

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1997

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SENATE BILL 1277*
Judiciary Committee Substitute Adopted 8/10/98

Short Title: Civil Procedure Rules Changes.

(Public)

Sponsors:

Referred to:

May 27, 1998

1 A BILL TO BE ENTITLED
2 AN ACT TO AMEND THE RULES OF CIVIL PROCEDURE, AND TO CLARIFY
3 THE PUBLIC DUTY DOCTRINE AND THE TORT CLAIMS ACT.

4 The General Assembly of North Carolina enacts:

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

7 Section 1. 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~~
11 ~~G.S. 47-108.25 or G.S. 105-374 the time allowed for service is 60 days.~~ summons. When
12 a summons 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

1 nonservice and the reasons therefor as to every such party not served, but failure to
2 comply with this requirement shall not invalidate the summons."

3
4 **SERVICE BY PRIVATE MAIL DELIVERY (RULE 4(j)) AND CONFORMING**
5 **CHANGES TO PROOF OF SERVICE**

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

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

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

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

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

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

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

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

31 a. Where the person under disability is a minor, process shall be
32 served separately in any manner prescribed for service upon a
33 natural person upon a parent or guardian having custody of the
34 child, or if there be none, upon any other person having the care
35 and control of the child. If there is no parent, guardian, or other
36 person having care and control of the child when service is made
37 upon the child, then service of process must also be made upon a
38 guardian ad litem who has been appointed pursuant to Rule 17.

39 b. If the plaintiff actually knows that a person under disability is
40 under guardianship of any kind, process shall be served
41 separately upon his guardian in any manner applicable and
42 appropriate under this section (j). If the plaintiff does not actually
43 know that a guardian has been appointed when service is made

1 upon a person known to him to be incompetent to have charge of
2 his affairs, then service of process must be made upon a guardian
3 ad litem who has been appointed pursuant to Rule 17.

4 (3) The State. – Upon the State by personally delivering a copy of the
5 summons and of the complaint to the Attorney General or to a deputy or
6 assistant attorney ~~general or general~~; by mailing a copy of the summons
7 and of the complaint, registered or certified mail, return receipt
8 requested, addressed to the Attorney General or to a deputy or assistant
9 attorney ~~general~~–~~general~~; or by depositing with a private delivery
10 service a copy of the summons and complaint, addressed to the Attorney
11 General or to a deputy or assistant attorney general, delivering to the
12 addressee, and obtaining a delivery receipt.

13 (4) An Agency of the State. –

14 a. Upon an agency of the State by personally delivering a copy of
15 the summons and of the complaint to the process agent appointed
16 by the agency in the manner hereinafter ~~provided~~–~~provided~~; ~~or by~~
17 mailing a copy of the summons and of the complaint, registered
18 or certified mail, return receipt requested, addressed to said
19 process ~~agent~~–~~agent~~; or by depositing with a private delivery
20 service a copy of the summons and complaint, addressed to the
21 process agent, delivering to the addressee, and obtaining a
22 delivery receipt.

23 b. Every agency of the State shall appoint a process agent by filing
24 with the Attorney General the name and address of an agent upon
25 whom process may be served.

26 c. If any agency of the State fails to comply with paragraph b
27 above, then service upon such agency may be made by
28 personally delivering a copy of the summons and of the
29 complaint to the Attorney General or to a deputy or assistant
30 attorney ~~general or general~~; by mailing a copy of the summons
31 and of the complaint, registered or certified mail, return receipt
32 requested, addressed to the Attorney General, or to a deputy or
33 assistant attorney ~~general~~–~~general~~; or by depositing with a
34 private delivery service a copy of the summons and complaint,
35 addressed to the Attorney General or to a deputy or assistant
36 attorney general, delivering to the addressee, and obtaining a
37 delivery receipt.

38 d. For purposes of this rule, the term "agency of the State" includes
39 every agency, institution, board, commission, bureau,
40 department, division, council, member of Council of State, or
41 officer of the State government of the State of North Carolina,
42 but does not include counties, cities, towns, villages, other
43 municipal corporations or political subdivisions of the State,

- 1 county or city boards of education, other local public districts,
2 units, or bodies of any kind, or private corporations created by
3 act of the General Assembly.
- 4 (5) Counties, Cities, Towns, Villages and Other Local Public Bodies. –
- 5 a. Upon a city, town, or village by personally delivering a copy of
6 the summons and of the complaint to its mayor, city manager or
7 ~~clerk~~ clerk; ~~or~~ by mailing a copy of the summons and of the
8 complaint, registered or certified mail, return receipt requested,
9 addressed to its mayor, city manager or ~~clerk~~ clerk; or by
10 depositing with a private delivery service a copy of the summons
11 and complaint, addressed to the mayor, city manager, or clerk,
12 delivering to the addressee, and obtaining a delivery receipt.
- 13 b. Upon a county by personally delivering a copy of the summons
14 and of the complaint to its county manager or to the chairman,
15 clerk or any member of the board of commissioners for such
16 ~~county~~ county; by mailing a copy of the summons and of the
17 complaint, registered or certified mail, return receipt requested,
18 addressed to its county manager or to the chairman, clerk, or any
19 member of this board of commissioners for such ~~county~~ county;
20 or by depositing with a private delivery service a copy of the
21 summons and complaint, addressed to the county manager or to
22 the chairman, clerk, or any member of the board of
23 commissioners of that county, delivering to the addressee, and
24 obtaining a delivery receipt.
- 25 c. Upon any other political subdivision of the State, any county or
26 city board of education, or other local public district, unit, or
27 body of any kind (i) by personally delivering a copy of the
28 summons and of the complaint to an officer or director thereof,
29 ~~or~~ (ii) by personally delivering a copy of the summons and of the
30 complaint to an agent or attorney-in-fact authorized by
31 appointment or by statute to be served or to accept service in its
32 behalf, ~~or~~ (iii) by mailing a copy of the summons and of the
33 complaint, registered or certified mail, return receipt requested,
34 addressed to the officer, director, agent, or attorney-in-fact as
35 specified in (i) and ~~(ii)~~ (ii); or by depositing with a private
36 delivery service a copy of the summons and complaint, addressed
37 to the officer, director, agent, or attorney-in-fact as specified in
38 (i) and (ii), delivering to the addressee, and obtaining a delivery
39 receipt.
- 40 d. In any case where none of the officials, officers or directors
41 specified in paragraphs a, b and c can, after due diligence, be
42 found in the State, and that fact appears by affidavit to the
43 satisfaction of the court, or a judge thereof, such court or judge

1 may grant an order that service upon the party sought to be
2 served may be made by personally delivering a copy of the
3 summons and of the complaint to the Attorney General or any
4 deputy or assistant attorney general of the State of North
5 ~~Carolina, or Carolina;~~ mailing a copy of the summons and of the
6 complaint, registered or certified mail, return receipt requested,
7 addressed to the Attorney General or any deputy or assistant
8 attorney general of the State of North ~~Carolina. Carolina;~~ or by
9 depositing with a private delivery service a copy of the summons
10 and complaint, addressed to the Attorney General or any deputy
11 or assistant attorney general of the State of North Carolina,
12 delivering to the addressee, and obtaining a delivery receipt.

13 (6) Domestic or Foreign Corporation. – Upon a domestic or foreign
14 corporation:

- 15 a. By delivering a copy of the summons and of the complaint to an
16 officer, director, or managing agent of the corporation or by
17 leaving copies thereof in the office of such officer, director, or
18 managing agent with the person who is apparently in charge of
19 the office; ~~or~~
- 20 b. By delivering a copy of the summons and of the complaint to an
21 agent authorized by appointment or by law to be served or to
22 accept service ~~or of~~ process or by serving process upon such
23 agent or the party in a manner specified by any ~~statute. statute;~~
- 24 c. By mailing a copy of the summons and of the complaint,
25 registered or certified mail, return receipt requested, addressed to
26 the officer, director or agent to be served as specified in
27 paragraphs ~~a and b.~~ a. and b.; or
- 28 d. By depositing with a private delivery service a copy of the
29 summons and complaint, addressed to the officer, director, or
30 agent to be served as specified in paragraphs a. and b., delivering
31 to the addressee, and obtaining a delivery receipt.

32 (7) Partnerships. – Upon a general or limited partnership:

- 33 a. By delivering a copy of the summons and of the complaint to any
34 general partner, or to any attorney-in-fact or agent authorized by
35 appointment or by law to be served or to accept service of
36 process in its ~~behalf, or behalf;~~ by mailing a copy of the
37 summons and of the complaint, registered or certified mail,
38 return receipt requested, addressed to any general partner, or to
39 any attorney-in-fact or agent authorized by appointment or by
40 law to be served or to accept service of process in its ~~behalf, or~~
41 behalf; by depositing with a private delivery service a copy of the
42 summons and complaint, addressed to any general partner or to
43 any attorney-in-fact or agent authorized by appointment or by

1 law to be served or to accept service of process in its behalf,
2 delivering to the addressee, and obtaining a delivery receipt; or
3 by leaving copies thereof in the office of such general partner,
4 attorney-in-fact or agent with the person who is apparently in
5 charge of the office.

6 b. If relief is sought against a partner specifically, a copy of the
7 summons and of the complaint must be served on such partner as
8 provided in this section (j).

9 (8) Other Unincorporated Associations and Their Officers. – Upon any
10 unincorporated association, organization, or society other than a
11 partnership:

12 a. By delivering a copy of the summons and of the complaint to an
13 officer, director, managing agent or member of the governing
14 body of the unincorporated association, organization or society,
15 or by leaving copies thereof in the office of such officer, director,
16 managing agent or member of the governing body with the
17 person who is apparently in charge of the office; ~~or~~

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

22 c. By mailing a copy of the summons and of the complaint,
23 registered or certified mail, return receipt requested, addressed to
24 the officer, director, agent or member of the governing body to
25 be served as specified in paragraphs ~~a and b.~~ a. and b.; or

26 d. By depositing with a private delivery service a copy of the
27 summons and complaint, addressed to the officer, director, agent,
28 or member of the governing body to be served as specified in
29 paragraphs a. and b., delivering to the addressee, and obtaining a
30 delivery receipt.

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

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

36 Section 2.1. G.S. 1A-1, Rule 4(j1) reads as rewritten:

37 "(j1) Service by publication on party that cannot otherwise be served. – A party that
38 cannot with due diligence be served by personal ~~delivery or~~ delivery, registered or
39 certified ~~mail~~ mail, or private delivery service may be served by publication. Except in
40 actions involving jurisdiction in rem or quasi in rem as provided in section (k), service of
41 process by publication shall consist of publishing a notice of service of process by
42 publication once a week for three successive weeks in a newspaper that is qualified for
43 legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area

1 where the party to be served is believed by the serving party to be located, or if there is
2 no reliable information concerning the location of the party then in a newspaper
3 circulated in the county where the action is pending. If the party's post-office address is
4 known or can with reasonable diligence be ascertained, there shall be mailed to the party
5 at or immediately prior to the first publication a copy of the notice of service of process
6 by publication. The mailing may be omitted if the post-office address cannot be
7 ascertained with reasonable diligence. Upon completion of such service there shall be
8 filed with the court an affidavit showing the publication and mailing in accordance with
9 the requirements of G.S. 1-75.10(2), the circumstances warranting the use of service by
10 publication, and information, if any, regarding the location of the party served.

11 The notice of service of process by publication shall (i) designate the court in
12 which the action has been commenced and the title of the action, which title may be
13 indicated sufficiently by the name of the first plaintiff and the first defendant; (ii) be
14 directed to the defendant sought to be served; (iii) state either that a pleading seeking
15 relief against the person to be served has been filed or has been required to be filed
16 therein not later than a date specified in the notice; (iv) state the nature of the relief being
17 sought; (v) require the defendant being so served to make defense to such pleading within
18 40 days after a date stated in the notice, exclusive of such date, which date so stated shall
19 be the date of the first publication of notice, or the date when the complaint is required to
20 be filed, whichever is later, and notify the defendant that upon his failure to do so the
21 party seeking service of process by publication will apply to the court for the relief
22 sought; (vi) in cases of attachment, state the information required by G.S. 1-440.14; (vii)
23 be subscribed by the party seeking service or his attorney and give the post-office address
24 of such party or his attorney; and (viii) be substantially in the following form:

25 **NOTICE OF SERVICE OF PROCESS BY PUBLICATION**
26 **STATE OF NORTH CAROLINA _____ COUNTY**
27 **IN THE _____ COURT**

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

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

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

36 This, the _____ day of _____, ~~19~~____
37 _____ (Attorney) (Party)
38 _____ (Address)".

39 Section 2.2. G.S. 1A-1, Rule 4(j2) reads as rewritten:

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

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

1 (2) Registered or Certified ~~Mail~~ Mail or Private Delivery Service. – Before
2 judgment by default may be had on service by registered or certified
3 ~~mail, mail or by private delivery service with delivery receipt,~~ the
4 serving party shall file an affidavit with the court showing proof of such
5 service in accordance with the requirements of ~~G.S. 1-75.10(4)~~ G.S. 1-
6 75.10(4) or G.S. 1-75.10(5), as appropriate. This affidavit together with
7 the return or delivery receipt signed by the person who received the mail
8 or delivery if not the addressee raises a presumption that the person who
9 received the mail or delivery and signed the receipt was an agent of the
10 addressee authorized by appointment or by law to be served or to accept
11 service of process or was a person of suitable age and discretion
12 residing in the addressee's dwelling house or usual place of abode. In
13 the event the presumption described in the preceding sentence is
14 rebutted by proof that the person who received the receipt at the
15 addressee's dwelling house or usual place of abode was not a person of
16 suitable age and discretion residing therein, the statute of limitation may
17 not be pleaded as a defense if the action was initially commenced within
18 the period of limitation and service of process is completed within 60
19 days from the date the service is declared invalid. Service shall be
20 complete on the day the summons and complaint are delivered to the
21 address.

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

28 Section 2.3. G.S. 1-75.10 reads as rewritten:

29 **"§ 1-75.10. Proof of service of summons, defendant appearing in action.**

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

32 (1) Personal Service or Substituted Personal Service. –

- 33 a. If served by the sheriff of the county or the lawful process officer
34 in this State where the defendant was found, by the officer's
35 certificate thereof, showing place, time and manner of service; or
36 b. If served by any other person, his affidavit thereof, showing
37 place, time and manner of service; his qualifications to make
38 service under Rule 4(a) or Rule 4(j3) of the Rules of Civil
39 Procedure; that he knew the person served to be the party
40 mentioned in the summons and delivered to and left with him a
41 copy; and if the defendant was not personally served, he shall
42 state in such affidavit when, where and with whom such copy
43 was left. If such service is made outside this State, the proof

- 1 thereof may in the alternative be made in accordance with the
2 law of the place where such service is made.
- 3 (2) Service of Publication. – In the case of publication, by the affidavit of
4 the publisher or printer, or his foreman or principal clerk, showing the
5 same and specifying the date of the first and last publication, and an
6 affidavit of mailing of a copy of the complaint or notice, as the case may
7 require, made by the person who mailed the same.
- 8 (3) Written Admission of Defendant. – The written admission of the
9 defendant, whose signature or the subscription of whose name to such
10 admission shall be presumptive evidence of genuineness.
- 11 (4) Service by Registered or Certified Mail. – In the case of service by
12 registered or certified mail, by affidavit of the serving party averring:
13 a. That a copy of the summons and complaint was deposited in the
14 post office for mailing by registered or certified mail, return
15 receipt requested;
16 b. That it was in fact received as evidenced by the attached registry
17 receipt or other evidence satisfactory to the court of delivery to
18 the addressee; and
19 c. That the genuine receipt or other evidence of delivery is
20 attached.
- 21 (5) Service by Private Delivery Service. – In the case of service by private
22 delivery service, by affidavit of the serving party averring:
23 a. That a copy of the summons and complaint was deposited with a
24 private delivery service certified by the Administrative Office of
25 the Courts, delivery receipt requested;
26 b. That it was in fact received as evidenced by the attached delivery
27 receipt or other evidence satisfactory to the court of delivery to
28 the addressee; and
29 c. That the genuine receipt or other evidence of delivery is
30 attached."

31 32 **SERVICE OF PLEADINGS AND PAPERS BY FAX (RULE 5(b))**

33 Section 3. G.S. 1A-1, Rule 5(b) reads as rewritten:

34 "(b) Service – How made. – A pleading setting forth a counterclaim or cross claim
35 shall be filed with the court and a copy thereof shall be served on the party against whom
36 it is asserted or on his attorney of record. With respect to all pleadings subsequent to the
37 original complaint and other papers required or permitted to be served, service with due
38 return may be made in the manner provided for service and return of process in Rule 4
39 and may be made upon either the party or, unless service upon the party himself is
40 ordered by the court, upon his attorney of record. With respect to such other pleadings
41 and papers, service upon the attorney or upon a party may also be made by delivering a
42 copy to him or by mailing it to him at his last known address or, if no address is known,
43 by filing it with the clerk of court. Delivery of a copy within this rule means handing it to

1 the attorney or to the ~~party; or party,~~ leaving it at the attorney's office with a partner or
2 ~~employee; employee,~~ or by sending it to the attorney's office by telefacsimile between
3 9:00 a.m. and 5:00 p.m. Eastern Time on a regular business day. If delivery by
4 telefacsimile is outside the permitted times, service will be deemed to have been
5 completed on the next business day. Service by mail shall be complete upon deposit of
6 the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office
7 or official depository under the exclusive care and custody of the United States Postal
8 Service."

10 **SERVICE OF BRIEFS AND MEMORANDA (RULE 5(f))**

11 Section 4. G.S. 1A-1, Rule 5 is amended by adding the following new
12 subsection:

13 "(f) Service of Briefs and Memoranda. – Except by leave of court or consent of the
14 parties, to be considered by the presiding judge, other than a magistrate, a brief or
15 memorandum in support of a motion shall be served by the moving party upon the
16 adverse party no later than the fifth business day preceding the scheduled hearing date on
17 the motion and a brief or memorandum shall be served by the adverse party upon the
18 moving party no later than the second business day prior to the scheduled hearing date on
19 the motion."

21 **MOTION STATED WITH PARTICULARITY (RULE 7(b))**

22 Section 5. G.S. 1A-1, Rule 7(b) reads as rewritten: " (b) Motions and other
23 papers. –(1) An application to the court for an order shall be by motion which, unless
24 made during a hearing or trial or at a session at which a cause is on the calendar for that
25 session, shall be made in writing, shall state with reasonable particularity the grounds
26 therefor, and shall set forth the relief or order sought. The requirement of writing is
27 fulfilled if the motion is stated in a written notice of the hearing of the motion.

28 (2) The rules applicable to captions, signing, and other matters of form of
29 pleadings apply to all motions and other papers provided for by these
30 rules.

31 (3) A motion to transfer under G.S. 7A-258 shall comply with the directives
32 therein specified but the relief thereby obtainable may also be sought in
33 a responsive pleading pursuant to Rule 12(b)."

35 **ATTORNEY'S EMPLOYEE NOT DISQUALIFIED FOR VIDEOTAPE** 36 **DEPOSITION (RULE 28(c))**

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

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

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

- 1 (2) The deposition is taken by videotape in compliance with Rule 30(b)(4)
2 and Rule 30(f), and the notice for the taking of the deposition states the
3 name of the person before whom the deposition will be taken and that
4 person's relationship, if any, to a party or a party's attorney."
5

6 **DISCOVERY DISPUTES (RULE 37)**

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

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

- 11 (1) Appropriate Court. – An application for an order to a party or a
12 deponent who is not a party may be made to a judge of the court in
13 which the action is pending, or, on matters relating to a deposition
14 where the deposition is being taken in this State, to a judge of the court
15 in the county where the deposition is being taken, as defined by Rule
16 30(h).

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

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

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

1 If the motion is denied, the court shall, after opportunity for hearing,
2 require the moving party to pay to the party or deponent who opposed
3 the motion the reasonable expenses incurred in opposing the motion,
4 including attorney's fees, unless the court finds that the making of the
5 motion was substantially justified or that other circumstances make an
6 award of expenses unjust.

7 If the motion is granted in part and denied in part, the court may
8 apportion the reasonable expenses incurred in relation to the motion
9 among the parties and persons in a just manner."
10

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

12 Section 8. G.S. 1A-1, Rule 55(b) reads as rewritten:

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

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

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

30 (2) By the Judge. –

31 a. In all other cases the party entitled to a judgment by default shall
32 apply to the judge therefor; but no judgment by default shall be
33 entered against an infant or incompetent person unless
34 represented in the action by a guardian ad litem or other such
35 representative who has appeared therein. If the party against
36 whom judgment by default is sought has appeared in the action,
37 ~~he~~ that party (or, if appearing by representative, ~~his~~ the
38 representative) shall be served with written notice of the
39 application for judgment at least three days prior to the hearing
40 on such application. If, in order to enable the judge to enter
41 judgment or to carry it into effect, it is necessary to take an
42 account or to determine the amount of damages or to establish
43 the truth of any averment by evidence or to take an investigation

1 of any other matter, the judge may conduct such hearings or
2 order such references as ~~he~~ the judge deems necessary and proper
3 and shall accord a right of trial by jury to the parties when and as
4 required by the Constitution or by any statute of North Carolina.
5 If the plaintiff seeks to establish paternity under Article 3 of
6 Chapter 49 of the General Statutes and the defendant fails to
7 appear, the judge shall enter judgment by default.

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

10 1. The motion specifically provides that the court may
11 decide the motion for judgment by default without a
12 hearing if the party against whom judgment is sought fails
13 to serve a written response, stating the grounds for
14 opposing the motion, within 30 days of service of the
15 motion; and

16 2. The party against whom judgment is sought fails to serve
17 the response in accordance with this sub-subdivision."
18

19 **ENHANCED NOTICE FOR TEMPORARY RESTRAINING ORDER (RULE**
20 **65(b))**

21 Section 9. G.S. 1A-1, Rule 65(b) reads as rewritten:

22 "(b) Temporary restraining order; notice; hearing; duration. – A temporary
23 restraining order may be granted without written or oral notice to the adverse party or that
24 party's attorney only if (i) it clearly appears from specific facts shown by affidavit or by
25 verified complaint that immediate and irreparable injury, loss, or damage will result to
26 the applicant before ~~notice can be served and a hearing had thereon.~~ the adverse party or
27 that party's attorney can be heard in opposition, and (ii) the applicant's attorney certifies
28 to the court in writing the efforts, if any, that have been made to give the notice and the
29 reasons supporting the claim that notice should not be required. Every temporary
30 restraining order granted without notice shall be endorsed with the date and hour of
31 issuance; shall be filed forthwith in the clerk's office and entered of record; shall define
32 the injury and state why it is irreparable and why the order was granted without notice;
33 and shall expire by its terms within such time after entry, not to exceed 10 days, as the
34 judge fixes, unless within the time so fixed the order, for good cause shown, is extended
35 for a like period or unless the party against whom the order is directed consents that it
36 may be extended for a longer period. The reasons for the extension shall be entered of
37 record. In case a temporary restraining order is granted without notice and a motion for a
38 preliminary injunction is made, it shall be set down for hearing at the earliest possible
39 time and takes precedence over all matters except older matters of the same character;
40 and when the motion comes on for hearing, the party who obtained the temporary
41 restraining order shall proceed with a motion for a preliminary injunction, and, if he does
42 not do so, the judge shall dissolve the temporary restraining order. On two days' notice to
43 the party who obtained the temporary restraining order without notice or on such shorter

1 notice to that party as the judge may prescribe, the adverse party may appear and move
2 its dissolution or modification and in that event the judge shall proceed to hear and
3 determine such motion as expeditiously as the ends of justice require. Damages may be
4 awarded in an order for dissolution as provided in section (e)."

6 CLARIFY PUBLIC DUTY DOCTRINE AND THE TORT CLAIMS ACT

7 Section 10. G.S. 143-291(a) reads as rewritten:

8 "(a) The North Carolina Industrial Commission is hereby constituted a court for the
9 purpose of hearing and passing upon tort claims against the State Board of Education, the
10 Board of Transportation, and all other departments, institutions and agencies of the State.
11 The Industrial Commission shall determine whether or not each individual claim arose as
12 a result of the negligence of any officer, employee, involuntary servant or agent of the
13 State while acting within the scope of his office, employment, service, agency or
14 authority, under circumstances where the State of North Carolina, if a private person,
15 would be liable to the claimant in accordance with the laws of North Carolina.
16 Negligence, within this section, is the failure to use ordinary care in following a duty
17 imposed by law, whether the duty is for the benefit of a specific person or of the general
18 public. If the Commission finds that there was such negligence on the part of an officer,
19 employee, involuntary servant or agent of the State while acting within the scope of his
20 office, employment, service, agency or authority, which was the proximate cause of the
21 injury and that there was no contributory negligence on the part of the claimant or the
22 person in whose behalf the claim is asserted, the Commission shall determine the amount
23 of damages which the claimant is entitled to be paid, including medical and other
24 expenses, and by appropriate order direct the payment of such damages by the
25 department, institution or agency concerned, but in no event shall the amount of damages
26 awarded exceed the sum of one hundred fifty thousand dollars (\$150,000) cumulatively
27 to all claimants on account of injury and damage to any one person. Community colleges
28 and technical colleges shall be deemed State agencies for purposes of this Article. The
29 fact that a claim may be brought under more than one Article under this Chapter shall not
30 increase the foregoing maximum liability of the State."

32 OFFICIAL COMMENTS

33 Section 11. The Revisor of Statutes shall cause to be printed along with this
34 act the following statement to the official Comment for G.S. 1A-1, Rule 5(b):

35 "To be considered by the presiding judge on a motion calendar for a Monday, for
36 example, a brief or memorandum must be served by the close of business on the
37 preceding Monday. The rule does not require the filing of a brief or memorandum; it
38 only governs instances in which a brief or memorandum is filed. The rule would not
39 preclude a party from providing the judge with copies of cases or statutes at the hearing."

40 This addition to the official Comment shall only be for annotation purposes
41 and shall not be construed to be the law.

43 EFFECTIVE DATE

1 Section 12. Sections 1 through 9 of this act become effective October 1, 1998,
2 and apply to actions filed on or after that date. Section 10 of this act becomes effective
3 October 1, 1998, and applies to claims pending on or after that date. The remaining
4 sections of this act are effective when they become law.