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Short Title: Civil Procedure Rules Changes.

(Public)

Sponsors:

Referred to:

May 27, 1998

A BILL TO BE ENTITLED  
AN ACT TO AMEND THE RULES OF CIVIL PROCEDURE AND TO STUDY  
CHANGES RELATIVE TO THE TORT CLAIMS ACT.

The General Assembly of North Carolina enacts:

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

Section 1. 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

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 **STUDY CHANGES RELATIVE TO THE TORT CLAIMS ACT**

7 Section 10. The Legislative Research Commission shall study the applicability  
8 of the public duty doctrine to the Tort Claims Act in light of North Carolina Supreme  
9 Court decisions in Stone v. NC Department of Labor, 347 NC 473 (1998), and Hunt v.  
10 NC Department of Labor, 348 NC 192 (1998), and shall study the application of  
11 uninsured and underinsured insurance coverage to claims made under the Tort Claims  
12 Act. The Commission shall make recommendations to the General Assembly on whether  
13 or not changes are needed to the Tort Claims Act or the insurance laws to clarify when  
14 damages should be paid under the Tort Claims Act or under uninsured or underinsured  
15 insurance coverage, and if so, what those changes should be. The Commission shall  
16 report to the 1999 Session of the 1999 General Assembly.

#### 18 **OFFICIAL COMMENTS**

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

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

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

#### 29 **EFFECTIVE DATE**

30 Section 12. Sections 1 through 9 of this become effective January 1, 1999, and  
31 apply to actions filed on or after that date. The remaining sections of this act are effective  
32 when they become law.