

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1997

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SENATE BILL 1277*

Short Title: Civil Procedure Rules Changes.

(Public)

Sponsors: Senators Dalton; and Ballantine.

Referred to: Judiciary.

May 27, 1998

A BILL TO BE ENTITLED

AN ACT TO AMEND THE RULES OF CIVIL PROCEDURE AND TO EXTEND THE CIVIL PROCEDURE STUDY COMMISSION.

The General Assembly of North Carolina enacts:

SERVICE BY NOTARIES (RULE 4(a))

Section 1. G.S. 1A-1, Rule 4(a) reads as rewritten:

"(a) Summons – Issuance; who may serve. – Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days. The complaint and summons shall be delivered to some proper person for service. In this State, such proper person shall be the sheriff of the county where service is to be ~~made~~ made, a notary public commissioned under Chapter 10A of the General Statutes, or some other person duly authorized by law to serve summons. Outside this State, such proper person shall be anyone who is not a party and is not less than 21 years of age or anyone duly authorized to serve summons by the law of the place where service is to be made. Upon request of the plaintiff separate or additional summons shall be issued against any defendants. A summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so. The date the summons bears shall be prima facie evidence of the date of issue."

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SUMMONS ALIVE FOR 60 DAYS (RULE 4(c))

Section 2. G.S. 1A-1, Rule 4(c) reads as rewritten:

"(c) Summons – Return. – Personal service or substituted personal service of summons as prescribed by Rule 4(j)(1) a and b must be made within ~~30-60~~ days after the date of the issuance of ~~summons, except that in tax and assessment foreclosures under G.S. 47-108.25 or G.S. 105-374 the time allowed for service is 60 days.~~ summons. When a summons has been served upon every party named in the summons, it shall be returned immediately to the clerk who issued it, with notation thereon of its service.

Failure to make service within the time allowed or failure to return a summons to the clerk after it has been served on every party named in the summons shall not invalidate the summons. If the summons is not served within the time allowed upon every party named in the summons, it shall be returned immediately upon the expiration of such time by the officer to the clerk of the court who issued it with notation thereon of its nonservice and the reasons therefor as to every such party not served, but failure to comply with this requirement shall not invalidate the summons."

SERVICE BY PRIVATE MAIL DELIVERY (RULE 4(j)) AND CONFORMING CHANGES TO PROOF OF SERVICE

Section 3. G.S. 1A-1, Rule 4(j) reads as rewritten:

"(j) Process – Manner of service to exercise personal jurisdiction. – In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:

(1) Natural Person. – Except as provided in subsection (2) below, upon a natural ~~person:~~ person by one of the following:

a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing ~~therein;~~ or therein.

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

d. By depositing with a private delivery service a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt.

(2) Natural Person under Disability. – Upon a natural person under disability by serving process in any manner prescribed in this section (j) for service upon a natural person and, in addition, where required by paragraph a or b below, upon a person therein designated.

- 1 a. Where the person under disability is a minor, process shall be
2 served separately in any manner prescribed for service upon a
3 natural person upon a parent or guardian having custody of the
4 child, or if there be none, upon any other person having the care
5 and control of the child. If there is no parent, guardian, or other
6 person having care and control of the child when service is made
7 upon the child, then service of process must also be made upon a
8 guardian ad litem who has been appointed pursuant to Rule 17.
- 9 b. If the plaintiff actually knows that a person under disability is
10 under guardianship of any kind, process shall be served
11 separately upon his guardian in any manner applicable and
12 appropriate under this section (j). If the plaintiff does not actually
13 know that a guardian has been appointed when service is made
14 upon a person known to him to be incompetent to have charge of
15 his affairs, then service of process must be made upon a guardian
16 ad litem who has been appointed pursuant to Rule 17.
- 17 (3) The State. – Upon the State by personally delivering a copy of the
18 summons and of the complaint to the Attorney General or to a deputy or
19 assistant attorney ~~general or general~~; by mailing a copy of the summons
20 and of the complaint, registered or certified mail, return receipt
21 requested, addressed to the Attorney General or to a deputy or assistant
22 attorney ~~general general~~; or by depositing with a private delivery service
23 a copy of the summons and complaint, addressed to the Attorney
24 General or to a deputy or assistant attorney general, delivering to the
25 addressee, and obtaining a delivery receipt.
- 26 (4) An Agency of the State. –
- 27 a. Upon an agency of the State by personally delivering a copy of
28 the summons and of the complaint to the process agent appointed
29 by the agency in the manner hereinafter ~~provided provided~~; ~~or by~~
30 mailing a copy of the summons and of the complaint, registered
31 or certified mail, return receipt requested, addressed to said
32 process ~~agent agent~~; or by depositing with a private delivery
33 service a copy of the summons and complaint, addressed to the
34 process agent, delivering to the addressee, and obtaining a
35 delivery receipt.
- 36 b. Every agency of the State shall appoint a process agent by filing
37 with the Attorney General the name and address of an agent upon
38 whom process may be served.
- 39 c. If any agency of the State fails to comply with paragraph b
40 above, then service upon such agency may be made by
41 personally delivering a copy of the summons and of the
42 complaint to the Attorney General or to a deputy or assistant
43 attorney ~~general or general~~; by mailing a copy of the summons

1 and of the complaint, registered or certified mail, return receipt
2 requested, addressed to the Attorney General, or to a deputy or
3 assistant attorney ~~general.~~ general; or by depositing with a private
4 delivery service a copy of the summons and complaint, addressed
5 to the Attorney General or to a deputy or assistant attorney
6 general, delivering to the addressee, and obtaining a delivery
7 receipt.

8 d. For purposes of this rule, the term "agency of the State" includes
9 every agency, institution, board, commission, bureau,
10 department, division, council, member of Council of State, or
11 officer of the State government of the State of North Carolina,
12 but does not include counties, cities, towns, villages, other
13 municipal corporations or political subdivisions of the State,
14 county or city boards of education, other local public districts,
15 units, or bodies of any kind, or private corporations created by
16 act of the General Assembly.

17 (5) Counties, Cities, Towns, Villages and Other Local Public Bodies. –

18 a. Upon a city, town, or village by personally delivering a copy of
19 the summons and of the complaint to its mayor, city manager or
20 ~~clerk.~~ clerk; or by mailing a copy of the summons and of the
21 complaint, registered or certified mail, return receipt requested,
22 addressed to its mayor, city manager or ~~clerk.~~ clerk; or by
23 depositing with a private delivery service a copy of the summons
24 and complaint, addressed to the mayor, city manager, or clerk,
25 delivering to the addressee, and obtaining a delivery receipt.

26 b. Upon a county by personally delivering a copy of the summons
27 and of the complaint to its county manager or to the chairman,
28 clerk or any member of the board of commissioners for such
29 ~~county.~~ county; by mailing a copy of the summons and of the
30 complaint, registered or certified mail, return receipt requested,
31 addressed to its county manager or to the chairman, clerk, or any
32 member of this board of commissioners for such ~~county.~~ county;
33 or by depositing with a private delivery service a copy of the
34 summons and complaint, addressed to the county manager or to
35 the chairman, clerk, or any member of the board of
36 commissioners of that county, delivering to the addressee, and
37 obtaining a delivery receipt.

38 c. Upon any other political subdivision of the State, any county or
39 city board of education, or other local public district, unit, or
40 body of any kind (i) by personally delivering a copy of the
41 summons and of the complaint to an officer or director thereof, ~~or~~
42 (ii) by personally delivering a copy of the summons and of the
43 complaint to an agent or attorney-in-fact authorized by

1 appointment or by statute to be served or to accept service in its
2 behalf, ~~or~~(iii) by mailing a copy of the summons and of the
3 complaint, registered or certified mail, return receipt requested,
4 addressed to the officer, director, agent, or attorney-in-fact as
5 specified in (i) and ~~(ii)~~-(ii); or by depositing with a private
6 delivery service a copy of the summons and complaint, addressed
7 to the officer, director, agent, or attorney-in-fact as specified in
8 (i) and (ii), delivering to the addressee, and obtaining a delivery
9 receipt.

- 10 d. In any case where none of the officials, officers or directors
11 specified in paragraphs a, b and c can, after due diligence, be
12 found in the State, and that fact appears by affidavit to the
13 satisfaction of the court, or a judge thereof, such court or judge
14 may grant an order that service upon the party sought to be
15 served may be made by personally delivering a copy of the
16 summons and of the complaint to the Attorney General or any
17 deputy or assistant attorney general of the State of North ~~Carolina,~~
18 ~~or~~ Carolina; mailing a copy of the summons and of the
19 complaint, registered or certified mail, return receipt requested,
20 addressed to the Attorney General or any deputy or assistant
21 attorney general of the State of North ~~Carolina.~~ Carolina; or by
22 depositing with a private delivery service a copy of the summons
23 and complaint, addressed to the Attorney General or any deputy
24 or assistant attorney general of the State of North Carolina,
25 delivering to the addressee, and obtaining a delivery receipt.
- 26 (6) Domestic or Foreign Corporation. – Upon a domestic or foreign
27 corporation:
- 28 a. By delivering a copy of the summons and of the complaint to an
29 officer, director, or managing agent of the corporation or by
30 leaving copies thereof in the office of such officer, director, or
31 managing agent with the person who is apparently in charge of
32 the office; ~~or~~
- 33 b. By delivering a copy of the summons and of the complaint to an
34 agent authorized by appointment or by law to be served or to
35 accept service ~~or~~ of process or by serving process upon such
36 agent or the party in a manner specified by any ~~statute.~~ statute;
- 37 c. By mailing a copy of the summons and of the complaint,
38 registered or certified mail, return receipt requested, addressed to
39 the officer, director or agent to be served as specified in
40 paragraphs ~~a and b.~~ a. and b.; or
- 41 d. By depositing with a private delivery service a copy of the
42 summons and complaint, addressed to the officer, director, or

- 1 agent to be served as specified in paragraphs a. and b., delivering
2 to the addressee, and obtaining a delivery receipt.
- 3 (7) Partnerships. – Upon a general or limited partnership:
- 4 a. By delivering a copy of the summons and of the complaint to any
5 general partner, or to any attorney-in-fact or agent authorized by
6 appointment or by law to be served or to accept service of
7 process in its ~~behalf, or~~ behalf; by mailing a copy of the summons
8 and of the complaint, registered or certified mail, return receipt
9 requested, addressed to any general partner, or to any attorney-in-
10 fact or agent authorized by appointment or by law to be served or
11 to accept service of process in its ~~behalf, or~~ behalf; by depositing
12 with a private delivery service a copy of the summons and
13 complaint, addressed to any general partner or to any attorney-in-
14 fact or agent authorized by appointment or by law to be served or
15 to accept service of process in its behalf, delivering to the
16 addressee, and obtaining a delivery receipt; or by leaving copies
17 thereof in the office of such general partner, attorney-in-fact or
18 agent with the person who is apparently in charge of the office.
- 19 b. If relief is sought against a partner specifically, a copy of the
20 summons and of the complaint must be served on such partner as
21 provided in this section (j).
- 22 (8) Other Unincorporated Associations and Their Officers. – Upon any
23 unincorporated association, organization, or society other than a
24 partnership:
- 25 a. By delivering a copy of the summons and of the complaint to an
26 officer, director, managing agent or member of the governing
27 body of the unincorporated association, organization or society,
28 or by leaving copies thereof in the office of such officer, director,
29 managing agent or member of the governing body with the
30 person who is apparently in charge of the office; ~~or~~
- 31 b. By delivering a copy of the summons and of the complaint to an
32 agent authorized by appointment or by law to be served or to
33 accept service of process or by serving process upon such agent
34 or the party in a manner specified by any ~~statute~~ statute;
- 35 c. By mailing a copy of the summons and of the complaint,
36 registered or certified mail, return receipt requested, addressed to
37 the officer, director, agent or member of the governing body to
38 be served as specified in paragraphs ~~a and b.~~ a. and b.; or
- 39 d. By depositing with a private delivery service a copy of the
40 summons and complaint, addressed to the officer, director, agent,
41 or member of the governing body to be served as specified in
42 paragraphs a. and b., delivering to the addressee, and obtaining a
43 delivery receipt.

1 (9) Service upon a foreign state or a political subdivision, agency, or
2 instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608.

3 For purposes of this Rule, 'private delivery service' means a private
4 delivery service that has been certified by the Administrative Office
5 of the Courts for service of process pursuant to this Rule."

6 Section 3.1. G.S. 1A-1, Rule 4(j1) reads as rewritten:

7 "(j1) Service by publication on party that cannot otherwise be served. – A party that
8 cannot with due diligence be served by personal ~~delivery or~~ delivery, registered or
9 certified ~~mail-mail~~, or private delivery service may be served by publication. Except in
10 actions involving jurisdiction in rem or quasi in rem as provided in section (k), service of
11 process by publication shall consist of publishing a notice of service of process by
12 publication once a week for three successive weeks in a newspaper that is qualified for
13 legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area
14 where the party to be served is believed by the serving party to be located, or if there is
15 no reliable information concerning the location of the party then in a newspaper
16 circulated in the county where the action is pending. If the party's post-office address is
17 known or can with reasonable diligence be ascertained, there shall be mailed to the party
18 at or immediately prior to the first publication a copy of the notice of service of process
19 by publication. The mailing may be omitted if the post-office address cannot be
20 ascertained with reasonable diligence. Upon completion of such service there shall be
21 filed with the court an affidavit showing the publication and mailing in accordance with
22 the requirements of G.S. 1-75.10(2), the circumstances warranting the use of service by
23 publication, and information, if any, regarding the location of the party served.

24 The notice of service of process by publication shall (i) designate the court in
25 which the action has been commenced and the title of the action, which title may be
26 indicated sufficiently by the name of the first plaintiff and the first defendant; (ii) be
27 directed to the defendant sought to be served; (iii) state either that a pleading seeking
28 relief against the person to be served has been filed or has been required to be filed
29 therein not later than a date specified in the notice; (iv) state the nature of the relief being
30 sought; (v) require the defendant being so served to make defense to such pleading within
31 40 days after a date stated in the notice, exclusive of such date, which date so stated shall
32 be the date of the first publication of notice, or the date when the complaint is required to
33 be filed, whichever is later, and notify the defendant that upon his failure to do so the
34 party seeking service of process by publication will apply to the court for the relief
35 sought; (vi) in cases of attachment, state the information required by G.S. 1-440.14; (vii)
36 be subscribed by the party seeking service or his attorney and give the post-office address
37 of such party or his attorney; and (viii) be substantially in the following form:

38 **NOTICE OF SERVICE OF PROCESS BY PUBLICATION**
39 **STATE OF NORTH CAROLINA _____ COUNTY**
40 **IN THE _____ COURT**

41 [Title of action or special proceeding] To [Person to be served]:

1 Take notice that a pleading seeking relief against you (has been filed) (is required to
2 be filed not later than _____, 19____) in the above-entitled (action) (special
3 proceeding). The nature of the relief being sought is as follows:

4 (State nature).

5 You are required to make defense to such pleading not later than (_____,
6 19____) and upon your failure to do so the party seeking service against you will apply to
7 the court for the relief sought.

8 This, the _____ day of _____, 19____
9 _____ (Attorney) (Party)
10 _____ (Address)".

11 Section 3.2. G.S. 1A-1, Rule 4(j2) reads as rewritten:

12 "(j2) Proof of service. – Proof of service of process shall be as follows:

13 (1) Personal Service. – Before judgment by default may be had on personal
14 service, proof of service must be provided in accordance with the
15 requirements of G.S. 1-75.10(1).

16 (2) Registered or Certified ~~Mail~~ Mail or Private Delivery Service. – Before
17 judgment by default may be had on service by registered or certified
18 ~~mail, mail or by private delivery service with delivery receipt~~, the
19 serving party shall file an affidavit with the court showing proof of such
20 service in accordance with the requirements of ~~G.S. 1-75.10(4)~~ G.S. 1-
21 75.10(4) or G.S. 1-75.10(5), as appropriate. This affidavit together with
22 the return or delivery receipt signed by the person who received the mail
23 or delivery if not the addressee raises a presumption that the person who
24 received the mail or delivery and signed the receipt was an agent of the
25 addressee authorized by appointment or by law to be served or to accept
26 service of process or was a person of suitable age and discretion
27 residing in the addressee's dwelling house or usual place of abode. In
28 the event the presumption described in the preceding sentence is
29 rebutted by proof that the person who received the receipt at the
30 addressee's dwelling house or usual place of abode was not a person of
31 suitable age and discretion residing therein, the statute of limitation may
32 not be pleaded as a defense if the action was initially commenced within
33 the period of limitation and service of process is completed within 60
34 days from the date the service is declared invalid. Service shall be
35 complete on the day the summons and complaint are delivered to the
36 address.

37 (3) Publication. – Before judgment by default may be had on service by
38 publication, the serving party shall file an affidavit with the court
39 showing the circumstances warranting the use of service by publication,
40 information, if any, regarding the location of the party served which was
41 used in determining the area in which service by publication was printed
42 and proof of service in accordance with G.S. 1-75.10(2)."

43 Section 3.3. G.S. 1-75.10 reads as rewritten:

1 **"§ 1-75.10. Proof of service of summons, defendant appearing in action.**

2 Where the defendant appears in the action and challenges the service of the summons
3 upon him, proof of the service of process shall be as follows:

- 4 (1) Personal Service or Substituted Personal Service. –
5 a. If served by the sheriff of the county or the lawful process officer
6 in this State where the defendant was found, by the officer's
7 certificate thereof, showing place, time and manner of service; or
8 b. If served by any other person, his affidavit thereof, showing
9 place, time and manner of service; his qualifications to make
10 service under Rule 4(a) or Rule 4(j3) of the Rules of Civil
11 Procedure; that he knew the person served to be the party
12 mentioned in the summons and delivered to and left with him a
13 copy; and if the defendant was not personally served, he shall
14 state in such affidavit when, where and with whom such copy
15 was left. If such service is made outside this State, the proof
16 thereof may in the alternative be made in accordance with the
17 law of the place where such service is made.
- 18 (2) Service of Publication. – In the case of publication, by the affidavit of
19 the publisher or printer, or his foreman or principal clerk, showing the
20 same and specifying the date of the first and last publication, and an
21 affidavit of mailing of a copy of the complaint or notice, as the case may
22 require, made by the person who mailed the same.
- 23 (3) Written Admission of Defendant. – The written admission of the
24 defendant, whose signature or the subscription of whose name to such
25 admission shall be presumptive evidence of genuineness.
- 26 (4) Service by Registered or Certified Mail. – In the case of service by
27 registered or certified mail, by affidavit of the serving party averring:
28 a. That a copy of the summons and complaint was deposited in the
29 post office for mailing by registered or certified mail, return
30 receipt requested;
31 b. That it was in fact received as evidenced by the attached registry
32 receipt or other evidence satisfactory to the court of delivery to
33 the addressee; and
34 c. That the genuine receipt or other evidence of delivery is
35 attached.
- 36 (5) Service by Private Delivery Service. – In the case of service by private
37 delivery service, by affidavit of the serving party averring:
38 a. That a copy of the summons and complaint was deposited with a
39 private delivery service certified by the Administrative Office of
40 the Courts, delivery receipt requested;
41 b. That it was in fact received as evidenced by the attached delivery
42 receipt or other evidence satisfactory to the court of delivery to
43 the addressee; and

1 c. That the genuine receipt or other evidence of delivery is
2 attached."

3 4 **SERVICE OF PLEADINGS AND PAPERS BY FAX (RULE 5(b))**

5 Section 4. G.S. 1A-1, Rule 5(b) reads as rewritten:

6 "(b) Service – How made. – A pleading setting forth a counterclaim or cross claim
7 shall be filed with the court and a copy thereof shall be served on the party against whom
8 it is asserted or on his attorney of record. With respect to all pleadings subsequent to the
9 original complaint and other papers required or permitted to be served, service with due
10 return may be made in the manner provided for service and return of process in Rule 4
11 and may be made upon either the party or, unless service upon the party himself is
12 ordered by the court, upon his attorney of record. With respect to such other pleadings
13 and papers, service upon the attorney or upon a party may also be made by delivering a
14 copy to him or by mailing it to him at his last known address or, if no address is known,
15 by filing it with the clerk of court. Delivery of a copy within this rule means handing it to
16 the attorney or to the ~~party, or party,~~ leaving it at the attorney's office with a partner or
17 ~~employee.~~ employee, or by sending it to the attorney's office by telefacsimile between
18 9:00 a.m. and 5:00 p.m. on a regular business day. Service by mail shall be complete
19 upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper
20 in a post office or official depository under the exclusive care and custody of the United
21 States Postal Service."

22 23 **SERVICE OF BRIEFS AND MEMORANDA (RULE 5(f))**

24 Section 5. G.S. 1A-1, Rule 5 is amended by adding the following new
25 subsection:

26 "(f) Service of briefs and memoranda. – To be considered by the presiding judge, a
27 brief or memorandum must be served upon the opposing party or the party's attorney of
28 record no later than the third business day preceding the scheduled hearing date on the
29 matter for which the brief or memorandum is submitted."

30 31 **ATTORNEY'S EMPLOYEE NOT DISQUALIFIED FOR VIDEOTAPE** 32 **DEPOSITION (RULE 28(c))**

33 Section 6. G.S. 1A-1, Rule 28(c) reads as rewritten:

34 "(c) Disqualification for interest. – No deposition shall be taken before a person
35 who is a relative or employee or attorney or counsel of any of the parties, or is a relative
36 or employee of such attorney or counsel, or is financially interested in the action ~~unless~~
37 unless:

38 (1) ~~the~~ The parties agree otherwise by stipulation as provided in Rule 29.
39 Rule 29; or

40 (2) The deposition is taken by videotape in compliance with Rule 30(b)(4)
41 and Rule 30(f), and the notice for the taking of the deposition states the
42 name of the person before whom the deposition will be taken and that
43 person's relationship, if any, to a party or a party's attorney."

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2 **MEDIATION OF DISCOVERY DISPUTES (RULE 37)**

3 Section 7. G.S. 1A-1, Rule 37(a) reads as rewritten:

4 "(a) Motion for order compelling discovery. – A party, upon reasonable notice to
5 other parties and all persons affected thereby, may apply for an order compelling
6 discovery as follows:

7 (1) Appropriate Court. – An application for an order to a party or a
8 deponent who is not a party may be made to a judge of the court in
9 which the action is pending, or, on matters relating to a deposition
10 where the deposition is being taken in this State, to a judge of the court
11 in the county where the deposition is being taken, as defined by Rule
12 30(h).

13 (2) Motion. – If a deponent fails to answer a question propounded or
14 submitted under Rules 30 or 31, or a corporation or other entity fails to
15 make a designation under Rule 30(b)(6) or 31(a), or a party fails to
16 answer an interrogatory submitted under Rule 33, or if a party, in
17 response to a request for inspection submitted under Rule 34, fails to
18 respond that inspection will be permitted as requested or fails to permit
19 inspection as requested, the discovering party may move for an order
20 compelling an answer, or a designation, or an order compelling
21 inspection in accordance with the request. The motion must include a
22 certification that the movant has in good faith conferred or attempted to
23 confer with the person or party failing to make the discovery in an effort
24 to secure the information or material without court action. When taking
25 a deposition on oral examination, the proponent of the question shall
26 complete the examination on all other matters before he adjourns the
27 examination in order to apply for an order. If the court denies the
28 motion in whole or in part, it may make such protective order as it
29 would have been empowered to make on a motion made pursuant to
30 Rule 26(c).

31 (3) Evasive or Incomplete Answer. – For purposes of this subdivision an
32 evasive or incomplete answer is to be treated as a failure to answer.

33 (4) Award of Expenses of Motion. – If the motion is granted, the court
34 shall, after opportunity for hearing, require the party or deponent whose
35 conduct necessitated the motion or the party advising such conduct or
36 both of them to pay to the moving party the reasonable expenses
37 incurred in obtaining the order, including attorney's fees, unless the
38 court finds that the opposition to the motion was substantially justified
39 or that other circumstances make an award of expenses unjust.

40 If the motion is denied, the court shall, after opportunity for hearing,
41 require the moving party to pay to the party or deponent who opposed
42 the motion the reasonable expenses incurred in opposing the motion,
43 including attorney's fees, unless the court finds that the making of the

1 motion was substantially justified or that other circumstances make an
2 award of expenses unjust.

3 If the motion is granted in part and denied in part, the court may
4 apportion the reasonable expenses incurred in relation to the motion
5 among the parties and persons in a just manner."
6

7 **PRESERVING EXCEPTIONS TO RULINGS (RULE 46)**

8 Section 8. G.S. 1A-1, Rule 46 reads as rewritten:

9 "Rule 46. Objections and exceptions.

10 (a) Rulings on admissibility of evidence. –

11 (1) When there is objection to the admission of evidence on the ground that
12 the witness is for a specified reason incompetent or not qualified or
13 disqualified, it shall be deemed that a like objection has been made to
14 any subsequent admission of evidence from the witness in question.
15 Similarly, when there is objection to the admission of evidence
16 involving a specified line of questioning, it shall be deemed that a like
17 objection has been taken to any subsequent admission of evidence
18 involving the same line of questioning.

19 (2) If there is proper objection to the admission of evidence and the
20 objection is overruled, the ruling of the court shall be deemed excepted
21 to by the party making the objection. If an objection to the admission of
22 evidence is sustained or if the court for any reason excludes evidence
23 offered by a party, the ruling of the court shall be deemed excepted to
24 by the party offering the evidence.

25 (3) No objections are necessary with respect to questions propounded to a
26 witness by the court or a juror but it shall be deemed that each such
27 question has been properly objected to and that the objection has been
28 overruled and that an exception has been taken to the ruling of the court
29 by all parties to the action.

30 (b) ~~Rulings—~~Pretrial rulings, interlocutory orders, trial rulings, and other orders not
31 directed to the admissibility of evidence. – With respect to ~~rulings—~~pretrial rulings,
32 interlocutory orders, trial rulings, and other orders of the court not directed to the
33 admissibility of evidence, formal objections and exceptions are unnecessary. In order to
34 preserve an exception to any such ruling or order or to the court's failure to make any
35 such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made
36 or sought, makes known to the court ~~his—the party's~~ objection to the action of the court or
37 makes known the action ~~which he—that the party~~ desires the court to take and ~~his—ground~~
38 ~~therefor;—the party's grounds for its position. and if—~~If a party has no opportunity to object
39 or except to a ruling or order at the time it is made, the absence of an objection or
40 exception does not thereafter prejudice ~~him—that party;~~ however, in order to preserve
41 exceptions to these rulings and orders for appellate review, a party shall promptly present
42 to the court a request, objection, or motion that states the specific grounds for the ruling
43 that the party desires the court to make upon having an opportunity to do so.

1 (e) Instruction.—If there is error, either in the refusal of the judge to grant a prayer
2 for instructions, or in granting a prayer, or in his instructions generally, the same is
3 deemed excepted to without the filing of any formal objections."
4

5 **DEFAULT JUDGMENT WITHOUT HEARING (RULE 55(b))**

6 Section 9. G.S. 1A-1, Rule 55(b) reads as rewritten:

7 "(b) Judgment. – Judgment by default may be entered as follows:

8 (1) By the Clerk. – When the plaintiff's claim against a defendant is for a
9 sum certain or for a sum which can by computation be made certain, the
10 clerk upon request of the plaintiff and upon affidavit of the amount due
11 shall enter judgment for that amount and costs against the defendant, if
12 ~~he—the defendant~~ has been defaulted for failure to appear and if ~~he—the~~
13 ~~defendant~~ is not an infant or incompetent person. A verified pleading
14 may be used in lieu of an affidavit when the pleading contains
15 information sufficient to determine or compute the sum certain.

16 In all cases wherein, pursuant to this rule, the clerk enters judgment
17 by default upon a claim for debt which is secured by any pledge,
18 mortgage, deed of trust or other contractual security in respect of which
19 foreclosure may be had, or upon a claim to enforce a lien for unpaid
20 taxes or assessments under G.S. 105-414, the clerk may likewise make
21 all further orders required to consummate foreclosure in accordance
22 with the procedure provided in Article 29A of Chapter 1 of the General
23 Statutes, entitled "Judicial Sales."

24 (2) By the Judge. –

25 a. In all other cases the party entitled to a judgment by default shall
26 apply to the judge therefor; but no judgment by default shall be
27 entered against an infant or incompetent person unless
28 represented in the action by a guardian ad litem or other such
29 representative who has appeared therein. If the party against
30 whom judgment by default is sought has appeared in the action,
31 ~~he—that party~~ (or, if appearing by representative, ~~his—the~~
32 representative) shall be served with written notice of the
33 application for judgment at least three days prior to the hearing
34 on such application. If, in order to enable the judge to enter
35 judgment or to carry it into effect, it is necessary to take an
36 account or to determine the amount of damages or to establish
37 the truth of any averment by evidence or to take an investigation
38 of any other matter, the judge may conduct such hearings or
39 order such references as ~~he—the judge~~ deems necessary and proper
40 and shall accord a right of trial by jury to the parties when and as
41 required by the Constitution or by any statute of North Carolina.
42 If the plaintiff seeks to establish paternity under Article 3 of

Chapter 49 of the General Statutes and the defendant fails to appear, the judge shall enter judgment by default.

b. A motion for judgment by default may be decided by the court without a hearing if:

1. The motion specifically provides that the court will decide the motion for judgment by default without a hearing if the party against whom judgment is sought fails to serve a written response, stating the grounds for opposing the motion, within 30 days of service of the motion; and
2. The party against whom judgment is sought fails to serve the response in accordance with this sub-subdivision."

ENHANCED NOTICE FOR TEMPORARY RESTRAINING ORDER (RULE 65)

Section 10. G.S. 1A-1, Rule 65(b) reads as rewritten:

"(b) Temporary restraining order; notice; hearing; duration. – A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (i) it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon; the adverse party or that party's attorney can be heard in opposition, and (ii) the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the judge fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice and a motion for a preliminary injunction is made, it shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing, the party who obtained the temporary restraining order shall proceed with a motion for a preliminary injunction, and, if he does not do so, the judge shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the judge may prescribe, the adverse party may appear and move its dissolution or modification and in that event the judge shall proceed to hear and determine such motion as expeditiously as the ends of justice require. Damages may be awarded in an order for dissolution as provided in section (e)."

OFFER OF JUDGMENT (RULES 68 and 84)

Section 11. G.S. 1A-1, Rule 68 reads as rewritten:

1 "Rule 68. Offer of judgment and disclaimer.

2 (a) Offer of judgment. –

3 (1) At any time more than ~~40~~30 days before the trial begins, a party
4 defending against a claim may serve ~~upon the adverse party an a written~~
5 offer to allow judgment to be ~~taken entered~~ against him for the money or
6 property or to the effect specified in his offer, with costs then accrued. ~~the~~
7 defending party and in favor of the adverse party for the relief specified
8 in the offer, plus any interest that has accrued as of that date, and, as
9 may be awarded by the court, costs and statutorily authorized attorneys'
10 fees incurred as of that date. The defending party shall not file the
11 written offer with the court at this time.

12 (2) If within ~~40~~30 days after the service of the offer the adverse party
13 serves written notice that the offer is accepted, either party may then file
14 the offer and notice of acceptance together with proof of service thereof
15 and thereupon the clerk shall enter judgment. ~~thereof.~~ The court shall
16 determine costs, interest, and statutorily authorized attorneys' fees and
17 enter judgment accordingly. An offer not accepted within ~~40~~30 days
18 after its service shall be deemed withdrawn and evidence of the offer is
19 not admissible except in a proceeding to determine costs. The defending
20 party shall file the offer deemed withdrawn prior to the proceeding to
21 determine costs. If the judgment finally obtained by the offeree is not
22 more favorable than the offer, the offeree must pay the costs incurred
23 after the making service of the offer. offer and shall not be entitled to
24 interest or attorneys' fees incurred after service of the offer. The fact that
25 an offer is made served but not accepted does not preclude a subsequent
26 offer.

27 (3) This subsection applies only to claims for monetary damages in which
28 any nonmonetary claims are ancillary and incidental to the monetary
29 claims.

30 (b) Conditional offer of judgment for damages. – A party defending against a
31 claim arising in contract or quasi contract may, with his responsive pleading, serve upon
32 the claimant an offer in writing that if he fails in his defense, the damages shall be
33 assessed at a specified sum; and if the claimant signifies his acceptance thereof in writing
34 within 20 days of the service of such offer, and on the trial prevails, his damages shall be
35 assessed accordingly. If the claimant does not accept the offer, he must prove his
36 damages as if the offer had not been made. If the damages assessed in the claimant's
37 favor do not exceed the sum stated in the offer, the party defending shall recover the costs
38 in respect to the question of damages.

39 (c) Definitions. – For purposes of this rule:

40 (1) 'Costs' mean the court costs that the court is authorized by law to award.
41 Costs do not include interest and attorneys' fees.

1 (2) 'Judgment finally obtained' means all relief to which the offeree is
2 finally adjudged entitled by the trial court, other than costs, interest, and
3 statutorily authorized attorneys' fees.

4 (3) 'Offer' means all relief tendered to the offeree pursuant to this rule.
5 Offer does not include costs, interest, or attorneys' fees. Further, offer
6 does not mean an offer of a lump sum that purports to include any or all
7 of the following: costs, interest, or attorneys' fees."

8 Section 12. G.S. 1A-1, Rule 84 is amended by adding a form at the end to
9 read:

10 **"(17) OFFER OF JUDGMENT UNDER RULE 68(A).**

11 Defendant offers that judgment be entered against it and in favor of Plaintiff for
12 \$ _____, plus interest that has accrued as of the time of service of this offer, and, as
13 may be awarded by the court, costs and statutorily authorized attorneys' fees incurred as
14 of the time of service of this offer."

15
16 **EXTEND CIVIL PROCEDURE STUDY COMMISSION AND INCREASE**
17 **MEMBERSHIP**

18 Section 13. Subsection (c) of Section 4.1 of Part IV of Chapter 17 of the 1996
19 Second Extra Session Laws reads as rewritten:

20 "(c) The Commission shall report to the General Assembly and the Chief Justice no
21 later than ~~April 1, 1998.~~ February 1, 2001. The report shall be in writing and shall set
22 forth the Commission's findings, conclusions, and recommendations, including any
23 proposed legislation or court rules. Upon issuing its final report, the Commission shall
24 terminate."

25 Section 14. Subsection (a) of Section 4.1 of Part IV of Chapter 17 of the 1996
26 Second Extra Session Laws reads as rewritten:

27 "(a) The Civil Procedure Study Commission is created. The Commission shall
28 consist of ~~18-24~~ voting members: six-eight members to be appointed by the President Pro
29 Tempore of the Senate, ~~six-eight~~ members to be appointed by the Speaker of the House of
30 Representatives, and ~~six-eight~~ members to be appointed by the Chief Justice of the North
31 Carolina Supreme Court. No more than four members appointed by the President Pro
32 Tempore of the Senate and no more than four members appointed by the Speaker of the
33 House of Representatives may be members of the General Assembly. No more than four
34 of the members appointed by any one of the three appointing authorities may be members
35 of the same political party."

36 Section 14.1. Of the funds appropriated to the General Assembly for the 1998-
37 99 fiscal year, the sum of twenty-five thousand dollars (\$25,000) shall be allocated to
38 implement the provisions of this act.

39
40 **EFFECTIVE DATE**

41 Section 15. Sections 1 through 12 of this act become effective October 1, 1998.
42 Section 12 applies to offers of judgment made on or after that date. Sections 1 through
43 11 apply to actions filed on or after that date. Sections 13 and 14 of this act and this

1 section are effective when they become law. Section 14.1 becomes effective July 1,
2 1998.