tremendously increased the cost of doing business. It's another layer of bureaucracy and all they do is recommend," Flaherty says. "It delays [challenged rules] from getting to the courts" where the rules ultimately receive a binding determination.

The *Whittington* litigation cost the state $190,620.33 in legal fees and other expenses, revealing a down-side to the ARRC's work. But defenders say that's not the commission's fault. "The authority is very limited," says Jack Stevens, an Asheville lawyer and former ARRC chairman. "You can't stop a rule. All you can do is slow it up." The ultimate decision, of course, is made by the courts.

Stevens doubts that the General Assembly wanted to render the ARRC powerless to stop a rule, and he cites a provision in the law that allows the ARRC to hold public hearings on challenged rules—something the ARRC has never done. Stevens surmises that those who drafted the ARRC provision envisioned "that you'd call a public hearing and put it [the contested rule] off for three months so that the legislature could come in and act," Stevens said. But that doesn't explain why the legislature didn't act in early 1987, while it was in session and while the fetal model rule and

Reviewing Rules from Another Perspective

by Charles D. Case

A tremendous avalanche of rules is being promulgated by the agencies. I keep up primarily with the environmental rules, and there are thousands of pages of them promulgated at the state and federal level every year. Without an adequate procedure for reviewing those rules effectively, there is no check on the power of the unelected bureaucracy. The legislature cannot keep up with all of the rules that are being passed. In a sense, the *Whittington* case is a bad example of the need and appropriateness of ARRC's review of a rule: *Whittington* looked at a simple, short, well-publicized rule that was extensively debated and monitored in the press. The more typical rule—at least in the environmental area—is long, complicated, technical, and costly to implement. The environmental rules share with the pregnancy-related rules in *Whittington* the fact that both are controversial, which, again, may make them less instructive as examples.

The primary threat to liberty, due process and fair play comes from rules that are promulgated quietly, with little review and less controversy, but that have adverse impacts that fall disproportionately on the particular group that has the misfortune of being in the wrong regulatory place at the wrong regulatory time. The threat most frequently comes not in huge leaps involving fetal models or similar concrete situations, but through small nibbles, nips, bits and slices that gradually carve up the regulated community. The ball-point pen example [see footnote 3, page 63] is actually a better example for that. In and of itself, it meant little. It probably cost little in terms of costs or time to use a pen. There were even good reasons, the agency claimed, for requiring that pens be used. Fortunately, Representative Watkins and others realized that it was an instructive paradigm for a deeper problem: a bureaucracy that chipped away at liberty and fairness without any contravening oversight.

Frogs get cooked without ever realizing it, because they get placed in tepid water that is then gradually warmed so slowly that they never know what happens to them. In much the same way, regulatory agencies make small incursions with rules that rarely—if ever—provide the regulatory community with sufficient cause to act to avoid the problem.

The writer is a Raleigh attorney who represents the Chemical Industry Council.