



NORTH CAROLINA
ADMINISTRATIVE OFFICE
of the COURTS

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Dear Mr. Abernathy,

Following are my responses to your email questions about judicial rotation. As I am sure you have discovered, there are many views about rotation. These are my views and I am not speaking for the Administrative Office or any other judicial official. I hope these views from my 20 years on the bench and 41 years with the court system will be useful to you.

How and when did the practice of rotating judges begin? (Right now I understand it goes back to the 1700s.)

Rotation does indeed go back to the founding of our nation and our state. It was embodied in our original court system under our original constitution and has been preserved through every constitutional change since, with the latest being Article IV of the current constitution adopted by an amendment passed in 1962. The specific current language reads: "The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed."

The only evolution in implementation relates to the geographic divisions and duration of the rotation. Originally, rotation was session by session, then for a year at a time in each district. Currently, the rotation cycle is for six months, returning to the home district for six months every three years on average. Within the rotation cycles, Senior Resident Superior Court Judges are assigned periodically to their home district to handle administrative matters while maintaining their regular rotation assignment.

In our first constitution of 1778, provision was made for 3 superior court judges only. The number was increased to four in 1790. The judges rotated throughout the early state, from New Bern, Edenton, Wilmington, and Halifax to Morganton, Hillsborough, Fayetteville, and Salisbury. (Can you imagine Judge Samuel Ashe from Wilmington riding that circuit on horseback?) The number and size of both the districts and divisions has evolved. By 1790, 8 judges rotated through an "Eastern Riding" and a "Western Riding." By 1868, 8 Superior Court Judges (selected by the legislature for life) still rotated, but through 8 "circuits." After the 1868 constitutional changes, 12 popularly elected Superior Court Judges rotated through 12 "districts." Initially, the judges only rotated among the counties within the district in which they were elected, but in 1878 the requirement that each judge rotate throughout the state was restored. In 1910 the state was divided into two division to reduce the burden of rotating throughout the state. By 1968, 38 Superior Court Judges rotated through 30 districts within two divisions.

Today, North Carolina has 49 districts and 8 "divisions" through which our 97 regular Superior Court Judges and 12 of our 15 Special Superior Court Judges rotate. The regular Judges rotate according to a master calendar and the specials are then plugged into that calendar either as needed or as used for sessions in addition to those established on the master calendar. The other 3 Special Superior Court Judges are available for rotation, but they are specially assigned to our three business courts located in Charlotte, Greensboro, and Raleigh.

Rotation was an issue addressed by the Commission on the Future of Justice (known as the Medlin Commission) in the last major study of our overall court system, completed in 1996. The principle was reaffirmed as promoting justice. This blue ribbon commission concluded: "To maintain the impartiality of the judiciary and a true statewide judicial system, circuit judges should "rotate" throughout their circuits. Rotation would free circuit judges from the pressures that can arise from purely local assignment and would foster the consistent application of the law across the state."

Why was it considered important then and why does it remain important to our judicial system?

I think this question is largely answered by the quote from the Commission on the Future of Justice. I would add that historically there are two potential corrupting influences about which the judiciary must be constantly vigilant: money and relationships. Since judges must run for election within their local districts, the people financing their campaigns are largely local people, and of those people most are probably connected to the courts in some way, either as attorneys or employees or associates within the judicial system. Rotation reduces both the reality of the temptation of bias and the perception that contributors may have better access or influence. The corrupting power of money was a major factor in one of the worst scandals of modern court history relating to the old Justice of the Peace system. Financial corruption was probably the driving force behind the court reforms of the 1960s that gave us our current constitution structure and abolished the offices of the Justices of the Peace.

The second potential for corruption has to do with relationships. Every election builds alliances, and those often are around the local courthouses. Rotation mitigates the potential for the perception of "home cooking" favor with local attorneys and supporters. It also blunts the perceptions that arise as attorneys who were supporters vie in litigation with those who were not. In former times, it was rare for an out-of-county attorney to appear in a local court; but today it is common. Rotation mitigates the building of inappropriate or overly-familiar relationships and enhances the perception that a truly impartial judge will be presiding. In this way, judicial independence is enhanced, and an independent judiciary is a principle of the highest value. While it is possible for local judges to overcome these risks, this check and balance for the judges of our highest trial court has historically been deemed advantageous and has served us well. To eliminate it will remove one check and balance that contributes to a unified and uniform General Court of Justice that has been remarkably free of corruption. Our modern society has probably increased the risks for our local judges. More money, more people, more attorneys, more litigation. Having a mechanism that allows more people in more places scrutinizing conduct, and a system that removes the judge from local pressures and local politics, is indeed salutary. While travel may be a burden, it holds no candle to that assumed by our earlier judges who endured bad roads or no roads, horse and buggy travel, and no Holiday Inns.

Rotation also makes it more likely that the quality of justice across the state will be more uniform over time. Pockets of dissonance will be identified and over time normalized. Any abnormal or inappropriate behavior tends to come to light as the members of a different attorney bar scrutinize and experience different judges with whom they have no personal allegiance. Excellence is recognized and reputations for hard work or good judgment are built – or not. The awkwardness of handing down decisions that would be displeasing to influential local constituents is more easily avoided. These are just a few of the advantages that come to mind. On balance, I agree with the constitutional declaration that "the principle of rotation is a salutary one" to the people we serve.

I've also learned that the state has temporarily suspended judge rotations during some periods and fiscal years to save costs. When was the last time this happened? How much did we save? (From what I'm finding online, it appears this was last suspended in 2009-10 but I need to confirm.)

As director of the Administrative Office of the Courts, it was my job to monitor our budget through the recession. As we looked at the cost of rotation, the question arose as to whether the expense of travel was justified. Overall, our initial assessment was that any savings were not sufficiently significant within the context of our entire budget to justify recommending stopping rotation. None of these savings could be used for salaries because they are considered non-recurring funds, but any savings could be used for other

non-salary purposes, such as supplies, so we constantly considered the possibility. The importance of rotation caused me to conclude that we should consider suspending rotation only if it appeared we would not have sufficient funds to cover all travel costs and not as a cost-shifting measure. During some of the worst days of the recession, it did appear that we would not be able to continue paying all travel at the expected rate, and a perception arose that stopping rotation would produce some savings, and we did determine that we could more confidently assure a balanced budget by reducing our travel costs for a reasonable time. The constitution mandates rotation, so "suspending" or "stopping" rotation raised legal and constitutional issues we preferred to avoid. After conferring with the Chief Justice, the Chief Justice exercised her discretion, modified the master calendar of rotation that she had previously issued, and returned all judges to their home districts for part of one rotation period. When we felt more secure about our budget, the regular rotation system resumed. It is normal for a judge to spend one rotation cycle in the judge's home district every two years or so, so the move was considered to be a change in rotation, not technically a "suspension of rotation." This rotation back to their home districts did result in some savings and enabled us to begin the fiscal year without incurring a deficit when the budget reduction was finally passed by the General Assembly.

The dates of the change in rotation by returning all judges to their home districts ran from July 20 until August 28, 2009. The actual saving during that time is difficult to calculate. The average travel reimbursement cost for 7 months of travel for 111 rotating judges was \$239,000, but that included travel for statutorily-required education and training as well as rotation. That is 00.05% (five one-hundredths of one percent) of our overall budget. The amount per month was approximately \$33,000 to \$34,000. We had estimated the drop in travel for the affected judges to have been approximately \$_____ \$20,000 per month unless all travel was eliminated, which we did not want to do. That would have required the cancelation of some courts. Even though judges return to their home districts, some districts have as many as 6 counties, and the judges would be entitled to out-of-county travel even during the suspension. Had the judges remained in their home districts for a longer period, it is likely travel costs would have risen somewhat back towards their previous levels. Illnesses, vacations, retirements, special assignments, disqualifications, holdovers due to lengthy cases, and other factors would require some increase in travel; and the travel for the required educational conferences would have remained unchanged. The largest savings in our actual travel costs was a major reduction in the reimbursement rate, and that complicates any computation further. Whether the costs would have returned to previous levels or not as the normal reimbursement rate was restored is an open question. Overall, along with all of the other measures we implemented, the saving contributed to helping us maintain a viable court system despite the most severe of economic downturns on an already underfunded court system. However, the savings attributable to halting rotation, though beneficial in tight economic times, is not as significant as is popularly believed.

As to prior suspensions: These are the ones we have documented:

Chief Justice Lake suspended rotation for thirteen weeks: October 3, 2005 through December 30, 2005. This related to the gas crisis of that year and the availability and price of gasoline.

Chief Justice Lake suspended rotation for six weeks from May 20, 2002 through June 28, 2002; and again for the six-month Fall master calendar from July 1, 2002 through January 3, 2003. This was related to the budget cuts following the recession of 2001.

Chief Justice Mitchell suspended rotation for thirteen weeks from April 3, 1995 through June 30, 1995. This had to do with reducing criminal case backlogs that had built up over time. By returning all of the judges to their home districts the belief was that the backlogs could be better managed and addressed.

There was a partial suspension in 1999 when judges on the coast were returned to their home districts by Chief Justice Frye following Hurricane Floyd; but that was not statewide measure.

I know of no other statewide suspension since the 1960's reforms.

- How are the judge's rotations and schedules set? Who determines where they go and when? Do individual judges get a say in their schedules?

The scheduling of judges is both constitutionally and statutorily within the discretion of the Chief Justice. The Chief Justice, with the assistance of her appointed Assistant Director establishes a "master calendar." The master calendar forms the basis of the underlying system of rotation. Each year, the senior

resident judge in each of the eight divisions is consulted and, using the prior years master calendar, makes a recommendation as to how the next cycle of rotation should be implemented. The Chief Justice monitors the overall rotation schedule with the goal of assuring that each judge will, over time, rotate through all of the districts within the division to the extent possible. The Chief Justice retains discretion to finalize the rotation schedules; and if circumstances arise justifying it, she exercises her discretion to modify it. Rotation according to the master calendar is normally limited to assignments within the districts and counties of each of the 8 divisions, although special commissions can take any judge to any district across the state at the Chief Justice's discretion.

The individual judges do have the ability to consult with the Chief Justice, and if the Chief Justice is persuaded that the ends of justice will be best served by a particular assignment or modification after the master calendar has been finalized, she will issue a new commission. If she believes it not to be appropriate, the master calendar will determine the judge's assignment. If the judge is new and not on the master calendar, she will determine assignments by commissions and may have the new judge assume the rotation position of a previous judge. No judge can self-commission.

How many superior court judges do we have statewide, including emergency judges?

As stated above, we have 97 Superior Court Judges at present. Of the 97, 44 are Senior Residents. We also have another 15 Special Superior Court Judges, of which 3 are appointed by the Chief Justice to the Business Courts. All judges are subject to rotation. The Regular and Senior Resident Superior Court Judges rotate using the master calendar. The Special Superior Court Judges rotate by special commissions. The 3 business court judges are permanently assigned to the business court sites, but can rotate and hear cases throughout the state.

I hope these responses adequately answer your questions. If you need further information, please feel free to contact Sharon Gladwell and we will try to answer your questions.

Very truly yours,



John W. Smith