

DR7-106 Trial Conduct.

- (A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.
- (B) In presenting a matter to a tribunal, a lawyer shall disclose:
- (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.
 - (2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.
- (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
- (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
 - (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
 - (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
 - (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.
 - (5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.
 - (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
 - (7) Intentionally or habitually violate any established rule of procedure or evidence.

DR7-107 Trial Publicity.

- (A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extra-

judicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

- (1) Information contained in a public record.
 - (2) That the investigation is in progress.
 - (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
 - (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
 - (5) A warning to the public of any dangers.
- (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
- (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
 - (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
 - (3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
 - (4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
 - (5) The identity, testimony, or credibility of a prospective witness.
 - (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.
- (C) DR7-107 (B) does not preclude a lawyer during such period from announcing:
- (1) The name, age, residence, occupation, and family status of the accused.
 - (2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
 - (3) A request for assistance in obtaining evidence.
 - (4) The identity of the victim of the crime.
 - (5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
 - (6) The identity of investigating and arresting officers or agencies and the length of the investigation.
 - (7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
 - (8) The nature, substance, or text of the charge.
 - (9) Quotations from or references to public records of the court in the case.
 - (10) The scheduling or result of any step in the judicial proceedings.
 - (11) That the accused denies the charges made against him.
- (D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a

criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

- (E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.
- (F) The foregoing provisions of DR7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.
- (G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:
 - (1) Evidence regarding the occurrence or transaction involved.
 - (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
 - (3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
 - (4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
 - (5) Any other matter reasonably likely to interfere with a fair trial of the action.
- (H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:
 - (1) Evidence regarding the occurrence or transaction involved.
 - (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
 - (3) Physical evidence or the performance or results of any examination or tests or the refusal or failure of a party to submit to such.
 - (4) His opinion as to the merits of the claims, defenses, or positions of an interested person.
 - (5) Any other matter reasonably likely to interfere with a fair hearing.
- (I) The foregoing provisions of DR7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.
- (J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR7-107.

DR7-108 Communication with or Investigation of Jurors.

- (A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.
- (B) During the trial of a case:
 - (1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.
 - (2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.
- (C) DR7-108 (A) and (B) do not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.
- (D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.
- (E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.
- (F) All restrictions imposed by DR7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.
- (G) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

DR7-109 Contact with Witnesses.

- (A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.
- (B) A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.
- (C) A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
 - (1) Expenses reasonably incurred by a witness in attending or testifying.
 - (2) Reasonable compensation to a witness for his loss of time in attending or testifying.
 - (3) A reasonable fee for the professional services of an expert witness.

DR7-110 Contact with Officials.

- (A) A lawyer shall not give or lend anything of substantial value to a judge, official or employee of a tribunal.
- (B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except:
 - (1) In the course of official proceedings in the cause.

- (2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
- (3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
- (4) As otherwise authorized by law.

CANON 8

A Lawyer Should Assist in Improving the Legal System

ETHICAL CONSIDERATIONS

EC8-1 Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.

EC8-2 Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal of amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.

EC8-3 The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services. Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce.

EC8-4 Whenever a lawyer seeks legislative or administrative changes, he should identify the capacity in which he appears, whether on behalf of himself, a client, or the public. A lawyer may advocate such changes on behalf of a client even though he does not agree with them. But when a lawyer purports to act on behalf of the public he should espouse only those changes which he conscientiously believes to be in the public interest.

EC8-5 Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

EC8-6 Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should pro-

test earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

EC8-7 Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system. Thus a lawyer should aid in establishing, as well as enforcing, standards of conduct adequate to protect the public by insuring that those who practice law are qualified to do so.

EC8-8 Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

EC8-9 The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

DISCIPLINARY RULES

DR8-101 Action as a Public Official.

(A) A lawyer who holds public office shall not:

- (1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself, or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.
- (2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.
- (3) Accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

DR8-102 Statements Concerning Judges and Other Adjudicatory Officers.

- (A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.
- (B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

ETHICAL CONSIDERATIONS

EC9-1 Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained

through our legal system. A lawyer should promote public confidence in our system and in the legal profession.

EC9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstanding and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

EC9-3 After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

EC9-4 Because the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits, any statement or suggestion by a lawyer that he can or would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it.

EC9-5 Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

EC9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

DISCIPLINARY RULES

DR9-101 Avoiding Even the Appearance of Impropriety.

- (A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.
- (B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.
- (C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official.

DR9-102 Preserving Identity of Funds and Property of a Client.

- (A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

- (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
- (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

- (1) Promptly notify a client of the receipt of his funds, securities, or other properties.
- (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
- (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.
- (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Appendix VII-A. Code of Judicial Conduct

Canon

1. A Judge Should Uphold the Integrity and Independence of the Judiciary.
2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.
3. A Judge Should Perform the Duties of His Office Impartially and Diligently.
4. A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice.
5. A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties.
6. A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities.
7. A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office.

Editor's Note.—The North Carolina Code of Judicial Conduct was adopted by the Supreme Court of North Carolina in conference on Sept. 26, 1973, and became effective upon publication thereof in the Advance Sheets of the North Carolina Reports. The Code of Judicial Conduct was published in 283 N.C. Advance Sheet No. 6.

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

- A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
- B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

- (1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.
- (2) A judge should maintain order and decorum in proceedings before him.

- (3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.
- (4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him.
- (5) A judge should dispose promptly of the business of the court.
- (6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.
- (7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:
 - (a) The use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
 - (b) The broadcasting, televising, recording, or photographing of investigative, ceremonial, or naturalization proceedings;
 - (c) The photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
 - (i) The means of recording will not distract participants or impair the dignity of the proceedings;
 - (ii) The parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;
 - (iii) The reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
 - (iv) The reproduction will be exhibited only for instructional purposes in educational institutions.

B. Administrative Responsibilities.

- (1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.
- (2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.
- (3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.
- (4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

- (1) A judge should disqualify himself in a proceeding in which his impartiality

might reasonably be questioned, including but not limited to instances where:

- (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
 - (b) He served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
 - (c) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
 - (d) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) Is acting as a lawyer in the proceeding;
 - (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.
- (2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.
- (3) For the purposes of this section:
- (a) The degree of relationship is calculated according to the civil law system;
 - (b) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian;
 - (c) "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:
 - (i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
 - (ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
 - (iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
 - (iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. Remittal of Disqualification.

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge

is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

CANON 4

*A Judge May Engage in Activities to Improve the Law,
the Legal System, and the Administration of Justice*

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

- A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.
- B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official.
- C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

CANON 5

*A Judge Should Regulate His Extra-Judicial Activities to
Minimize the Risk of Conflict with His Judicial Duties*

- A. **Avocational Activities.** A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.
- B. **Civic and Charitable Activities.** A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:
 - (1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.
 - (2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization.
 - (3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.
- C. **Financial Activities.**
 - (1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.
 - (2) Subject to the requirements of subsection (1), a judge may hold and man-

age investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, manager, advisor, or employee of any business.

- (3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.
 - (4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:
 - (a) A judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;
 - (b) A judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;
 - (c) A judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds \$100, the judge reports it in the same manner as he reports compensation in Canon 6C.
 - (5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.
 - (6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.
 - (7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.
- D. **Fiduciary Activities.** A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:
- (1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.
 - (2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.
- E. **Arbitration.** A judge should not act as an arbitrator or mediator.
- F. **Practice of Law.** A judge should not practice law.
- G. **Extra-judicial Appointments.** A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent

his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

CANON 6

*A Judge Should Regularly File Reports of Compensation Received
for Quasi-Judicial and Extra-Judicial Activities*

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

- A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.
- B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.
- C. Public Reports. A judge should report the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. His report should be made at least annually and should be filed as a public document in the office of the clerk of the court on which he serves or other office designated by rule of court.

CANON 7

*A Judge Should Refrain from Political Activity
Inappropriate to His Judicial Office*

A. Political Conduct in General.

- (1) A judge or a candidate for election to judicial office should not:
 - (a) Act as a leader or hold any office in a political organization;
 - (b) Make speeches for a political organization or candidate or publicly endorse a candidate for public office;
 - (c) Solicit funds for a political organization or candidate except as authorized in subsection A(2).
- (2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization.
- (3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

B. Campaign Conduct.

- (1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:
 - (a) Should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

- (b) Should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;
 - (c) Should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.
- (2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit campaign funds, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.
- (3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

EFFECTIVE DATE OF COMPLIANCE

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Code becomes effective may:

- (a) Continue to act as an officer, director, or non-legal advisor of a family business;
- (b) Continue to act as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family.

Appendix VIII. Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases

Article

VI. Procedure for Payment of Compensation.

ARTICLE VI.

Procedure for Payment of Compensation.

Section 6.6. Counsel appointed for the representation of indigent defendants shall not accept any compensation other than that awarded by the Court.

Editor's Note.—The amendment adopted by the Council of the North Carolina State Bar at its regular quarterly meeting in July, 1973, and approved by the Supreme Court Aug. 31, 1973, added § 6.6.

As the rest of this article was not changed by the amendment, only § 6.6 is set out.

Appendix IX. Rules Governing Admission to Practice of Law

(Approved by the Supreme Court November 16, 1971.)

Rule

1. Compliance Necessary.
2. Definitions.
3. Applicants.
4. Registration.
5. Applications of General Applicants.
6. Requirements for General Applicants.
7. Requirements for Comity Applicants.

Rule

8. Moral Character.
 9. Educational Requirements.
 10. Protest.
 11. Examinations.
 12. Certificate or License.
 13. Appeals.
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Editor's Note.—These rules were adopted by the Council of the North Carolina State Bar at its regular quarterly meeting in October, 1971, and approved by the Supreme Court Nov. 16, 1971. They amend and rewrite the rules adopted by the Council in October, 1970, and approved Nov. 4, 1970. The rules appearing in Replacement Volume 4A were approved Feb. 22, 1968.

RULE I

Compliance Necessary

Section 1. No person shall be admitted to the practice of law in North Carolina unless he has complied with these rules and the laws of the State.

RULE II

Definitions

Section 1. The term "Board" as herein used refers to the "Board of Law Examiners of North Carolina."

Section 2. The term "Secretary" as herein used refers to the Secretary of the Board of Law Examiners of North Carolina.

RULE III

Applicants

Section 1. For the purpose of these rules, applicants are classified either as "general applicants" or as "comity applicants." To be classified as a "general applicant," and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule VI hereof. To be classified as a "comity applicant" and certified as such for admission to practice law, a person shall satisfy the requirements of Rule VII hereof.

Section 2. As soon as possible after the filing date for applications, the Secretary shall make public a list of both general and comity applicants for the ensuing examination.

RULE IV**Registration**

Section 1. Every person seeking admission to practice law in the State of North Carolina as a general applicant shall register, by filing with the Secretary, upon forms prescribed by the Board.

Section 2. Each registration form shall be complete in every detail and must be accompanied by such other evidence or documents as may be prescribed by the Board.

Section 3. Registrations shall be filed with the Secretary at least eighteen (18) months prior to August 1 of the year in which the applicant expects to take the bar examination.

Section 4. Each registration by a resident of the State of North Carolina must be accompanied by a fee of \$20.00 and each registration by a non-resident shall be accompanied by a fee of \$35.00. An additional fee of \$25.00 shall be charged all applicants who file a late registration, both resident and non-resident. All said fees shall be payable to the Board. No part of a registration fee shall be refunded for any reason whatsoever.

Editor's Note. — The amendment adopted by the Council of the North Carolina State Bar in July, 1974, and approved by the Supreme Court August 30, 1974, substituted "\$20.00" for "\$10.00" and "\$35.00" for "\$25.00" in the first sentence of § 4.

It is difficult to image a justifiable purpose for § 3 of this rule which requires registration 18 months prior to taking the examination; but the court expresses no opinion as to its constitutional validity.

Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970).

Belated Registration Allowed as of Course.—Section 4 of this rule provides for an additional "late registration" fee of \$25. Apparently upon payment of such a fee belated registration is allowed as a matter of course. Keenan v. Board of Law Examiners, 217 F. Supp. 1350 (E.D.N.C. 1970).

RULE V**Applications of General Applicants**

Section 1. After complying with the registration provisions of Rule IV, applications for admission to an examination must be made upon forms supplied by the Board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application.

Section 2. Applications must be received and filed with the Secretary not later than 12:00 o'clock noon, Eastern Standard Time, on the 10th day of January of the year the applicant desires to take the written bar examination.

Section 3. Every application by a general applicant who is a resident of the State of North Carolina shall be accompanied by a fee of \$100.00. Every application by a general applicant who is not a resident of the State of North Carolina shall be accompanied by a fee of \$100.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a nonresident.

Section 4. No part of the fee required by Section 3 of this Rule V shall be refunded to the applicant unless the applicant shall file with the Secretary a written request to withdraw as an applicant, not later than the 15th day of June before the next examination, in which event not more than one-half ($\frac{1}{2}$) of the fee may be

refunded to the applicant in the discretion of the Board; provided, however, no part of any fee paid to the National Conference of Bar Examiners or its successors shall be refunded.

Editor's Note. — The amendment adopted by the Council at its regular quarterly meeting in July, 1972, and approved by the Supreme Court July 31, 1972, increased the fees in § 3 from \$75.00 to \$100.00.

RULE VI

Requirements for General Applicants

Section 1. Before being licensed by the Board to practice law in the State of North Carolina, a general applicant shall:

- (1) Be of good moral character and have satisfied the requirements of Rule VIII hereof;
- (2) Have registered as a general applicant in accordance with the provisions of Rule IV hereof;
- (3) Possess the legal educational qualifications as prescribed in Rule IX hereof;
- (4) Be a citizen of the United States;
- (5) Be of the age of at least eighteen (18) years;
- (6) Be and continuously have been a bona fide citizen and resident of the State of North Carolina on and from the 15th day of June of the year in which the applicant takes the written Bar examination.
- (7) Have filed formal application as a general applicant in accordance with Rule V hereof;
- (8) Stand and pass a written bar examination as prescribed in Rule XI hereof.

Editor's Note. — The amendment adopted by the Council of the North Carolina State Bar in July, 1973, and approved by the Supreme Court Aug. 31, 1973, substituted "licensed" for "certified (licensed)" in the introductory paragraph, deleted former subdivision (7), requiring a nonresident applicant to file a declaration of intent to become a citizen and resident of North Carolina, and redesignated former subdivisions (8) and (9) as (7) and (8).

Former Subdivision (6) Unconstitutional.—Subdivision (6) of this rule, before its amendment in 1970, was held unconstitutional because it created an unreasonable, arbitrary classification, unnecessarily burdened the plaintiffs' right to travel, and arbitrarily denied the plaintiffs an opportunity to practice their profession. *Keenan v. Board of Law Examiners*, 317 F. Supp. 1350 (E.D.N.C. 1970).

RULE VII

Requirements for Comity Applicants

Section 1. Any attorney at law immigrating or who has heretofore immigrated to North Carolina from a sister state or from the District of Columbia or a territory of the United States, upon written application, may be certified (licensed) by the Board to practice law in the State of North Carolina, without written examination, in the discretion of the Board, provided each such applicant shall:

- (1) Be a citizen of the United States;
- (2) File written application with the Secretary, upon such form as may be prescribed by the Board, not less than six (6) months before the application shall be considered by the Board.
- (3) Pay to the Board with each written application a fee of \$300.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a non-resident, not more than \$125.00 of which may be refunded to the applicant in the discretion of the Board if admission to practice law in the State of North Carolina is denied;

- (4) Be and continuously have been a bona fide citizen and resident of the State of North Carolina for a period of at least sixty (60) days immediately prior to the consideration of his application to practice law in the State of North Carolina.
- (5) Prove to the satisfaction of the Board:
 - a. That the applicant is licensed to practice law in a State having comity with North Carolina.
 - b. That the applicant has been actively and substantially engaged for at least three (3) years out of the last five (5) years immediately preceding the filing of his application with the Secretary in:
 - i. The practice of law as defined by G.S. 84-2.1, or
 - ii. Activities which would constitute the practice of law if done for the general public, or
 - iii. Serving as a Judge of a court of record, or
 - iv. Serving as a full time teacher in a law school approved by the Council of The North Carolina State Bar, or as full time member of the Faculty of the Institute of Government of The University of North Carolina at Chapel Hill.

Time spent in active military service of the United States, not to exceed three (3) years, may be excluded in computing the five (5) year period referred to hereinabove;

- (6) Satisfy the Board that the State in which the applicant is licensed and from which he seeks comity will admit attorneys licensed to practice in the State of North Carolina to the practice of law in such State without written examination.
- (7) Be in good professional standing in the State from which he seeks comity.
- (8) Furnish to the Board such evidence as may be required to satisfy the Board of his good moral character.
- (9) Applicants must meet the educational requirements of Rule IX as hereinafter set out if first licensed to practice law after August 1971.

Section 2. No license shall be issued to any applicant for admission under this Rule VII except at the time of the annual licensing of the general applicants; provided, the Board may at any other time, in its discretion grant an interim permission to such comity applicants to practice law until license shall be issued.

Editor's Note. — The amendment adopted by the Council of the North Carolina State Bar in July, 1974, and approved by the Supreme Court Aug. 30, 1974, inserted in subdivision (3) of § 1 the language beginning "\$300.00 plus such fee" and ending "a non-resident."

The amendment adopted by the Council of the

North Carolina State Bar in Jan. 22, 1974, and approved by the Supreme Court Jan. 25, 1974, added, at the end of subdivision (5)b.iv, "or as full-time member of the Faculty of the Institute of Government of The University of North Carolina at Chapel Hill."

RULE VIII

Moral Character

Section 1. Every applicant shall have the burden of proving that he is possessed of good moral character and that he is entitled to the high regard and confidence of the public.

Section 2. All information furnished to the Board by an applicant, shall be deemed material and all such information shall be and become a permanent record of the Board.

Section 3. No one shall be certified (licensed) to practice law in this State by examination or comity:

- (1) Who fails to disclose fully to the Board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to his professional conduct, whether same have been terminated or not, in this or any other state, or any Federal Court or other jurisdiction, or
- (2) Who fails to disclose fully to the Board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant, whether the same have been terminated or not in this or any other state or in any of the Federal Courts or other jurisdictions.

Section 4. Every applicant shall appear before a Bar Candidate Committee, appointed by the Chairman of the Board, in the Judicial District in which he resides, or in such other judicial district as the Board in its sole discretion may designate to the candidate, to be examined about any matter pertaining to his moral character. The applicant shall give such information to the Committee as may be required on such forms as may be provided by the Board. A Bar Candidate Committee may require the applicant to make more than one appearance before the Committee and to furnish to the Committee such information and documents as it may reasonably require pertaining to the moral fitness of the applicant to be certified (licensed) to practice law in North Carolina. Each applicant will be advised of the time and place of his appearance before the Bar Candidate Committee.

Section 5. All investigations in reference to the moral character of an applicant may be informal, but shall be thorough, with the object of ascertaining the truth. Neither the hearsay rule, nor any other technical rule of evidence need be observed.

Section 6. Every applicant may be required to appear before the Board to be examined about any matter pertaining to his moral character.

Section 7. No new application or petition for reconsideration of a previous application from an applicant who has been denied permission to take the bar examination by the Board on the grounds of failure to prove good moral character shall be considered by the Board within a period of three (3) years next after the date of such denial unless, for good cause shown, permission for reapplication or petition for a reconsideration is granted by the Board.

RULE IX

Educational Requirements

Section 1. General Education. Each applicant to take the examination, prior to beginning the study of law, must have completed, at an accredited college or university an amount of academic work equal to $\frac{3}{4}$ of the work required for a bachelor's degree at the university of the State in which the college or university is located. With his application he shall file an affidavit from such college or university furnishing all information that the Board shall require.

Section 2. Every general applicant applying for admission to practice law in the State of North Carolina, before being granted a certificate (license) to practice law shall file with the Secretary a certificate from the President, Dean or other proper official of the Law school approved by the Council of The North Carolina State Bar, a list of which is available in the office of the Secretary, or shall otherwise show to the satisfaction of the Board that the applicant has or will receive a law degree within sixty (60) days after the date of the written examination or that the applicant has successfully completed the courses required by the Council of The North Carolina State Bar, or will complete such courses within sixty (60) days after the date of the written examination provided in Rule XI, being the same courses as those set out in Rule XI, Sec. 3, hereof.

RULE X**Protest**

Section 1. Any person may protest the application of any applicant to be admitted to the practice of law either by examination or as a matter of comity.

Section 2. Such protest shall be made in writing, signed by the person making the protest and bearing his home and business address, and shall be filed with the Secretary prior to the date on which the applicant is to be examined.

Section 3. The Secretary shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the Secretary a written withdrawal as a candidate for admission to the practice of law at that examination.

Section 4. In case the applicant does not withdraw as a candidate for admission to the practice of law at that examination, the person or persons making the protest and the applicant in question shall appear before the Board at a time and place to be designated by the Board. In the event time will not permit a hearing on the protest prior to the examination, the applicant may take the written examination; however, if the applicant passes the written examination, no certificate (license) to practice law shall be issued to him as provided by Rule XII until final disposition of the protest in favor of the applicant.

Section 5. Nothing herein contained shall prevent the Board on its own motion from withholding its certificate (license) to practice law until it has been fully satisfied as to the moral fitness of the applicant as provided by Rule VIII.

RULE XI**Examinations**

Section 1. One written examination shall be held each year for those applying to be admitted to the practice of law in North Carolina as general applicants.

Section 2. The examination shall be held in the City of Raleigh between July 1 and August 31 on such dates as the Board may set from time to time.

Section 3. The examination shall deal with the following subjects: Business Associations (including agency, corporations, and partnerships), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Legal Ethics, Real Property, Security Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.

Section 4. The Board shall determine what shall constitute the passing of an examination.

Section 5. No person shall be permitted to take the examination more than five (5) times within any ten (10) year period.

Editor's Note. — The amendment adopted by the Council at its regular quarterly meeting in July, 1972, and approved by the Supreme Court July 31, 1972, substituted "between July 1 and August 31 on such date as the Board may set from time to time" for "and shall commence on the first Tuesday in August" in § 2.

RULE XII**Certificate or License**

Section 1. Upon compliance with the rules of the Board, and all orders of the Board, the Secretary, upon order of the Board shall issue a certifi-

cate (license) to practice law in North Carolina to each applicant as may be designated by the Board in the form and manner as may be prescribed by the Board, and at such times as prescribed by the Board.

RULE XIII

Appeals

Section 1. Any applicant may appeal from an adverse ruling or determination of the Board of Law Examiners as to his eligibility to take the written examination. After an applicant has successfully passed the written examination, he may appeal from any adverse ruling or determination withholding his certificate (license) to practice law from him.

Section 2. Any appealing applicant shall give notice of appeal in writing, within twenty (20) days after notice of such ruling or determination, and file with the Secretary his written exceptions to the ruling or determination, which exceptions shall state the grounds of objection to such ruling or determination. Failure to file such notice of appeal in the manner and within the time stated shall operate as a waiver of the right to appeal and shall result in the decision of the Board becoming final.

Section 3. Within sixty days after receipt of the notice of appeal, the Secretary shall prepare, certify, and file with the clerk of the Superior Court of Wake County, at the expense of the appellant, the record of the case, comprising

- (1) The application and supporting documents or papers filed by the applicant with the Board;
- (2) A complete transcript of the testimony taken at the hearing;
- (3) Copies of all pertinent documents and other written evidence introduced at the hearing;
- (4) A copy of the decision of the Board; and
- (5) A copy of the notice of appeal containing the exceptions filed to the decision.

With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

Section 4. Such appeal shall lie to the Superior Court of Wake County and shall be heard by the presiding judge or resident judge, without a jury, who may hear oral arguments and receive written briefs, but no evidence not offered at the hearing shall be taken except that in cases of alleged omissions or errors in the record. Testimony thereon may be taken by the court. The findings of fact by the Board, when supported by competent evidence shall be conclusive and binding upon the court. The court may affirm, reverse or remand the case for further proceedings. If the court reverses or remands for further proceedings the decision of the Board, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or remand.

Section 5. Any party to the review proceeding, including the Board, may appeal to the Supreme Court from the decision of the Superior Court. No appeal bond shall be required of the Board.

Appendix IX-A. Rules Governing Practical Training of Law Students

(Approved by the Supreme Court March 14, 1973.)

Article

- I. Purpose.
- II. General Definition.
- III. Eligibility.
- IV. Form and Duration of Certification.

Article

- V. Supervision.
- VI. Activities.
- VII. Use of Student's Name.
- VIII. Miscellaneous.

Editor's Note.—These rules were adopted by the Council of the North Carolina State Bar at its regular quarterly meeting in October, 1972, and approved by the Supreme Court March 14, 1973.

ARTICLE I — Purpose:

The Bench and Bar are primarily responsible for making available competent legal services for all persons including those unable to pay for these services. As one means of providing assistance to attorneys representing clients unable to pay for such services and to encourage law schools to provide their students with supervised practical training of varying kinds during the period of their formal legal education, the following rules are adopted.

ARTICLE II — General Definition:

Subject to additional definitions contained in these rules which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in these rules:

A. *Legal Aid Clinic* — An established or proposed department, division, program or course in a law school under the supervision of at least one full time member of the school's faculty or staff who has been admitted and licensed to practice law in this State and conducted regularly and systematically to render legal services to indigent persons.

B. *Indigent Persons* — A person financially unable to employ the legal services of an attorney as determined by a standard of indigence established by a Judge of the General Court of Justice.

C. *Legal Aid* — Legal services of a civil, criminal or other nature rendered for or on behalf of an indigent person without charge to such person.

D. *Third Year Law Student* — A student regularly enrolled and in good standing in a law school in this State who has satisfactorily completed at least two-thirds of the requirements for a first professional degree in law (J.D. or its equivalent).

E. *Lawyer* — Supervising lawyer means sole practitioner, one or more lawyers sharing offices but not partners, one or more lawyers practicing together in a partnership or in a professional corporation.

ARTICLE III — Eligibility:

In order to engage in activities permitted by these rules, the law student must:

A. Be duly enrolled in this State in a law school approved by the Council of The North Carolina State Bar.

B. A student regularly enrolled and in good standing in a law school in this State who has satisfactorily completed at least two-thirds of the requirements for a first professional degree in law (J.D. or its equivalent).

APPENDIX IX-A—TRAINING OF LAW STUDENTS

C. Be certified by the Dean of his law school, on forms provided by The North Carolina State Bar, as being of good character with requisite legal ability and training to perform as a legal intern. Certification may be denied or, if granted, withdrawn by the Dean without a hearing or any showing of cause and for any reason.

D. Be introduced to the Court in which he is appearing by an attorney admitted to practice in that Court.

E. Neither ask for nor receive any compensation or remuneration of any kind from any client for whom he renders services, but this shall not prevent an attorney, legal aid bureau, law school, public defender agency, or the State from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.

F. Certify in writing that he has read and is familiar with the Canons of Professional Ethics of North Carolina and the opinions interpretive thereof.

ARTICLE IV — Form and Duration of Certification:

A certification of a student by the Law School Dean:

A. Shall be filed with the Secretary of The North Carolina State Bar in the Office of The North Carolina State Bar in Raleigh and, unless it is sooner withdrawn, it shall remain in effect until the expiration of 18 months after it is filed, or until the announcement of the results of the first Bar Examination following the student's graduation, whichever is earlier. For any student who passes that examination, a certification shall continue in effect until the date he is admitted to the Bar.

B. May be withdrawn by the Dean at any time without a hearing and without any showing of cause and *shall* be withdrawn by him if the student ceases to be duly enrolled as a student prior to his graduation, by mailing a notice to that effect to the Secretary of The North Carolina State Bar, at the office of The North Carolina State Bar in Raleigh, to the supervising attorney and to the student.

C. May be withdrawn by any Resident Superior Court Judge or Judge holding the Court of the judicial district in which the student is appearing or has appeared at any time without notice or hearing and without any showing of cause. Notice of the withdrawal shall be mailed to the student, to the supervising attorney, to the student's Dean, and to the Secretary of The North Carolina State Bar, at the office of The North Carolina State Bar in Raleigh.

D. Forms to be used for certification and withdrawal of certification are attached.

ARTICLE V — Supervision:

A supervising lawyer shall:

A. Be an active member of the State Bar of North Carolina, and before supervising the activities specified in Rule VI hereof, shall have actively practiced law in North Carolina as a full time occupation for at least two years.

B. Supervise no more than five students concurrently.

C. Assume personal professional responsibility for any work undertaken by the student while under his supervision.

D. Assist and counsel with the student in the activities mentioned in these rules, and review such activities with such student, all to the extent required for the proper practical training of the student and the protection of the client.

E. Read, approve and personally sign any pleadings or other papers prepared by such student prior to the filing thereof, and read and approve any documents which shall be prepared by such student for execution by any person

or persons not a member or members of the State Bar of North Carolina prior to the submission thereof for execution.

F. As to any of the activities specified by Rule VI hereof:

1. Before commencing supervision of any student, file with the Secretary of The North Carolina State Bar in the office of The North Carolina State Bar in Raleigh, a notice in writing, signed by him, stating the name of such student, the period or periods during which he expects to supervise the activities of such student, and that he will adequately supervise such student in accordance with these rules.
2. Notify the Secretary of The North Carolina State Bar in the office of The North Carolina State Bar in Raleigh in writing promptly whenever his supervision of such student shall cease.

ARTICLE VI — Activities:

A properly certified student may engage in the activities provided in this section under the supervision of an attorney qualified and acting in accordance with the provision of Section V:

A. Without the presence of the supervising attorney, a student may give advice to a client on legal matters provided that the student gives a clear prior explanation to the client that he is not an attorney and provided that the supervising attorney has given the student permission to render legal advice in the subject area involved.

B. Without being physically accompanied by the supervising attorney, a student may represent indigent persons in the following hearings or proceedings:

1. Administrative hearings and proceedings before Federal, State, and local administrative bodies.
2. Civil litigation before Courts or Magistrates, provided the case is one which could be assigned to a magistrate under North Carolina General Statute Section 7A-210(1) and (2), whether or not assignment is in fact requested or made to a magistrate.
3. In any criminal matter, except those criminal matters in which the defendant has the right to the assignment of counsel under any constitutional provision, statute, or rule of Court.

C. Without being physically accompanied by the supervising attorney, a student may represent the State in the prosecution of all misdemeanors with the consent of the District Solicitor.

D. When physically accompanied by the supervising attorney who has read, approved, and personally signed any briefs, pleadings, or other papers prepared by the student for presentment to the Court, a student may represent indigent clients in the following hearings or proceedings, provided however, the approval of the presiding Judge is first secured:

1. All juvenile proceedings.
2. The presentation of a brief and oral argument in any civil or criminal matter in the District or Superior Court.
3. All misdemeanor cases.

E. A student may accompany his supervising attorney when the supervising attorney is attorney of record for an indigent client in any civil or criminal action, but may take part in the proceedings only with the consent of the presiding Judge.

F. In all cases under this Rule in which a student makes an appearance in Court or before an administrative agency on behalf of a client, he shall have the written consent in advance of the client and his supervising attorney. The client shall be given a clear explanation, prior to the giving of his consent, that

APPENDIX IX-A—TRAINING OF LAW STUDENTS

the student is not an attorney. These consents shall be filed with the Court and made a part of the record in the case.

G. In all cases under this rule in which a student is permitted to make an appearance in Court or before an administrative agency on behalf of a client, he may engage in all activities appropriate to the representation of the client, including, without limitation, selection of and argument to the Jury, examination and cross-examination of witnesses, motions and arguments thereon, and giving notices of appeal.

H. Except as herein allowed, the certified student shall not be permitted to participate in any activity in the connection with the practical training of law students unless he is under the direct and physical supervision of the supervising attorney.

ARTICLE VII — Use of Student's Name :

A. A student's name may properly be :

1. Be printed or typed on briefs, pleadings, and other similar documents on which the student has worked with or under the direction of the supervising lawyer, provided the student is clearly identified as a student certified under these rules, and provided further that a student shall not sign his name to such briefs, pleadings, or other similar documents.
2. Be signed to letters written on the supervising attorney's letterhead which relate to the student's supervised work, provided there appears below his signature a clear identification that he is certified under these rules, such as "Certified Law Student under the Supervision of (Supervising lawyer).

B. A student's name may not appear :

1. On the letterhead of a Supervising lawyer ; or
2. On a business card bearing the name of a Supervising lawyer ; or
3. On a business card identifying the student as certified under these rules.

ARTICLE VIII — Miscellaneous :

A. Nothing contained in these rules shall affect the right of any person who is not admitted to practice law to do anything that he might lawfully do prior to the adoption of these rules.

B. These rules are subject to amendment, modification, revision, supplement, repeal, or other change by appropriate action in the future without notice to any student certified at the time under these rules.

NORTH CAROLINA RULES GOVERNING PRACTICAL TRAINING OF LAW STUDENTS

IN RE :

APPLICATION OF

CERTIFICATION OF ELIGIBILITY AND GOOD MORAL CHARACTER
TO PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS
PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA
STATE BAR

TO: THE NORTH CAROLINA STATE BAR :

The undersigned certifies as follows :

1. Name and address of person signing this certificate.
.....
2. Name and address of law school and official connection with same.
.....
3. is duly enrolled in the State of North Carolina in a law school approved by the Council of The North Carolina State Bar and is in good standing in said law school and has satisfactorily completed at least two-thirds of the requirements for a first professional degree in law (J.D. or its equivalent).
4. is of good character with the requisite legal ability and training to perform as a legal intern pursuant to the Rules and Regulations Governing Practical Training of Law Students.

Seal (of School)

....., Dean
.....

Name of School

....., Dean of

Law School, being first duly sworn on oath deposes and says that he has read the foregoing certificate and he knows the contents thereof; that the statements contained therein are true of his own knowledge, except as to those matters stated upon information and belief, and, as to those, he believes them to be true.

Sworn and subscribed to before me

this day of, 19.....

..... Notary Public

My commission expires

Form: Dean's Certificate

NORTH CAROLINA RULES
GOVERNING PRACTICAL TRAINING
OF LAW STUDENTS

IN RE:

APPLICATION OF
.....
.....

WITHDRAWAL OF ELIGIBILITY TO PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR.
TO: THE NORTH CAROLINA STATE BAR:

The undersigned, having previously certified to the Council of The North Carolina State Bar as to the eligibility for the above named individual to participate in the Practical Training of Law Students Program promulgated by The North Carolina State Bar, does hereby WITHDRAW said certificate of eligibility and does hereby notify The North Carolina State Bar that
..... is no longer eligible to participate in said program.

Seal (of School)

....., Dean
.....

Name of School

....., Dean of

Law School, being first duly sworn on oath deposes and says that he has read the foregoing certificate and he knows the contents thereof; that the statements con-

APPENDIX IX-A—TRAINING OF LAW STUDENTS

tained therein are true of his own knowledge, except as to those matters stated upon information and belief, and, as to those, he believes them to be true.

Sworn and subscribed to before me

this the day of, 19.....

....., Notary Public.

My commission expires

Form: Withdrawal of Dean's Certificate

Appendix X. North Carolina Supreme Court Library Rules

General Provisions

Rule
2. Definitions.

Appendix I

Official Register, State of
North Carolina

General Provisions

2. Definitions.—Subject to additional definitions contained in subsequent sections and applicable to specific parts of these Rules, and unless the context otherwise requires, the following definitions shall apply for purposes of these Rules:

(f) “Official Register” means that list of positions of the State of North Carolina that is appended to these Rules as Appendix I.

Editor’s Note.—The amendment promulgated Nov. 28, 1972, rewrote subsection (f). As the rest of this rule was not changed by the amendment, only the introductory paragraph and subsection (f) are set out.

Appendix I.

OFFICIAL REGISTER STATE OF NORTH CAROLINA

(1) The Senators, Representatives, Principal Clerks, Reading Clerks, Sergeants-at-Arms, Legislative Services Officer, and Director of Research of the General Assembly.

(2) The Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.

(3) The Secretary of the Department of Administration; Secretary of Transportation and Highway Safety; Secretary of the Department of Natural and Economic Resources; Secretary of Human Resources; Secretary of Social Rehabilitation and Control; Secretary of Commerce; Commissioner of Revenue; Secretary of Art, Culture and History; and Secretary of Military and Veterans’ Affairs.

(4) The Judges of the Superior Court and the Judges of the District Court.

(5) The Solicitors and the Public Defenders.

(6) The State Librarian.

(7) The Director of the Office of Archives and History.

(8) The Director, Assistant Director, and Assistant Counsel of the Administrative Office of the Courts.

(9) The Secretary-Treasurer of The North Carolina State Bar.

Editor’s Note.—This Appendix I was promulgated Nov. 28, 1972.

Appendix XI. Comparative Tables

(4) TABLE OF LAWS CODIFIED SUBSEQUENT TO 1919

PUBLIC-LOCAL LAWS OF 1923

Ch.	Sec.	General Statutes
583	1-12	160A-349.1 to 160A-349.12

SESSION LAWS OF 1951

Ch.	Sec.	General Statutes
87		160A-349.13

SESSION LAWS OF 1955

904	1-5	143-329 to 143-333
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SESSION LAWS OF 1963

Ch.	Sec.	General Statutes
707	5	115-69 note

SESSION LAWS OF 1965

Ch.	Sec.	General Statutes
517	..	105-116

SESSION LAWS OF 1967

Ch.	Sec.	General Statutes	Ch.	Sec.	General Statutes
218	1	9-8 Repealed			7A-43.1 to 7A-43.3
996	13	146-33			Repealed,
1049	5	7A-132, 7A-300, 7A-304, 7A-343, 7A-346			7A-160 to 7A-165
					Repealed
1049	6	7-44 Repealed,	1272	3	105-116
		7-45 Repealed,	1272	4	105-120
		7-68 Repealed,			

SESSION LAWS OF 1969

Ch.	Sec.	General Statutes	Ch.	Sec.	General Statutes
521		103-4			130-11, 130-58.1,
605	1, 2	106-567			136-67, 143-280,
616	1	58-72			153-53.1, 153-52,
616	2	58-79.2			153-53.3, 153-53.4
796		106-26	1013	6	15-5.2 Repealed
982	..	14-320, 35-39, 48-2, 48-9.1, 48-15, 48-16, 48-19, 48-20, 48-24, 48-25, 51-2 note, 122-40, 122-49,	1190	53	115-99 Repealed
			1190	57	151-1 to 151-8 Repealed
			1278	1	120-3
			1278	2	120-4

SESSION LAWS OF 1971

Ch.	Sec.	General Statutes	Ch.	Sec.	General Statutes
1	1, 2	164-14	5	..	20-145
1	3	164-14 note	10	..	90-220.11
3	..	14-250			

Ch.	Sec.	General Statutes	Ch.	Sec.	General Statutes
11	..	47-48	111	2	143-215.8
12	..	1-54	111	3	143-215.8 note, 143-215.44 note
13	1	84-20			12-4
13	2	84-26	115		160-457.1
14	..	47-51	116	1, 2	157-4.1
15	..	20-36	116	3, 4	135-1
16	..	67-34 L.M.	117	1	135-1, 135-8
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In using this table refer to Appendix XI, (2), where sections of the Consolidated Statutes have been transferred to sections appearing in the General Statutes of North Carolina. (This sentence is set out to correct an error in the Replacement Volume.—Ed. note.)

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CITY OF BOSTON
FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
BY
JOHN HUTCHINGS
OF THE BOSTON BAR
IN TWO VOLUMES
VOL. II
BOSTON
PUBLISHED BY
JOHN HUTCHINGS
AT THE SIGN OF THE
CROWN IN CORNHILL
1780

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STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1974

I, James H. Carson, Jr., Attorney General of North Carolina, do hereby certify that the foregoing 1974 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

JAMES H. CARSON JR.,
Attorney General of North Carolina

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