

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1997

H

1

HOUSE BILL 1279

Short Title: Civil Procedure Rules Changes.

(Public)

---

Sponsors: Representatives Baddour and Goodwin.

---

Referred to: Rules, Calendar and Operations of the House.

---

May 14, 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

1 having authority to do so. The date the summons bears shall be prima facie evidence of  
2 the date of issue."

### 5 **SUMMONS ALIVE FOR 60 DAYS (RULE 4(c))**

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

8 "(c) Summons – Return. – Personal service or substituted personal service of  
9 summons as prescribed by Rule 4(j)(1) a and b must be made within ~~30~~60 days after the  
10 date of the issuance of summons, ~~except that in tax and assessment foreclosures under G.S. 47-~~  
11 ~~108.25 or G.S. 105-374 the time allowed for service is 60 days.~~ summons. When a summons  
12 has been served upon every party named in the summons, it shall be returned  
13 immediately to the clerk who issued it, with notation thereon of its service.

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

### 23 **SERVICE BY PRIVATE MAIL DELIVERY (RULE 4(j)) AND CONFORMING** 24 **CHANGES TO PROOF OF SERVICE**

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

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

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

- 33 a. By delivering a copy of the summons and of the complaint to  
34 him or by leaving copies thereof at the defendant's dwelling  
35 house or usual place of abode with some person of suitable age  
36 and discretion then residing ~~therein~~; or therein.
- 37 b. By delivering a copy of the summons and of the complaint to an  
38 agent authorized by appointment or by law to be served or to  
39 accept service of process or by serving process upon such agent  
40 or the party in a manner specified by any statute.
- 41 c. By mailing a copy of the summons and of the complaint,  
42 registered or certified mail, return receipt requested, addressed to  
43 the party to be served, and delivering to the addressee.

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

- 1           b.     Every agency of the State shall appoint a process agent by filing  
2                 with the Attorney General the name and address of an agent upon  
3                 whom process may be served.
- 4           c.     If any agency of the State fails to comply with paragraph b  
5                 above, then service upon such agency may be made by  
6                 personally delivering a copy of the summons and of the  
7                 complaint to the Attorney General or to a deputy or assistant  
8                 attorney ~~general or general~~; by mailing a copy of the summons  
9                 and of the complaint, registered or certified mail, return receipt  
10                requested, addressed to the Attorney General, or to a deputy or  
11                assistant attorney general; or by depositing with a private  
12                delivery service a copy of the summons and complaint, addressed  
13                to the Attorney General or to a deputy or assistant attorney  
14                general, delivering to the addressee, and obtaining a delivery  
15                receipt.
- 16           d.     For purposes of this rule, the term "agency of the State" includes  
17                 every agency, institution, board, commission, bureau,  
18                 department, division, council, member of Council of State, or  
19                 officer of the State government of the State of North Carolina,  
20                 but does not include counties, cities, towns, villages, other  
21                 municipal corporations or political subdivisions of the State,  
22                 county or city boards of education, other local public districts,  
23                 units, or bodies of any kind, or private corporations created by  
24                 act of the General Assembly.

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

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

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

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

- 1 c. By mailing a copy of the summons and of the complaint,  
2 registered or certified mail, return receipt requested, addressed to  
3 the officer, director, agent or member of the governing body to  
4 be served as specified in paragraphs ~~a and b.~~ a. and b.; or  
5 d. By depositing with a private delivery service a copy of the  
6 summons and complaint, addressed to the officer, director, agent,  
7 or member of the governing body to be served as specified in  
8 paragraphs a. and b., delivering to the addressee, and obtaining a  
9 delivery receipt.

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

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

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

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

33 The notice of service of process by publication shall (i) designate the court in which  
34 the action has been commenced and the title of the action, which title may be indicated  
35 sufficiently by the name of the first plaintiff and the first defendant; (ii) be directed to the  
36 defendant sought to be served; (iii) state either that a pleading seeking relief against the  
37 person to be served has been filed or has been required to be filed therein not later than a  
38 date specified in the notice; (iv) state the nature of the relief being sought; (v) require the  
39 defendant being so served to make defense to such pleading within 40 days after a date  
40 stated in the notice, exclusive of such date, which date so stated shall be the date of the  
41 first publication of notice, or the date when the complaint is required to be filed,  
42 whichever is later, and notify the defendant that upon his failure to do so the party  
43 seeking service of process by publication will apply to the court for the relief sought; (vi)

1 in cases of attachment, state the information required by G.S. 1-440.14; (vii) be  
2 subscribed by the party seeking service or his attorney and give the post-office address of  
3 such party or his attorney; and (viii) be substantially in the following form:

4 **NOTICE OF SERVICE OF PROCESS BY PUBLICATION**

5 **STATE OF NORTH CAROLINA \_\_\_\_\_ COUNTY**

6 **IN THE \_\_\_\_\_ COURT**

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

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

11 (State nature).

12 You are required to make defense to such pleading not later than (\_\_\_\_\_,  
13 19\_\_\_\_) and upon your failure to do so the party seeking service against you will apply to  
14 the court for the relief sought.

15 This, the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

16 \_\_\_\_\_ (Attorney) (Party)

17 \_\_\_\_\_ (Address)".

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

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

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

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



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

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

8 **"§ 1-75.10. Proof of service of summons, defendant appearing in action.**

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

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

- 1           (5) Service by Private Delivery Service. – In the case of service by private  
2 delivery service, by affidavit of the serving party averring:  
3           a. That a copy of the summons and complaint was deposited with a  
4 private delivery service certified by the Administrative Office of  
5 the Courts, delivery receipt requested;  
6           b. That it was in fact received as evidenced by the attached delivery  
7 receipt or other evidence satisfactory to the court of delivery to  
8 the addressee; and  
9           c. That the genuine receipt or other evidence of delivery is  
10 attached."  
11  
12

### 13 **SERVICE OF PLEADINGS AND PAPERS BY FAX (RULE 5(b))**

14

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

16           "(b) Service – How made. – A pleading setting forth a counterclaim or cross claim  
17 shall be filed with the court and a copy thereof shall be served on the party against whom  
18 it is asserted or on his attorney of record. With respect to all pleadings subsequent to the  
19 original complaint and other papers required or permitted to be served, service with due  
20 return may be made in the manner provided for service and return of process in Rule 4  
21 and may be made upon either the party or, unless service upon the party himself is  
22 ordered by the court, upon his attorney of record. With respect to such other pleadings  
23 and papers, service upon the attorney or upon a party may also be made by delivering a  
24 copy to him or by mailing it to him at his last known address or, if no address is known,  
25 by filing it with the clerk of court. Delivery of a copy within this rule means handing it to  
26 the attorney or to the ~~party; or party,~~ leaving it at the attorney's office with a partner or  
27 ~~employee.~~ employee, or by sending it to the attorney's office by telefacsimile between  
28 9:00 a.m. and 5:00 p.m. on a regular business day. Service by mail shall be complete  
29 upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper  
30 in a post office or official depository under the exclusive care and custody of the United  
31 States Postal Service."  
32  
33

### 34 **SERVICE OF BRIEFS AND MEMORANDA (RULE 5(f))**

35

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

38           "( f) Service of briefs and memoranda. – To be considered by the presiding judge, a  
39 brief or memorandum must be served upon the opposing party or the party's attorney of  
40 record no later than the third business day preceding the scheduled hearing date on the  
41 matter for which the brief or memorandum is submitted."  
42  
43

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

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

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

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

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

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

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

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

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

(2) Motion. – If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question shall complete the examination on all other matters before he adjourns the examination in order to apply for an order. If the court denies the

1 motion in whole or in part, it may make such protective order as it  
2 would have been empowered to make on a motion made pursuant to  
3 Rule 26(c).

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

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

13 If the motion is denied, the court shall, after opportunity for hearing,  
14 require the moving party to pay to the party or deponent who opposed  
15 the motion the reasonable expenses incurred in opposing the motion,  
16 including attorney's fees, unless the court finds that the making of the  
17 motion was substantially justified or that other circumstances make an  
18 award of expenses unjust.

19 If the motion is granted in part and denied in part, the court may  
20 apportion the reasonable expenses incurred in relation to the motion  
21 among the parties and persons in a just manner."  
22

## 23 PRESERVING EXCEPTIONS TO RULINGS (RULE 46)

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

25 "Rule 46. Objections and exceptions.

26 (a) Rulings on admissibility of evidence. –

27 (1) When there is objection to the admission of evidence on the ground that  
28 the witness is for a specified reason incompetent or not qualified or  
29 disqualified, it shall be deemed that a like objection has been made to  
30 any subsequent admission of evidence from the witness in question.  
31 Similarly, when there is objection to the admission of evidence  
32 involving a specified line of questioning, it shall be deemed that a like  
33 objection has been taken to any subsequent admission of evidence  
34 involving the same line of questioning.

35 (2) If there is proper objection to the admission of evidence and the  
36 objection is overruled, the ruling of the court shall be deemed excepted  
37 to by the party making the objection. If an objection to the admission of  
38 evidence is sustained or if the court for any reason excludes evidence  
39 offered by a party, the ruling of the court shall be deemed excepted to  
40 by the party offering the evidence.  
41  
42

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

6 (b) ~~Rulings—~~Pretrial rulings, interlocutory orders, trial rulings, and other orders not  
7 directed to the admissibility of evidence. — With respect to ~~rulings—~~pretrial rulings,  
8 interlocutory orders, trial rulings, and other orders of the court not directed to the  
9 admissibility of evidence, formal objections and exceptions are unnecessary. In order to  
10 preserve an exception to any such ruling or order or to the court's failure to make any  
11 such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made  
12 or sought, makes known to the court ~~his—the party's~~ objection to the action of the court or  
13 makes known the action ~~which he—that the party~~ desires the court to take and ~~his ground~~  
14 ~~therefor;—the party's grounds for its position. and if—~~If a party has no opportunity to object  
15 or except to a ruling or order at the time it is made, the absence of an objection or  
16 exception does not thereafter prejudice ~~him—that party;~~ however, in order to preserve  
17 exceptions to these rulings and orders for appellate review, a party shall promptly present  
18 to the court a request, objection, or motion that states the specific grounds for the ruling  
19 that the party desires the court to make upon having an opportunity to do so.

20 (c) ~~Instruction.—If there is error, either in the refusal of the judge to grant a prayer~~  
21 ~~for instructions, or in granting a prayer, or in his instructions generally, the same is~~  
22 ~~deemed excepted to without the filing of any formal objections."~~

## 25 **DEFAULT JUDGMENT WITHOUT HEARING (RULE 55(b))**

26  
27 Section 9. G.S. 1A-1, Rule 55(b) reads as rewritten:

28 "(b) Judgment. — Judgment by default may be entered as follows:

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

37 In all cases wherein, pursuant to this rule, the clerk enters judgment  
38 by default upon a claim for debt which is secured by any pledge,  
39 mortgage, deed of trust or other contractual security in respect of which  
40 foreclosure may be had, or upon a claim to enforce a lien for unpaid  
41 taxes or assessments under G.S. 105-414, the clerk may likewise make  
42 all further orders required to consummate foreclosure in accordance

1 with the procedure provided in Article 29A of Chapter 1 of the General  
2 Statutes, entitled "Judicial Sales."

3 (2) By the Judge. –

4 a. In all other cases the party entitled to a judgment by default shall  
5 apply to the judge therefor; but no judgment by default shall be  
6 entered against an infant or incompetent person unless  
7 represented in the action by a guardian ad litem or other such  
8 representative who has appeared therein. If the party against  
9 whom judgment by default is sought has appeared in the action,  
10 ~~he~~that party (or, if appearing by representative, ~~his~~the  
11 representative) shall be served with written notice of the  
12 application for judgment at least three days prior to the hearing  
13 on such application. If, in order to enable the judge to enter  
14 judgment or to carry it into effect, it is necessary to take an  
15 account or to determine the amount of damages or to establish  
16 the truth of any averment by evidence or to take an investigation  
17 of any other matter, the judge may conduct such hearings or  
18 order such references as ~~he~~the judge deems necessary and proper  
19 and shall accord a right of trial by jury to the parties when and as  
20 required by the Constitution or by any statute of North Carolina.  
21 If the plaintiff seeks to establish paternity under Article 3 of  
22 Chapter 49 of the General Statutes and the defendant fails to  
23 appear, the judge shall enter judgment by default.

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

- 26 1. The motion specifically provides that the court will decide  
27 the motion for judgment by default without a hearing if  
28 the party against whom judgment is sought fails to serve a  
29 written response, stating the grounds for opposing the  
30 motion, within 30 days of service of the motion; and  
31 2. The party against whom judgment is sought fails to serve  
32 the response in accordance with this sub-subdivision."  
33  
34

### 35 ENHANCED NOTICE FOR TEMPORARY RESTRAINING ORDER (RULE 65)

36  
37 Section 10. G.S. 1A-1, Rule 65(b) reads as rewritten:

38 "(b) Temporary restraining order; notice; hearing; duration. – A temporary  
39 restraining order may be granted without written or oral notice to the adverse party or that  
40 party's attorney only if (i) it clearly appears from specific facts shown by affidavit or by  
41 verified complaint that immediate and irreparable injury, loss, or damage will result to  
42 the applicant before ~~notice can be served and a hearing had thereon~~ the adverse party or that  
43 party's attorney can be heard in opposition, and (ii) the applicant's attorney certifies to the

1 court in writing the efforts, if any, that have been made to give the notice and the reasons  
2 supporting the claim that notice should not be required. Every temporary restraining  
3 order granted without notice shall be endorsed with the date and hour of issuance; shall  
4 be filed forthwith in the clerk's office and entered of record; shall define the injury and  
5 state why it is irreparable and why the order was granted without notice; and shall expire  
6 by its terms within such time after entry, not to exceed 10 days, as the judge fixes, unless  
7 within the time so fixed the order, for good cause shown, is extended for a like period or  
8 unless the party against whom the order is directed consents that it may be extended for a  
9 longer period. The reasons for the extension shall be entered of record. In case a  
10 temporary restraining order is granted without notice and a motion for a preliminary  
11 injunction is made, it shall be set down for hearing at the earliest possible time and takes  
12 precedence over all matters except older matters of the same character; and when the  
13 motion comes on for hearing, the party who obtained the temporary restraining order  
14 shall proceed with a motion for a preliminary injunction, and, if he does not do so, the  
15 judge shall dissolve the temporary restraining order. On two days' notice to the party who  
16 obtained the temporary restraining order without notice or on such shorter notice to that  
17 party as the judge may prescribe, the adverse party may appear and move its dissolution  
18 or modification and in that event the judge shall proceed to hear and determine such  
19 motion as expeditiously as the ends of justice require. Damages may be awarded in an  
20 order for dissolution as provided in section (e)."

## 21 22 23 OFFER OF JUDGMENT (RULES 68 and 84)

24  
25 Section 11. G.S. 1A-1, Rule 68 reads as rewritten:

26 "Rule 68. Offer of judgment and disclaimer.

27 (a) Offer of judgment. –

28 (1) At any time more than 40–30 days before the trial begins, a party  
29 defending against a claim may serve upon the adverse party an a written  
30 offer to allow judgment to be taken entered against him for the money or  
31 property or to the effect specified in his offer, with costs then accrued. the  
32 defending party and in favor of the adverse party for the relief specified  
33 in the offer, plus any interest that has accrued as of that date, and, as  
34 may be awarded by the court, costs and statutorily authorized attorneys'  
35 fees incurred as of that date. The defending party shall not file the  
36 written offer with the court at this time.

37 (2) If within 40–30 days after the service of the offer the adverse party  
38 serves written notice that the offer is accepted, either party may then file  
39 the offer and notice of acceptance together with proof of service thereof  
40 and thereupon the clerk shall enter judgment thereof. The court shall  
41 determine costs, interest, and statutorily authorized attorneys' fees and  
42 enter judgment accordingly. An offer not accepted within 40–30 days  
43 after its service shall be deemed withdrawn and evidence of the offer is

1 not admissible except in a proceeding to determine costs. The defending  
2 party shall file the offer deemed withdrawn prior to the proceeding to  
3 determine costs. If the judgment finally obtained by the offeree is not  
4 more favorable than the offer, the offeree must pay the costs incurred  
5 after ~~the making~~ service of the ~~offer~~ offer and shall not be entitled to  
6 interest or attorneys' fees incurred after service of the offer. The fact that  
7 an offer is ~~made~~ served but not accepted does not preclude a subsequent  
8 offer.

9 (3) This subsection applies only to claims for monetary damages in which  
10 any nonmonetary claims are ancillary and incidental to the monetary  
11 claims.

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

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

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

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

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

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

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

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

38  
39  
40 **EXTEND CIVIL PROCEDURE STUDY COMMISSION AND INCREASE**  
41 **MEMBERSHIP**  
42



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

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

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

10 "(a) The Civil Procedure Study Commission is created. The Commission shall  
11 consist of ~~18-24~~ voting members: ~~six-eight~~ members to be appointed by the President Pro  
12 Tempore of the Senate, ~~six-eight~~ members to be appointed by the Speaker of the House of  
13 Representatives, and ~~six-eight~~ members to be appointed by the Chief Justice of the North  
14 Carolina Supreme Court. No more than four members appointed by the President Pro  
15 Tempore of the Senate and no more than four members appointed by the Speaker of the  
16 House of Representatives may be members of the General Assembly. No more than four  
17 of the members appointed by any one of the three appointing authorities may be members  
18 of the same political party."

19 Section 14.1. Of the funds appropriated to the General Assembly for the 1998-  
20 99 fiscal year, the sum of twenty-five thousand dollars (\$25,000) shall be allocated to  
21 implement the provisions of this act.  
22  
23

#### 24 EFFECTIVE DATE

25

26 Section 15. Sections 1 through 12 of this act become effective October 1, 1998.  
27 Section 12 applies to offers of judgment made on or after that date. Sections 1 through  
28 11 apply to actions filed on or after that date. Sections 13 and 14 of this act and this  
29 section are effective when they become law. Section 14.1 becomes effective July 1,  
30 1998.