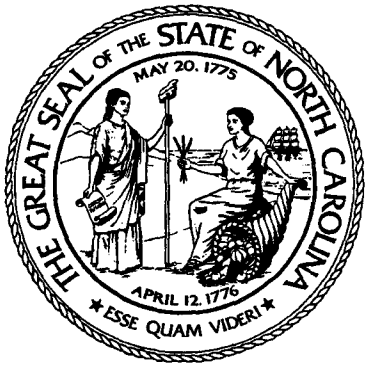
CIVIL PROCEDURE STUDY COMMISSION



REPORT TO THE
1997 GENERAL ASSEMBLY
(1998 Regular Session)
OF NORTH CAROLINA

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CIVIL PROCEDURE STUDY COMMISSION

March 20, 1998

The Honorable Dennis Wicker, Lieutenant Governor
The Honorable Marc Basnight, Senate President Pro Tempore
The Honorable Harold Brubaker, Speaker of the House
The Honorable Burley Mitchell, Chief Justice

Dear Gentlemen:

On behalf of the Civil Procedure Study Commission, we are pleased to submit to you the 1998 report of the Commission. For the past several months, the Commission members have focused on improving the Rules of Civil Procedure for the parties, the attorneys, the courts, and the public. The Commission's work was carried out under the directives of our enabling legislation, which encouraged the development of improved practices and procedures to (1) reduce the time required to dispose of civil actions, (2) simplify pretrial and trial procedures, (3) guarantee fairness and impartiality in the courts, and (4) increase the parties' and the public's satisfaction with the court system. To further these goals, the Commission recommends several amendments to the Rules of Civil Procedure. Because of time constraints, we were not able to complete our review of all the Rules. Accordingly, we recommend that the General Assembly reauthorize the Commission, which expires April 1, 1998, so that it can continue providing input to each of you on needed changes in the Rules of Civil Procedure.

Respectfully submitted,

Burton Craige

Mr. Marshall Hurley, Co-chair

Mr. Burton Craige, Co-chair

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SUMMARY AND EXPLANATION OF RECOMMENDATIONS

Rule 4(a), (c), and (j)(1)c.:

Rule 4(a) allows service of a summons and complaint by the sheriff or any other person authorized by law to serve these papers. The Commission recommends amending the Rule to also allow a notary public to make service. The notary must be a commissioned notary public in North Carolina.

Rule 4(c) requires service of a summons to be made within 30 days of issuance of the summons. The Commission recommends that this period be extended to 60 days in order to reduce the amount of paperwork and time involved in the endorsement for an extension of time.

Rule 4(j) provides that natural persons, governmental agencies, and most other entities can be served with a summons and complaint by personal delivery to the person or his authorized agent or by certified or registered mail, return receipt requested. The Commission recommends increasing the methods of service to include the use of a private mail service, such as Federal Express and UPS, as long as a delivery receipt is provided by the service. The Commission also recommends amending Rule 4(j2) and G.S. 1-75.10 to conform the proof of service provisions with the proposed change in Rule 4(j).

Rule 5(b) and (f):

Rule 5 governs the service and filing of pleadings and other papers. Service can be made by delivering a copy of the pleadings or papers to the party or the party's attorney or mailing it to the party's or attorney's last known address. The Commission

recommends broadening the methods of service of pleadings and papers under Rule 5 to include service on the attorney by fax. The fax must be sent to the attorney's office during regular business hours (between 9:00 am and 5:00 pm) on a regular business day.

The Commission recommends adding a new Rule 5(f) that requires an attorney filing a brief or memorandum to serve the brief or memorandum on the opposing attorney at least two business days before the scheduled hearing for which the brief or memorandum is filed. The Commission requests that the Revisor of Statutes insert the following language in the Official Comment to Rule 5 for explanatory purposes:

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

Rule 28:

Rule 28 provides for the persons before whom depositions may be taken. Among the persons disqualified by the Rule are the employees of the parties' attorneys. The rule has the effect of preventing the deposing attorney's employee from operating the videotape on a videotaped deposition. The Commission recommends amending the Rule to allow a videotaped deposition to be taken before an employee of the attorney as long as deposition notice discloses the name of the employee and by whom he or she is employed.

Rule 37

Rule 37 governs the failure to make discovery and the sanctions for such failure. Under the current Rule, when the opposing party fails to respond to discovery, the discovering party may apply to the court for an order compelling discovery. The Commission recommends that the Rule be amended to require that the moving party certify that it has in good faith conferred or attempted to confer with the person failing to make discovery in an effort to secure the information or material without court action.

Rule 46(b) and (c):

Rule 46(b) provides that formal objections and exceptions by a party to a court order or ruling, other than a ruling on the admissibility of evidence, are unnecessary. The Commission recommends amending Rule 46(b) to clarify that it applies not only to trial rulings, but also to pretrial rulings and interlocutory orders. The Commission also recommends amending Rule 46(b) to clarify a party's need to make an exception on the record upon having an opportunity to do so.

Rule 46(c) currently provides that no formal objections are required to preserve exceptions to the judge's instructions or failure to instruct. However, Rule 10(b)(2) of the Rules of Appellate Procedure require formal objections to jury instructions to preserve these exceptions on appeal. The Commission recommends repealing Rule 46(c) so that there is no longer a conflict with Rule 10(b)(2) of the Rules of Appellate Procedure.

Rule 55

Rule 55(b)(2) governs the entry of default judgments by judges. The Commission recommends that the Rule be amended to allow (but not require) a judge to enter a

default judgment against a party *without a hearing* if:

(1) the moving party specifically moves for judgment by default without a hearing upon the opposing party's failure to serve a written response within 30 days stating the grounds for opposing the motion; and
(2) the opposing party is served with this motion and fails to timely respond.

Rule 65(b)

Rule 65(b) governs the issuance of temporary restraining orders ("TROs"). The current Rule allows a judge to issue a TRO without notice to the adverse party if the party seeking the TRO can show that it will suffer immediate and irreparable harm before notice could be issued and a hearing conducted. The Commission recommends amending the Rule to enhance the opportunity for notice to the adverse party. The proposed change, based on federal Rule 65(b), adds a requirement that the party seeking the TRO must also show the court what efforts it made to give notice to the adverse party and the reasons that it believes notice should not be required.

Rules 68 and 84

Rule 68 provides for a formal offer of judgment by a party defending a claim ten or more days before trial. The Rule is designed to encourage settlement and compromise of claims. If the party to whom the offer is made refuses to accept and does not obtain a more favorable "judgment" at trial, that party bears the costs incurred since the time of the offer. The North Carolina Supreme Court recently ruled in *Poole v. Miller (342 NC 349, 1995, rehearing denied, 1996 NC Lexis 98)* that interest and attorneys' fees must be included in addition to the jury verdict in determining the "judgment" amount when making the cost comparison under Rule 68.

The Commission recommends that the Rule be amended to clearly exclude costs, interest, and statutorily-authorized attorneys' fees in determining the amount of the judgment. The Commission further recommends (1) that the cutoff period for making the offer of judgment be moved up from 10 days before trial to 30 days before trial, (2) that an offeree who refuses an offer and does no better at trial should not recover post-offer interest or attorneys' fees, and (3) that "lump sum" offers of judgment (those including costs, interest, or attorney fees) not be allowed. The Commission also recommends the addition of an offer of judgment form under Rule 84.

Extend Civil Procedure Study Commission

By the terms of its enabling legislation, the Civil Procedure Study Commission expires when it makes its report to the Chief Justice and the General Assembly. The report must be made by April 1, 1998. The Commission recommends the following:

(1) That the authorizing legislation be amended to (a) reauthorize the Commission so that it can continue working and report to the 2001 General Assembly and (b) increase the membership from 18 to 24 members.

(2) That the current members be surveyed for their willingness and ability to continue serving on the commission if it is reauthorized.

(3) That the appointing authorities – the Speaker, the President Pro Tempore of the Senate, and the Chief Justice – be requested by letter to appoint as many of these same members who are willing to serve as possible in order to provide continuity to the Commission's work and to coordinate their appointments to ensure diversity in the composition of the Commission.

COMMITTEE PROCEEDINGS

DECEMBER 10, 1997

The Civil Procedure Study Commission held its initial meeting on December 10, 1997.

Chief Justice Burley Mitchell spoke to the Commission. The Chief Justice gave a brief history of the Commission. The Commission was created because of the public's dissatisfaction with the way they perceive their courts to be functioning. The courts are too slow and cumbersome to have issues resolved in a timely manner. The goal is to obtain as much efficiency as possible from the current court system while not sacrificing the quality of justice. The Chief Justice realized that part of the problem on both the civil and criminal side were some of the rules of procedure. He had suggested to the leadership of both houses that changes needed to be made to the rules.

Chief Justice Mitchell requested that the Commission look at the entire picture. He pointed out that arbitration and mediation do not expedite the work of the court and do not reduce the case load of the courts appreciatively. They do not move cases any faster than the ordinary litigation procedures. They do appear to leave the litigants much more satisfied that they have had a fair hearing. The Chief Justice noted that the N. C. Commission on the Future of Justice and the Courts has come forward with a plan that the Legislature will have an opportunity to study. They concluded that accountability and authority should go together.

Chief Justice Mitchell recommended that the Commission look at the entire system to see how the rules can be changed to make the courts function more efficiently. He noted that the time frame for filing various pleadings and responses and for bringing cases to trial are unrealistically long and that a casual attitude had developed about continuances.

Peter Pappas, with the Litigation Section of the N. C. Bar Association, spoke briefly to the Commission. The Litigation Section is composed of an equal number of plaintiff attorneys and an equal number of defendant attorneys. Mr. Pappas noted that they strive to reach a consensus regarding rules changes. The Bar Association has endorsed the Future of the Justice and the Courts' report.

Susan Boyles, Chairperson of the Trial Practice and Procedure SubCommittee of the Bar Association's Litigation Section, also addressed the Commission. Ms. Boyles briefly commented on the rules changes that the Bar Association had worked on. Mr. Dick Taylor, chief executive officer of the Academy of Trial Lawyers, also spoke to the Commission.

The Commission members offered the following suggestions as possible topics of study for the Commission:

- A review of alternative dispute resolution
- Extend the life of the study commission
- Look at fast track litigation procedures and rules
- Consider allowing the Supreme Court, instead of the legislature, to amend the rules of civil procedure (subject to legislative review)
- Look at case differentiation
- Look at ways to reduce the amount of time it takes to get to trial
- Review calendaring by sessions

- Look at following concerning procedural rules: Rule 12(b)(6) motions; Rule 30; treating extensions as ex parte under Rule 6; differences in federal rules on Rule 41(a) and whether the rule contributes to delays and lack of preparation; use of Rule 56(f) by the court to narrow the issues in dispute
- Review ways to enhance the use of Rule 11 sanctions
- Look at going from notice pleadings to more substantial pleadings
- Review problems caused by a party getting a TRO on a pending matter in a different court district

The chairmen of the Commission appointed three subcommittees to begin working on various proposals: a Pre-discovery Subcommittee, a Discovery Subcommittee, and a Post-Discovery Subcommittee. The following chairs and members were appointed:

Pre-Discovery	Discovery	Post-Discovery
Mr. Jim Fuller, Chair	Mr. Lamar Armstrong, Chair	Marshall Gallop, Chair
Mr. Phil Baddour	Sen. Patrick Ballantine	Judge Marvin Gray
Mr. Jim Cooney	Sen. Roy Cooper	Mr. Alan Miles
Mr. Jim Faircloth	Mr. Irvin Hankins	Mr. Vance Perry
Mr. Luther Starling	Mr. Alan Pugh	Sen. R.C. Soles
Prof. Thomas Ringer		

Mr. Craige, chairman, subsequently distributed to the members of each subcommittee a list of issues for consideration. These lists were based on the comment of the Chief Justice, the pending proposals of the Bar Association, and comments by the Commission members.

JANUARY 22, 1998

The Civil Procedure Study Commission held its second meeting on January 22, 1998.

Mr. Stevens Clarke, with the Institute of Government, made a presentation to the Commission concerning Alternative Dispute Resolution. Mr. Clarke discussed the history of the pilot program on mediation. In 1991, the General Assembly enacted legislation calling for a mediation pilot program for civil cases, excluding those involving actions with extraordinary risk. Most of the cases were negligence suits, usually involving motor vehicles. In the pilot districts, the senior resident judges were authorized, but not required, to order mediation conferences that the attorneys, the parties and their insurance adjusters were required to attend. The AOC was required to investigate whether the program made the operation of the superior courts more efficient, less costly and more satisfying to the litigants.

The AOC looked at a variety of sources of data, including court records and interviews with and questionnaires completed by litigants and attorneys. They also directly observed some mediation sessions. Much of the analysis focused on three counties: Cumberland, Guilford and Surry. A control group and a mediation group were created.

The results of the study showed:

- Conferences lasted up to 10 hours - median time was about 2½ hours

- The initial session almost always concluded the matter; 14% of the time it was continued
- The attorneys did most of the negotiating
- Litigants did little direct negotiating
- Attorneys submitted possible offers or demands for approval
- Mediators often explained issues to litigants and gave them opportunities to express personal concerns that went beyond strictly legal issues

Initially, it was expected that most eligible contested cases would go to mediation conferences, but only about one-half did. It does not appear that the number of trials was reduced by this program. There was also no significant reduction in the number of motions and orders that judges and clerks had to process. There was no reduction found in court workload, at least not in terms of motions and orders which had to be processed. However, they did find that the program sped the process up – by an average of 7 weeks.

It was expected that because cases were being resolved quicker, attorney costs would be lower, but they were not. Plaintiffs in the control group who settled reported a median attorney cost of $3,300. Plaintiffs in the mediation group who settled had a median cost of $3,400, or if they went to mediation and settled afterward, about $3,700. These costs usually included the mediator's fee, which the attorney passes onto the client. There was not any indication that the cost was less. When "mean" costs were looked at, the comparisons were similar. There was no suggestion that mediation reduced the cost, even though it sped up disposition.

The conclusion concerning defendants was similar. For the control group, the cost of going to a settlement was about $3,000. For defendants who settled by mediation, it was less: $2,400. For those who went to mediation and settled later, it was higher. There was no evidence that the cost was less for plaintiffs or defendants.

It was concluded that the program was successful to some degree. It sped up the processing of cases, and it provided a process that the participants generally liked and were favorable toward. Cases that settled in mediation probably would have settled anyway according to Mr. Clarke.

Mr. Clarke pointed out things that might be done to make the program more effective:

1. To improve participation - by setting stricter timing rules and enforcing them.
2. To reduce trials - by making it a rule that a trial cannot take place until mediation has taken place.

The subcommittees presented their reports to the Commission. The items under consideration by the Pre-Discovery Subcommittee included a number of rule changes designed to make service of complaints and other papers easier, to ensure some fairness in a party being able to read the other party's brief prior to a hearing, and to enhance judicial case management. The Discovery Subcommittee announced that it was reviewing Rule 26(b)(4), Rule 30(c), Rule 30(d)(1), and Rule 46(b). The Subcommittee indicated that it had also considered the following issues:

1. Mandatory disclosures at beginning of discovery: The subcommittee did not favor this.
2. Curtail blanket objections to discovery requests: The subcommittee had no recommendations; it felt that the use of the existing motion to compel might suffice.
3. Permit video deposition without stenographer: This is not allowed under Rule 30(b)(4). The Subcommittee was considering a change that would allow a notary in a law firm to swear in the witness and start the video for

the deposition. The subcommittee felt that Rule 28(c) should be amended so that the notary is not disqualified from carrying this out.

4. Provide for resolution of recurrent discovery issues by appellate courts: The subcommittee talked about an advisory panel that would function similar to the Ethics Committee. They also developed an idea to use existing mediators for resolution of certain discovery disputes. The subcommittee felt that Rule 37 should be amended to require a party, before filing a motion to compel, to confer with opposing counsel and attempt to resolve matters. The matter would then be submitted to a mediator by way of telephone conference without the clients; this would be relatively cheap, and the mediator would attempt to resolve the discovery dispute.

The Post-Discovery Subcommittee also gave its report. The chair of the Subcommittee indicated that each member of the Subcommittee was assigned a group of Rules to review for the next meeting. Among the recommendations under consideration:

1. Revision of Rule 46(b) with respect to the need for making an exception on the record: The subcommittee indicated that it would look further at this.
2. Repeal of Rule 46(c): The subcommittee indicated that it would also look further at this.
3. Revision of Rule 55(b)(2) to allow entry of default judgment without oral argument: The subcommittee discussed circumstances where this is necessary or desirable and concluded that they need to look at what the Bar Association has proposed as a bill.
4. Revision of Rule 68 to define offers of judgment with more precision: The subcommittee felt that if there is going to be a Rule 68, the *Poole vs. Miller* decision needs to be legislatively overruled because the decision defeated the purpose of Rule 68.

5. Modify Rule 41(a) to conform to federal rule on "free" dismissals: The subcommittee did not feel that this was a problem and was not necessary to change. There is some balance in the rule in that whoever is presenting the claim has the right to take a dismissal up until the time the case is submitted, but that person also bears the responsibility of paying whatever costs have been incurred by either party before filing a lawsuit.
6. Eliminate calendaring by sessions: The subcommittee recognized the merit of this but was concerned about the differences in the way courts are run in various counties.
7. Award of attorney's fees to prevailing party under Rule 68: The subcommittee concluded that this was more of a substantive change than a procedural change, representing a departure from the way business is done to date.
8. Prevent abuses of ex parte TRO's: The subcommittee discussed this in the context of the federal rule. The federal rule puts more emphasis on the opposing side being notified and having an opportunity to be heard. There was feeling that there was merit to this and that something should be done to give the other side some notice.
9. Encourage courts to use Rule 56 to dispose of claims or to narrow issues for trial: The subcommittee felt that the problem which exists with this rule is a court-made problem, not necessarily a problem with the Rule.

Mr. Michael Crowell, former Executive Director, Commission for the Future of Justice and the Courts in North Carolina (hereinafter, "Future Commission"), spoke to the Commission about the proposal to give the Supreme Court authority over the rules of civil procedure and evidence. The Future Commission was a twenty-seven member commission appointed by Chief Justice Exum in 1994 and chaired by John Medlin. It was intended to be the most comprehensive review of the court system in North Carolina since the present structure was established in the 1960s.

The recommendations of the Future Commission dealt mostly with the structure and management of the court system. The recommendations include such issues as:

- merging superior and district court
- significantly reducing the number of judicial districts in the state
- within the trial court, which would be called the circuit court, and creating one specialization -- family court
- creating a state judicial council to assist the Chief Justice and other court officials in managing the court system
- transferring both the prosecution and public defense functions from the court system to the Executive Branch
- appointing all judges and clerks of court

The major themes of the recommendations are: (1) that a more independent judiciary is needed, one that is less dependent on the Legislature for some of the basic decisions about how the court system should be operating; (2) that court officials should be more accountable for their job performance; and (3) that the structure of the court system should be sufficiently flexible to allow it to be changed as conditions change.

The Future Commission has recommended that the authority to set the rules of civil and criminal procedure and the rules of evidence be transferred from the Legislature to the Supreme Court, subject to a veto, but not revision, by the Legislature. The view of the Commission was that court officials need to be accountable for the progress of cases in the courts. If they are going to be accountable they have to have as much control as possible over the rules that govern how those cases proceed.

The model, though not discussed in detail, is the federal court system model, under which the U. S. Supreme Court adopts the rules of procedure for the federal district courts. They receive recommendations from a judicial conference, which has advisory committees for different aspects of the rules. The Future Commission felt that this was an important issue but did not feel that it was particularly complex. It is a fairly simple policy choice that would need to be made.

FEBRUARY 12, 1997

The Civil Procedure Study Commission held its third meeting on February 12, 1998.

Burton Craige and Linwood Jones, Commission Counsel, discussed draft proposed legislation on allowing the Supreme Court to adopt the Rules of Civil Procedure. The proposal would give the authority over the rules of civil procedure to the Supreme Court, but the legislature would still be allowed to amend or repeal the rules and would be allowed to enact new rules on its own. The proposal and Mr. Jones' memorandum explaining the proposal are contained in the Appendix of this report. After some deliberation, further discussion on the issue was postponed.

Subcommittee Reports

Pre-Discovery:

Mr. Starling presented the following proposals that the Subcommittee was working on:

1. Allow service by a deputy sheriff, a professional process server, or certified mail and/or private carrier, i.e. FedEx or UPS. The subcommittee also recommended tracking the federal rule on acceptance of service.
2. Modify the summons so that a summons stays alive for 60 days rather than 30.
3. Briefs, if filed, should be received two business days prior to the hearing. The subcommittee does not advocate required briefs.

Discovery: Lamar Armstrong

Mr. Armstrong presented the following proposals that the subcommittee was working on:

1. Extend video depositions: Amend Rule 28(c).
2. Rule 26(b)(4) - Trial Experts: The proposal is a compromise between the federal rule and the existing North Carolina rule. There would be an entitlement, by interrogatory, to the following specific information about an individual identified as an expert (to be used either at trial or in support of any motion which might be presented in the case):

    - Qualifications of the witness which justify designation as an expert
    - Description of the discipline or field of study with respect to which the witness is to be used as an expert
    - List of all publications that the witness has authored in the preceding 10 years
    - Terms of agreement or arrangements made with the expert regarding his compensation as an expert

- List of all other cases in which he has testified either at trial or by deposition within the preceding 5 years
- A complete statement of all opinions to be expressed by the witness and the basis of the opinions or the reasons by which the expert justifies the opinions
- The data or other information considered by the witness in forming the opinion so identified
- The exhibits to be used as a summary of or support of the opinion
- With respect to experts who are not identified to be used at trial or in motions, but who may have information that cannot be practically obtained otherwise, they can only be "discovered" either in interrogatories or by deposition upon order of the court.
- Any person who has been identified as an expert to be used at trial or in support of a motion may be deposed.
- With respect to a party seeking discovery by deposition of an expert who is not going to testify but who is ordered by the court to provide information, fees for that party's preparation and time spent in responding to the discovery must be paid. The full Committee recommended language to distinguish "treating physicians" by providing that the rule does not include treating physicians and health care providers.

3. Rule 37 - Motions to Compel - The proposal is to add to the Rule the following:

"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". The Subcommittee added: "If such a motion is made, the court may refer the motion to a mediator certified by the Administrative

Office of the Court and the parties shall attempt to resolve the discovery dispute in accordance with mediation procedures established by the court or agreed to by the parties. If the mediation is unsuccessful, the pending motion under Rule 37 shall be addressed by the court in due course. The cost of the mediation shall be initially borne equally by the parties. The court may allocate the cost if appropriate in its discretion pursuant to petition of any party seeking such allocation."

Post-Discovery

Proposals: Mr. Gallop indicated that the Subcommittee was working on the following proposals:

1. Rule 46 (b) and (c): The subcommittee suggested removing the words in italics below from the draft:

"and other orders of the court not directed to admissibility of evidence, formal objections and exceptions are unnecessary and are deemed to be preserved *until entry of final judgment.*"

2. Rule 46(c): The Subcommittee agreed that as this rule now exists, it is contrary to Rule 10(b) of the Rules of Appellate Procedure and should be repealed.

3. Rule 55(b)(2): The Subcommittee agreed conceptually that the proposed change on default judgments was good.

4. Rule 41(a)(1): no report.

5. Rule 56(d): The Subcommittee felt that the problem was with how the courts have interpreted the rule and applied it.

6. Rule 65(b): The Subcommittee noted that it was considering language similar to the federal rule.

7. Rule 68: The Subcommittee recommended adoption of SB 551 to be enacted with several changes.

MARCH 4, 1998

The Civil Procedure Study Commission held its fourth meeting on March 4, 1998, and received and discussed subcommittee reports:

SUBCOMMITTEE REPORTS

Pre-Discovery:

Mr. Fuller presented the recommendations of the Subcommittee. See the Appendix. The Commission recommended the following with respect to the Subcommittee's proposal:

1. *Service by fax:* The Commission recommended adding "between 9:00 a.m. and 5:00 p.m. on regular business days".
2. *Summons alive for 60 days:* No changes.

3. *Service by notaries:* The Commission recommended a reference to "North Carolina" notary publics.
4. *Service by US Mail and private mail delivery services:* The Commission recommended adding after "delivery service" the words "which would provide a receipt to verify delivery" and omit the names of specific delivery services.
5. *Service of briefs and memoranda:* The Commission recommended adding "p.m." after 5:00; deleting the words "filed and"; changing "memoranda" to "memorandum" and deleting "an attorney must file and serve a brief or memorandum by the close of business on the preceding Wednesday."

Discovery:

Mr. Hankins presented the Subcommittee's report. See the Appendix. The Commission discussed the proposed changes to Rule 26(b)(4) at length. The Commission member suggested expanding the reference to "fact witnesses" beyond "treating physicians" to include all fact witnesses, (2) that a fact witness should still be subject to interrogatories on his or her expert opinion and the basis for that opinion, and (3) that the reference to "exhibits" should be removed. The proposal to mediate discovery disputes (rule 37) was also discussed. The Commission recommended making clear that only attorney mediators would be used.

Post-Discovery:

Mr. Gallop presented the report of the Subcommittee.

1. *Rule 56 (Summary Judgment):* Mr. Gallop noted that he had nothing to add different from the letter he had sent to the members on the issues (See the Appendix). However, he pointed out that there was a Court of Appeals case that said that Rule 56(d) imposes a duty on the judge to try to

determine those factual issues that are not in dispute. Mr. Gallop subsequently provided, by mail, a copy of the case (*State of North Carolina ex rel Edminsten v. Challenge, Inc.,* 71 N.C. App. 575, 1984) to counsel and the other commission members.

2. *Rule 65 (TROs):* Mr. Gallop noted that no other changes had been made beyond what was shown in the letter.
3. *Rule 68 (Offer of Judgment):* Mr. Gallop indicated there had been no changes since the previous meeting. He feels that the present caselaw directly addresses the "interest" issue (i.e., a party cannot accept an offer of judgment and get interest). He also noted that the proposed cap on attorneys' fees awarded under G.S. 6-21.1 was designed to put some balance in the proposal.

March 20, 1998

The Committee considered the draft legislation before it. The draft contained the recommendations of the subcommittees and a proposal to reauthorize the study commission. The proposals and the action taken are discussed below:

Rule 4

The proposed changes to Rule 4 involved allowing notary publics to serve the summons and complaint, extending the life of the summons from 30 to 60 days, and allowing for service by private mail delivery services (such as Federal Express and UPS). There was some discussion about whether the changes to Rule 4 were too much of a piecemeal approach to Rule 4, but it was noted that these changes did not preclude a more comprehensive revision by this Commission, the Bar Association, or others in the future.

The Committee voted to approve all three changes to Rule 4 as follows:

Rule 4(a):

There was some discussion about the anticipated opposition of the sheriffs to this provision. The Commission approved the provision as written.

Rule 4(c):

There was discussion about extending the period to 90 days. The Commission approved the provision as written (60 days).

Rule 4(j):

There was discussion about measures to assure that private delivery services meet minimum standards of reliability. Two suggestions were made: (1) require the service to be bonded, and (2) require the service to be approved by an entity such as the State Bar.

The need to make additional amendments to the proof of service statutes (Rule 4(j)(2) and G.S. 1-75.10) were also discussed. The inclusion of the US Mail in the proposed provision was questioned on grounds that the provision for service by certified or registered mail already covered this.

The Commission approved the proposed recommendation with the following changes:

(1) Delete the reference in the proposed new provision to the US Mail.

(2) Require the private delivery service to be certified by the AOC. Although the Commission did not recommend the grounds for becoming certified, its intent is to ensure that the service is a reliable one.

(3) Authorize staff counsel to prepare proposed amendments to Rule 4(j2) and G.S. 1-75.10 to account for private delivery services in the proof of service statutes.

(4) Authorize staff counsel to prepare proposed amendments to extend the ability to use private delivery services for service on all other entities under Rule 4 (State agencies, partnerships, etc.) It was noted that Rule (j)(2) already provides for this for natural persons with disabilities (by reference back to (j)(1). Staff counsel will send to the Commission members a revised version of proposed amendments to Rule 4 that incorporates the changes noted above. Unless a majority of members object, the revised version will be adopted by the Commission. (The revised version was subsequently sent to the members, and there were no objections. One member suggested minor technical changes that were incorporated into the final draft.)

Rule 5:

Rule 5(b): The proposed change provides for service of pleadings and papers by fax. There was some discussion about proof of delivery, and it was noted that the same proof problem exists with the use of regular mail. The Commission approved this proposal as written.

Rule 5(f): The proposed addition would require briefs and memoranda to be served on the opposing party three days before the scheduled hearing. It was noted that this rule change would also apply to responsive pleadings. The Commission approved the provision as written and requested that the following be included in the Official Comments to the Rule for explanatory purposes:

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

Rule 26(b)(4)

The proposed change significantly revises the rules governing discovery of experts. There was discussion that this area of the law needs to be addressed, but that the proposal could be costly and lead to more extraneous litigation. The Commission did not recommend this proposal.

Rule 28

The proposed change will allow an attorney's employee to operate a video camera in a videotaped deposition. The Commission discussed the merits of the proposal and noted concerns about potential manipulation and distortion of the camera for the benefit of the attorney taking the deposition. The Commission approved the proposal as written.

Rule 37

The proposed change would provide for mediation of discovery disputes by attorney mediators. The proposed change would also require a party that moves for an order compelling discovery to certify that it has attempted to confer with the other party in an effort to obtain discovery without court intervention. The Commission favored the mediation concept but was concerned whether this would slow the process down further. The Commission believes that some type of neutral third party review of discovery disputes – perhaps by an arbitrator or referee – may be of benefit. The Commission approved the addition of the language in Rule 37(a)(2) about a moving party certifying attempts to confer with the other party to obtain discovery, but the Commission did not approve the mediation proposal.

Rule 46

The proposed change clarifies that Rule 46(b) applies not only to trial rulings, but also to pretrial and interlocutory rulings, and it clarifies the party's need to make

exceptions on the record. The proposed change also repeals a provision that conflicts with the rules of appellate procedure.

The Commission approved the proposal as written, except that the phrase "upon having an opportunity to do so" was added to the end of the new language in Rule 46(b). This language had been included in the original subcommittee recommendation.

Rule 55

The proposed change provides for default judgment without a hearing.

The Commission approved the change as written, with a few amendments: change the word "file" to "serve" and delete the words "with the court" from the phrase "fails to file a written response *with the court*".

Rule 65

The proposed change, modeled after the federal rule, provides for enhanced notice when a party is seeking a temporary restraining order.

The Commission approved the proposal as written.

Rules 68 and 84:

The proposed changes address problems concerning offers of judgment and the costs that go into the cost comparison under an offer of judgment.

It was noted that most of the provision, with the exception of the new provision in (a)(4) on attorneys fees in cases falling under G.S. 6-21.1, reflected much of what had already been worked on by the North Carolina Bar Association committee that addressed Rule 68. There was particular discussion about the issue of attorneys' fees under (a)(4).

The Commission voted against the proposal as written, but subsequently approved the proposal with an amendment removing (a)(4).

Extend the Study Commission:

Although there was some discussion about the most appropriate structure for continuing the study of the rules of civil procedure over the long term, the Commission approved the proposal to reauthorize the Commission to meet until February 1, 2001, with the following additional recommendations:

(1) That the Commission membership be increased from 18 to 24 members.

(2) That the current members be surveyed for their willingness and ability to continue serving on the commission if it is reauthorized.

(3) That the appointing authorities – the Speaker, the President Pro Tempore of the Senate, and the Chief Justice – be requested by letter to appoint as many of these same members who are willing to serve as possible in order to provide continuity to the Commission's work and to coordinate their appointments to ensure diversity in the composition of the Commission.

RECOMMENDED LEGISLATION

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1997

H D

98-RN-001C
THIS IS A DRAFT 1-APR-98 17:11:45

Short Title: Civil Procedure Rules Changes (Public)

Sponsors:

Referred to:

A BILL TO BE ENTITLED

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

The General Assembly of North Carolina enacts:

SERVICE BY NOTARIES (RULE 4(a))

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

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

The date the summons bears shall be prima facie evidence of the date of issue."

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

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

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

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

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

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

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

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

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

age and discretion then residing ~~therein; or~~ therein.

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

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

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

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

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

b. If the plaintiff actually knows that a person under disability is under guardianship of any kind, process shall be served separately upon his guardian in any manner applicable and appropriate under this section (j). If the plaintiff does not actually know that a guardian has been appointed when service is made upon a person known to him to be incompetent to have charge of his affairs,

then service of process must be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

(3) The State. -- Upon the State by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney ~~general or~~ general; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General or to a deputy or assistant attorney ~~general.~~ general; or by depositing with a private delivery service a copy of the summons and complaint, addressed to the Attorney General or to a deputy or assitant attorney general, delivering to the addressee, and obtaining a delivery receipt.

(4) An Agency of the State. --

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

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

c. If any agency of the State fails to comply with paragraph b above, then service upon such agency may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney ~~general or~~ general; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General, or to a deputy or assistant attorney ~~general.~~ general; or by depositing

with a private delivery service a copy of the summons and complaint, addressed to the Attorney General or to a deputy or assistant attorney general, delivering to the addressee, and obtaining a delivery receipt.

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

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

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

b. Upon a county by personally delivering a copy of the summons and of the complaint to its county manager or to the chairman, clerk or any member of the board of commissioners for such ~~county or~~ county; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its county manager or to the chairman, clerk, or any member of this board of commissioners for such ~~county.~~ county; or by depositing with a private delivery service a copy of the summons and complaint, addressed

to the county manager or to the chairman, cler, or any member of the board of commissioners of that county, delivering to the addressee, and obtaining a delivery receipt.

c. Upon any other political subdivision of the State, any county or city board of education, or other local public district, unit, or body of any kind (i) by personally delivering a copy of the summons and of the complaint to an officer or director thereof, ~~or~~ (ii) by personally delivering a copy of the summons and of the complaint to an agent or attorney-in-fact authorized by appointment or by statute to be served or to accept service in its behalf, ~~or~~ (iii) by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent, or attorney-in-fact as specified in (i) and ~~(ii).~~ (ii); or by depositing with a private delivery service a copy of the summons and complaint, addressed to the officer, director, agent, or attorney-in-fact as specified in (i) and (ii), delivering to the addressee, and obtaining a delivery receipt.

d. In any case where none of the officials, officers or directors specified in paragraphs a, b and c can, after due diligence, be found in the State, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof, such court or judge may grant an order that service upon the party sought to be served may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or any deputy or assistant attorney general of the State of North ~~Carolina, or~~ Carolina; mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General or any deputy or assistant attorney general of the State of North ~~Carolina.~~ Carolina; or by depositing with a private delivery service a

copy of the summons and complaint, addressed to the Attorney General or any deputy or assistant attorney general of the State of North Carolina, delivering to the addressee, and obtaining a delivery receipt.

(6) Domestic or Foreign Corporation. -- Upon a domestic or foreign corporation:

a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office; ~~or~~

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

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

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

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

a. By delivering a copy of the summons and of the complaint to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its ~~behalf, or~~ behalf; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its ~~behalf, or~~ behalf; by

depositing with a private delivery service a copy of the summons and complaint, addressed to any general partner or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in it behalf, delivering to the addressee, and obtaining a delivery receipt; or by leaving copies thereof in the office of such general partner, attorney-in-fact or agent with the person who is apparently in charge of the office.

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

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

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

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

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

d. By depositing with a private delivery service a copy of the summons and complaint, addressed to the officer, director, agent or member of the governing body to be served as specified

in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt.

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

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

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

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

The notice of service of process by publication shall (i) designate the court in which the action has been commenced and the title of the action, which title may be indicated sufficiently by the name of the first plaintiff and the first defendant; (ii) be directed to the defendant sought to be served; (iii) state either that a pleading seeking relief against the person to be served has been filed or has been required to be filed therein not later than a date specified in the notice; (iv) state the nature of the relief being sought; (v) require the defendant being so served to make defense to such pleading within

40 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of the first publication of notice, or the date when the complaint is required to be filed, whichever is later, and notify the defendant that upon his failure to do so the party seeking service of process by publication will apply to the court for the relief sought; (vi) in cases of attachment, state the information required by G.S. 1-440.14; (vii) be subscribed by the party seeking service or his attorney and give the post-office address of such party or his attorney; and (viii) be substantially in the following form:

NOTICE OF SERVICE OF PROCESS BY PUBLICATION

STATE OF NORTH CAROLINA _____ COUNTY

In the _____ Court

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

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

(State nature).

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

This, the _____ day of _____, 19____

_____ (Attorney) (Party)

_____ (Address) "

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

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

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

(2) Registered or Certified ~~Mail.~~ Mail or Private Delivery Service.-- Before judgment by default may be had on service by registered or certified ~~mail,~~ mail or by private delivery service with delivery receipt, the serving party shall file an affidavit with the court showing proof of such service in accordance with the requirements of ~~G.S. 1-75.10(4).~~ G.S. 1-75.10(4) or G.S. 1-75.10(5), as appropriate. This affidavit together with the return or delivery receipt signed by the person who received the mail or delivery if not the addressee

raises a presumption that the person who received the mail or delivery and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age and discretion residing in the addressee's dwelling house or usual place of abode. In the event the presumption described in the preceding sentence is rebutted by proof that the person who received the receipt at the addressee's dwelling house or usual place of abode was not a person of suitable age and discretion residing therein, the statute of limitation may not be pleaded as a defense if the action was initially commenced within the period of limitation and service of process is completed within 60 days from the date the service is declared invalid. Service shall be complete on the day the summons and complaint are delivered to the address.

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

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

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

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

(1) Personal Service or Substituted Personal Service. --

a. If served by the sheriff of the county or the lawful process officer in this State where the defendant was found, by the officer's certificate thereof, showing place, time and manner of service; or

b. If served by any other person, his affidavit thereof, showing place, time and manner of service; his qualifications to make service under Rule 4(a) or Rule 4(j3) of the Rules of Civil Procedure; that he knew the person served to be the party mentioned in

the summons and delivered to and left with him a copy; and if the defendant was not personally served, he shall state in such affidavit when, where and with whom such copy was left. If such service is made outside this State, the proof thereof may in the alternative be made in accordance with the law of the place where such service is made.

(2) Service of Publication. -- In the case of publication, by the affidavit of the publisher or printer, or his foreman or principal clerk, showing the same and specifying the date of the first and last publication, and an affidavit of mailing of a copy of the complaint or notice, as the case may require, made by the person who mailed the same.

(3) Written Admission of Defendant. -- The written admission of the defendant, whose signature or the subscription of whose name to such admission shall be presumptive evidence of genuineness.

(4) Service by Registered or Certified Mail. -- In the case of service by registered or certified mail, by affidavit of the serving party averring:

a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;

b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and

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

(5) Service by Private Delivery Service.-- In the case of service by private delivery service, by affidavit of the serving party averring:

a. That a copy of the summons and complaint was deposited with a private delivery service certified by the Administrative Office of the Courts, delivery receipt requested;

b. That it was in fact received as evidenced by the attached delivery receipt or other evidence satisfactory to the court of delivery to the addressee; and

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

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

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

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

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

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

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

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

Section 7. 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 8. 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 motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

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

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

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

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

PRESERVING EXCEPTIONS TO RULINGS (RULE 46)

Section 9. G.S. 1A-1, Rule 46 reads as rewritten:

"**Rule 46. Objections and exceptions.**(a) Rulings on admissibility of evidence. --

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

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

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

(b) ~~Rulings~~ Pretrial rulings, interlocutory orders, trial rulings, and other orders not directed to the admissibility of evidence. -- With respect to ~~rulings~~ pretrial rulings, interlocutory orders, trial rulings, and other orders of the court not directed to the admissibility of evidence, formal objections and exceptions are unnecessary. In order to preserve an exception to any such ruling or order or to the court's failure to make any such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court ~~his~~ the party's objection to the action of the court or makes known the action ~~which he~~ that the party desires the court to take and ~~his ground therefor;~~ the party's grounds for its position. ~~and if~~ If a party has no opportunity to object or except

to a ruling or order at the time it is made, the absence of an objection or exception does not thereafter prejudice ~~him.~~ that party; however, in order to preserve exceptions to these rulings and orders for appellate review, a party shall promptly present to the court a request, objection or motion that states the specific grounds for the ruling that the party desires the court to make upon having an opportunity to do so.

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

DEFAULT JUDGMENT WITHOUT HEARING (RULE 55(b))

Section 10. G.S. 1A-1, Rule 55(b) reads as rewritten:

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

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

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

(2) By the Judge. --

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

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

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

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

ENHANCED NOTICE FOR TEMPORARY RESTRAINING ORDER (RULE 65)

Section 11. G.S. 1A-1, Rule 65(b) reads as rewritten:

"(b) Temporary restraining order; notice; hearing; duration. --A temporary restraining order may be granted without written or oral notice to the adverse party

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

OFFER OF JUDGMENT (RULES 68 and 84):

Section 12. G.S. 1A-1, Rule 68 reads as rewritten:

""**Rule 68. Offer of judgment and disclaimer.**

(a) Offer of judgment. --

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

(2) If within ~~10~~ 30 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service ~~thereof and thereupon the clerk shall enter judgment.~~ thereof. The court shall determine costs, interest, and statutorily authorized attorneys' fees and enter judgment accordingly. An offer not accepted within ~~10~~ 30 days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. The defending party shall file the offer deemed withdrawn prior to the proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after ~~the making~~ service of the ~~offer.~~ offer, and shall not be entitled to interest or attorneys' fees incurred after service of the offer. The fact that an offer is ~~made~~ served but not accepted does not preclude a subsequent offer.

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

(b) Conditional offer of judgment for damages. -- A party defending against a claim arising in contract or quasi contract may, with his responsive pleading,

serve upon the claimant an offer in writing that if he fails in his defense, the damages shall be assessed at a specified sum; and if the claimant signifies his acceptance thereof in writing within 20 days of the service of such offer, and on the trial prevails, his damages shall be assessed accordingly. If the claimant does not accept the offer, he must prove his damages as if the offer had not been made. If the damages assessed in the claimant's favor do not exceed the sum stated in the offer, the party defending shall recover the costs in respect to the question of damages.

(c) Definitions. -- For purposes of this rule:

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

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

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

Section 13. G.S. 1A-1, Rule 84 is amended by adding a form at the end to read:

"**(17) Offer of Judgment Under Rule 68(a).**

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

EXTEND CIVIL PROCEDURE STUDY COMMISSION AND INCREASE MEMBERSHIP

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

"(c) The Commission shall report to the General Assembly and the Chief Justice no later than ~~April 1, 1998.~~ February 1, 2001.

The report shall be in writing and shall set forth the Commission's findings, conclusions, and recommendations, including any proposed legislation or court rules. Upon issuing its final report, the Commission shall terminate."

Section 14.1. Subsection (a) of Section 4.1 of Part IV of Chapter 17 of the 1996 Second Extra Session Laws reads as rewritten:

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

EFFECTIVE DATE

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

APPENDICES

CIVIL PROCEDURE STUDY COMMISSION
1997-1999
Membership List

President Pro Tem's Appointments

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Sen. Roy A. Cooper, III
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Mr. Marshall Gallop
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Mr. Vance Perry
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Sen. R.C. Soles, Jr.
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Supreme Court Appointments

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Mr. James C. Fuller
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The Honorable Marvin Gray
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Susan Moore
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Memorandum

To: Members of Pre-Discovery Subcommittee
(Jim Fuller, Chair; Phil Baddour; Jim Cooney; Jim Faircloth; Luther Starling)

From: Burton Craige, Co-Chair
Civil Procedure Study Commission

Re: Subcommittee Agenda

Date: January 20, 1998

The pre-discovery subcommittee should consider possible amendments to Rules 1 through 25 of the North Carolina Rules of Civil Procedure. This memorandum summarizes proposals that have been made by bar organizations and Commission members.

The Bar Association has proposed an amendment to Rule 4(h) to allow private service of process.

The North Carolina Academy of Trial Lawyers proposed that North Carolina adopt the federal practice of requiring that motions, particularly dispositive motions, be accompanied by a memorandum of law. The Academy also asked the Commission to consider revising Rule 9(j) to eliminate special pleading requirements for medical malpractice cases.

Chief Justice Mitchell suggested that the time for filing pleadings and responses could be shortened.

At the December 10, 1997 meeting, members of the Commission suggested that the following changes be considered:

1) Judge to be assigned to case early in litigation;
2) Differentiation among cases, based on complexity;
3) Mandatory mediation or settlement conference early in litigation;
4) Restrict ex parte extensions under Rule 6;
5) No automatic extension of time to file answer;
6) Amend Rule 8 to require more specificity in pleading;
7) Strengthen Rule 11;
8) Restrict filing of baseless Rule 12(b)(6) motions.

BC/ppb
cc: Marshall Hurley
Linwood Jones

Memorandum

To: Members of Discovery Subcommittee
(Lamar Armstrong, Chair; Patrick Ballentine; Roy Cooper; Irv Hankins; Alan Pugh; Thomas Ringer)

From: Burton Craige, Co-Chair
Civil Procedure Study Commission

Re: Subcommittee Agenda

Date: January 20, 1998

The discovery subcommittee should consider possible amendments to Rules 26 through 37 of the North Carolina Rules of Civil Procedure. This memorandum summarizes proposals that have been made by bar organizations and Commission members.

The Bar Association has proposed the following amendments:

1) Revision of Rule 26(b)(4) to conform the rule to the widespread practice of consensual depositions of experts and to clarify that an expert can be compelled to produce documentary evidence other than materials protected by attorney/client privilege or attorney work product.
2) Revision of Rules 30(c) and 30(d) to prevent abusive deposition behavior.

At the December 10, 1997 meeting, Commission members suggested that the following changes be considered:

1) Mandatory disclosures at beginning of discovery;
2) Curtail blanket objections to discovery requests;
3) Permit video deposition without stenographer;
4) Foster low-cost discovery methods such as discovery of expert opinions through interrogatories;
5) Mandatory disclosure of expert reports;
6) Provide for resolution of recurrent discovery issues by appellate courts.

BC/ppb
cc: Marshall Hurley
Linwood Jones

Memorandum

To: Members of Post-Discovery Subcommittee
(Marshall Gallop, Chair; Hon. Marvin Gray; Alan Miles; Vance Perry; R.C. Soles)

From: Burton Craige, Co-Chair
Civil Procedure Study Commission

Re: Subcommittee Agenda

Date: January 20, 1998

The post-discovery subcommittee should consider possible amendments to Rules 38 through 68 of the North Carolina Rules of Civil Procedure. This memorandum summarizes proposals that have been made by bar organizations and Commission members.

The Bar Association has proposed the following amendments:

1) Revision of Rule 46(b) re the need for making an exception on the record;
2) Repeal of Rule 46(c);
3) Revision of Rule 55(b)(2) to allow entry of default judgment without oral argument;
4) Revision of Rule 68 to define offers of judgment with more precision.

At the December 10, 1997 meeting, Commission members suggested that the following changes be considered:

1) Modify Rule 41(a) to conform to federal rule;
2) Eliminate calendaring by sessions;
3) Award of attorney's fees to prevailing party;
4) Prevent abuses of ex parte TRO's;
5) Encourage courts to use Rule 56 to dispose of claims or to narrow issues for trial.

BC/ppb
cc: Marshall Hurley
Linwood Jones

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NADIA F. McNALLY
DONNA C. EPPS

TO: Civil Procedure Study Commission
FR: Pre-Discovery Committee
DT: 4 March 1998

We recommend the following changes to the Rules of Civil Procedure be adopted by the Full Commission.

1. Rule 5(b) shall be amended as follows: "Delivery of a copy within this rule means handing it to the attorney or to the party; or leaving at the attorney's office with a partner or employee, or by sending it to the attorney's office by telefacsimile."

2. Rule 4(c) shall be amended as follows: "Personal service . . . must be made within 60 days after the date of the issuance of the summons . . . . "

3. Rule 4(a) shall be amended as follows: "In this state, such proper person shall be the sheriff of the county where service is to be made or a notary public . . . . "

4. Rule 4(j)(1)(c) shall be amended as follows: "By depositing in the U.S. Mail or a private delivery service ~~including but not limited to Federal Express or United Parcel Service~~ that provides a receipt a copy of the summons and of the complaint . . . . "

5. Rule 5 shall be amended as follows: "(f) To be considered by the presiding judge, any brief or memoranda must be ~~filed and~~ served upon opposing counsel not later than 5:00 p.m. on the third business day preceding the scheduled hearing date. For example, to be considered by the presiding judge on a motion calendar for a Monday, ~~an attorney must file and serve~~ a brief or memorandum must be served by the close of business on the preceding Wednesday."

Commentary

TO: Civil Procedure Study Commission
FR: Pre-discovery Committee
DT: 22 January 1998

We completed about a third of our agenda, and look forward to a thoughtful review with resultant recommendations on other items at future meetings. Among those issues reviewed today, we are able to share the following general principles that enjoy unanimous support.

1. Service: We believe the lawyer should be able to choose from a smorgasbord of service opportunities, giving consideration to the type of case, location of the practice, and any special needs. Accordingly, service by any of the following four methods would be equally valid: (a) by sheriff's deputy; (b) by professional process server or by the attorney or attorney's employee; (c) by certified mail or a private carrier such as FedEx or UPS; (d) by an acceptance of service document sent by regular mail (such as is now employed in the federal courts in the western part of the state).

2. Summons: We are anxious to get rid of needless paperwork that wastes the time of court officials and causes the lawyers to go through non-productive hoops. Accordingly, we believe the summons should be alive for 60 days (instead of 30). Upon a showing of a good faith attempt to serve the defendant within the prescribed time, the lawyer may obtain an additional 60 days by application to the clerk.

3. Brief: We agree on two primary principles. First, there are many cases for which a brief or memo is not necessary, and there should be no paper-pushing requirement to file one. Second, in order to be of any value to opposing counsel and the court, last minute delivery just before the case is called for hearing is a disservice to all involved. We recommend that, in order to be considered by the court, all pre-hearing memoranda must be received by opposing counsel by delivery, mail, or fax not later than the close of the third business day before the hearing. In general practice in the state courts, this will mean before 5:00 on Wednesday afternoon for a hearing set the following Monday. Because we believe complex cases are, and should be, different critters, we suggest seven days' service of the movant's brief, with a response due three days in advance of the hearing.

4. Complex Cases: Simply put, we should have them statewide. We are going to further review the process that seems to be working well in Charlotte. Our inclination is to have the designation of a complex case be done by the filing attorney. A standing provision that allows either counsel to request a formal discovery conference would provide the opportunity, in a given case, to object to a case's being designated either complex or standard.

5. Judicial Case Management: First and foremost, we need to shelve the entire practice of judges having assignments to limited physical areas and for limited periods of time. A judge should have general authority at all times in the district to which he or she is assigned or serves as resident.

When a judge completes the case calendar it would be expected that the judge would promptly return home and would try civil or criminal cases already on a published calendar, or would move forward with taking of pleas and hearing of motions. Depending on whether cases are uniformly assigned to judges for supervision, we believe it would be appropriate for the returning judge to call matters for hearing on short notice, but would not be appropriate to require lawyers to travel long distances to other counties except by consent.

In general, we believe that complex cases should be assigned to judges, probably throughout a division. That judge would be responsible for motions, case supervision, and working with the lawyers to bring the cases expeditiously to trial. Standard cases, on the other hand, would be subject to supervision by the trial court administrator or clerk, and would be handled on a regular motion hearing as is now the practice.

More, later.

Rule 28. Persons Before Whom Depositions May Be Taken

c. 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

(1) the parties agree otherwise by stipulation as provided in Rule 29; ***or,***

(2) ***the deposition is taken by sound-and-visual means in compliance with Rule 30(b)(4) and 30(f), and the notice for the taking of the deposition further states the name of the person before whom the deposition will be taken and the relationship, if any, of this person with any attorney or party.***

MEMORANDUM

TO: Civil Procedures Study Commission - Discovery Subcommittee

FROM: Irvin W. Hankins III

DATE: February 24, 1998

RE: **NORTH CAROLINA RULES OF CIVIL PROCEDURE**
Rule 26(b)(4) - Proposed Language

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(4) **Trial Preparation: Experts.** Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial may be obtained only as follows:

(A) By an interrogatory which shall be deemed to be a single interrogatory for purposes of Rule 33(a), a party may require any other party to identify each person who the other party expects to call as an expert witness at trial or use in support of any motion to be presented to the court, and with respect to any such person so identified except a treating physician who is also a fact witness, the following information shall be provided in response to the interrogatory,:

(i) The qualifications of the witness which justify designation of the witness as an expert;

(ii) The description of the discipline or field of study with respect to which the witness is to be used as an expert;

(iii) A list of all publications which the witness has authored in the preceding ten years;

(iv) All terms of any agreement or arrangement made with the expert regarding his compensation for his engagement as an expert;

(v) A list of all other cases in which the witness has testified within preceding five years either at trial or by deposition;

(vi) A statement of all opinions to be expressed by the witness and the basis of the opinions or the reasons by which the expert justifies the opinions;

(vii) The data or other information considered by the witness in forming the opinions so identified;

(viii) The exhibits to be used as a summary of or support for the opinions so identified.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or by order of the court upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) A party may depose any person who has been identified as an expert whose opinions may be presented at trial or used in support of any motion to be presented to the court.

(D) Unless manifest injustice would result, the court shall require that the party seeking discovery to pay the expert a reasonable fee for time spent preparing for and responding to discovery under subdivision (b)(4)(B) or (C) of this rule.

MEMORANDUM

TO: Civil Procedures Study Commission - Discovery Subcommittee

FROM: Irvin W. Hankins III

DATE: February 24, 1998

RE: **NORTH CAROLINA RULES OF CIVIL PROCEDURE**
Rule 37(a)(2) - Proposed Language

---

(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 the 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 or 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 such a motion is made, the court may refer the motion to a mediator certified by the ~~Administrative Office of the Courts~~ and the parties shall attempt to resolve the discovery dispute in accordance with mediation procedures established by the court or agreed to by the parties. If the mediation is unsuccessful the pending motion under Rule 37 shall be addressed by the court in due course. The cost of said mediation shall be initially borne equally by the parties. The court may allocate the costs if appropriate in its discretion pursuant to petition of any party seeking such allocation.

Dispute Resolution Commission

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February 16, 1998

Writer's Email
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Post-Discovery Subcommittee Members

Judge Marvin Gray, Senator R. C. Soles,
Alan Miles and Vance Perry

Re: February 12, 1998 Meeting of Subcommittee and Meeting of Civil Procedure Study Commission

Gentlemen:

Due to the fact that there were only two of us in attendance at the Subcommittee meeting on February 12, and the fact that there was a lengthy discussion of this Subcommittee's views at the regular meeting of the Commission (which will appear in the minutes of that meeting), I am not preparing formal "Minutes" for our February 12 Subcommittee Meeting.

Nevertheless, I wanted to confirm with all of you the proposals that were made by this Subcommittee (represented by Alan Miles and me) at the February 12 meeting of the Commission.

A. **RULE 41(a)(1)** -- After some discussion, we were unable to come up with what we felt was a real good solution to the complaint raised by some Commission members of the Plaintiff's being able to file a Notice of Voluntary Dismissal up to the point in time where the Plaintiff rested his case at trial. The Federal Rule provides a "clean cutoff" which is before a responsive pleading is filed; however, it did not appear to us that there was strong sentiment for cutting off the "free dismissal" this early in the North Carolina practice. We concluded that one possibility might be to require the dismissal to be taken "before the case was called for trial or hearing on a dispositive motion". We invited other suggestions from the Commission members; and would do so again at this time.

B. **RULE 46(b)&(c)** -- I enclose for each of you a copy of the proposed amendments to Rule 46(b) & (c) which I understand have passed the House and are in Senator Cooper's Senate Committee. Although I have some concern that we were not certain exactly what the drafters of the

proposed amendment to Rule 46(b) were attempting to accomplish, we did have some concern about the proposed Amendment to Rule 46(b). More particularly, on Line 13, we felt that the sentence should be concluded with a "." either after the word "unnecessary" or after the word "preserved"; and in any event that the final phrase "until entry of final judgment" should be deleted.

Additionally beginning on line 18, we felt that there should be a "." after the word "action"; a deletion of the word "and", and the beginning of a new sentence with the word "If". This sentence would continue through the word "prejudice" on line 20 and thereafter would be modified to read after the word prejudice ". . . that party; however, in order to preserve exceptions to such rulings and orders for appellate review, a party shall present to the court a request, objection, or motion, stating the specific grounds for the ruling that the party desires the court to make upon having an opportunity to do so".

We do not necessarily believe Rule 46(b) should be amended; however, if there is an amendment, our recommendation is as indicated hereinabove.

We do agree with the deletion of Rule 46(c) because it appears to be directly in conflict with Rule 10(b) of the Rules of Appellate Procedure.

C. **RULE 55(b)(2)** -- I enclose a copy of the proposed amendment to Rule 55(b)(2). It is my understanding that this particular amendment was deleted from the bill before it was passed by the House and transmitted to the Senate; however, it is further my understanding, that the bill that presently resides in the Senate is a vehicle by which this proposed amendment could be implemented should the General Assembly wish to do so.

You will note that the proposed amendment creates a subparagraph "a" and a subparagraph "b", the subparagraph "a" being essentially the existing rule.

The Subcommittee was in favor of the proposed amendment to create subparagraph b; but with the modifications as written in on the copy of the proposal which is enclosed. It appears that the purpose of the amendment would be to allow the obtaining of a default judgment (after some appearance by the Defendant) without the necessity of a hearing rather than "oral argument"; therefore, we felt

that everywhere the words "oral argument" appeared, they should be replaced by "a hearing". Additionally, we felt that the word "will" in line 27 should be replaced by the word "may".

Finally, we felt that the language "within 30 days of service of the motion" should be inserted after the word "writing" on line 32.

D. **RULE 56** -- Members of the Commission had expressed concerns about some way to make Rule 56 more effective in disposing of issues in cases. Our review of the language of Rule 56(d) "Case Not Fully Adjudicated on Motion" revealed that the language already says "If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy . . . . It shall thereupon make an order specifying the facts that appear without substantial controversy. . . ." It appeared to us that the language already is "pretty mandatory"; and once again it appears to be less of a problem with the language than with getting the Court to recognize and enforce the language.

There was one suggestion that at the end of Rule 56(c), language could be inserted to the effect that "Should the matter not be disposed of by the court upon motion, the court shall proceed as directed under subparagraph (d) hereinbelow".

Once again we welcome any suggestions anyone may have.

E. **RULE 65** -- I enclose a copy of the specific proposal made by the Subcommittee regarding an amendment to Rule 65 of the North Carolina Rules of Civil Procedure. As you will see, this would essentially change the first sentence of Rule 65(b) to conform to the Federal rule.

There was some discussion as to whether this would result in any other changes in North Carolina law; and from a careful reading and comparison of the present North Carolina Rule 65 and the present Federal Rule 65, it does not appear that there would be any change in practice other than the improved "notice requirement" before obtaining a TRO.

F. **RULE 68** -- I enclose for you a copy of the specific proposal by the Subcommittee with respect to an amendment to Rule 68. Please note that this enclosure indicates that it is Senate Bill 551; however, it does in fact have three modifications over the actual existing Senate Bill 551.

These modifications are as follows:

1. The language "upon the adverse party" is eliminated from line 10 to eliminate the suggest that service would be only upon "the offeree" in a multi-party case.

2. Language is added to the end of the sentence on line 15 of p.2 so that the sentence, as rewritten, would read ". . . of the offer, and shall not be entitled to interest or attorneys' fees incurred after service of the offer".

   This language was added due to the definition of "costs" contained in the definition portion of the bill. There was discussion at the Commission meeting regarding the propriety of cutting off "interest"; however, in considering this, it should be noted that this amendment specifically provides that "interest" can be obtained upon accepting an Offer of Judgment (which is contrary to present case law); therefore, it was thought that if interest can be obtained by accepting the Offer of Judgment, a rejection of the Offer of Judgment and a failure to do better at trial should result in a cutting off of the post offer interest as with costs and attorneys' fees.

3. Beginning on line 23 of p.2 subparagraph (4) is added. The basis for this proposal was to create some certainty as to the exposure for attorneys' fees if an offer under $10,000.00 (and subject to G.S. §6-21.1) were accepted. It was felt that this provision provided some balance to the provision of this Bill which declares that "lump sum" Offers of Judgment are not valid Rule 68 Offers of Judgment. This provision was clearly the most controversial aspect of this recommendation; and in light of the fact that there were only two members of our Subcommittee present at the Subcommittee meeting, I would appreciate all four of you giving careful consideration to this portion of the recommendation

and letting me know before our next meeting, which is scheduled for Wednesday, March 4, 1998, what your specific vote is as to whether to include subparagraph (a)(4) in our recommendation to the full Commission for its action.

By copy of this letter to all members of the Commission, I am providing them with the status of all our proposals to date with the hope that it will facilitate a discussion and a vote at our next meeting on March 4, or, in any event, before we have to report to the General Assembly.

I look forward to any questions, comments or suggestions any of you, or any of the Commission members, may have.

Best wishes.

Yours very truly,

BATTLE, WINSLOW, SCOTT & WILEY, P.A.

Marshall A. Gallop, Jr.

MAGjr:hj

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the admission of evidence is sustained or if the court for any reason excludes evidence offered by a party, the ruling of the court shall be deemed excepted to by the party offering the evidence.

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

(b) ~~Rulings~~ Pretrial rulings, interlocutory orders, trial rulings, and other orders not directed to the admissibility of evidence. -- With respect to ~~rulings~~ pretrial rulings, interlocutory orders, trial rulings, and other orders of the court not directed to the admissibility of evidence, formal objections and exceptions are ~~unnecessary.~~ unnecessary, and are deemed to be preserved until entry of final judgment. In order to preserve an exception to any such ruling or order or to the court's failure to make any such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court ~~his~~ the party's objection to the action of the court or makes known the action ~~which he~~ that the party desires the court to take and ~~his ground therefor;~~ the party's grounds for this action; and if a party has no opportunity to object or except to a ruling or order at the time it is made, the absence of an objection or exception does not thereafter prejudice ~~him.~~ that party; however, in order to preserve ~~these~~ exceptions to rulings and orders for appellate review, a party shall present to the court a ~~timely~~ request, objection, or motion, stating the specific grounds for the ruling that the party desires the court to make, ~~and shall obtain a ruling upon the party's request, objection, or motion.~~ upon having an opportunity to do so.

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

Section 5. G.S. 1A-1, Rule 55(b) reads as rewritten:

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

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

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

consummate foreclosure in accordance with the procedure provided in Article 29A of Chapter 1 of the General Statutes, entitled 'Judicial Sales.'

(2) By the Judge. --

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

b. Motions for judgment by default ~~will~~ may be decided by the court without ~~oral argument~~ a hearing when the party seeking judgment by default specifically provides in a motion that judgment by default will be decided by the court without ~~oral argument~~ a hearing if the party against whom judgment is sought fails to respond in writing. This subdivision does not apply when (i) the party against whom judgment is sought serves a written response stating that party's grounds for opposition to the motion within 30 days of service of the motion, or (ii) the court orders ~~oral argument.~~ a hearing."

Section 6. This act becomes effective October 1, 1997, and applies to causes of action commencing on or after that date.

NC Rule 65 (b) – First Sentence

(b) **Temporary Restraining Order; Notice; Hearing; Duration.** A temporary restraining order may be granted without notice to the adverse party if it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon.

Recommend Replacing By:

Federal Rule 65(b) – First Sentence As Modified

(b) **Temporary Restraining Order; Notice; Hearing; Duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by ~~the~~ verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1997

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With Proposed Amendments By Post-Discovery Subcommittee

SENATE BILL 551

PROPOSED COMMITTEE SUBSTITUTE S551-CSRN-001

Short Title: Amend Offer of Judgment Rule. (Public)

Sponsors: Senator Cooper.

Referred to: Judiciary.

March 27, 1997

A BILL TO BE ENTITLED

AN ACT TO AMEND RULE 68 OF THE RULES OF CIVIL PROCEDURE REGARDING OFFERS OF JUDGMENT.

The General Assembly of North Carolina enacts:

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

"Rule 68. Offer of judgment and disclaimer.

(a) Offer of judgment. --

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

(2) If within ~~10~~ 30 days after the service of the offer the adverse party serves written notice that the

offer is accepted, either party may then file the offer and notice of acceptance together with proof of service ~~thereof and thereupon the clerk shall enter judgment.~~ thereof. The court shall determine costs, interest, and statutorily authorized attorneys' fees and enter judgment accordingly. An offer not accepted within ~~10~~ 30 days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. The defending party shall file the offer deemed withdrawn prior to the proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after ~~the making~~ service of the ~~offer.~~ offer, and shall not be entitled to interest or attorneys' fees incurred after service of the offer. The fact that an offer is ~~made~~ served but not accepted does not preclude a subsequent offer.

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

(4) If an offer is served and accepted pursuant to this subsection, and the court awards attorneys' fees pursuant to G.S. 6-21.1, the attorneys' fees awarded shall not exceed one third (1/3) of the offer as it is defined in this Rule.

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

(c) Definitions. -- For purposes of this rule:

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

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

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

Section 2. G.S. 1A-1, Rule 84 is amended by adding a form at the end to read:

"(17) Offer of Judgment Under Rule 68(a).

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

Section 3. This act becomes effective October 1, 1997, and applies to offers of judgment made on or after that date.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1997

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98-RN-0007
(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)

Short Title: Civil Procedure Rules Enabling Act (Public)

Sponsors: <cSponsor>

Referred to:

A BILL TO BE ENTITLED

AN ACT TO AUTHORIZE THE SUPREME COURT TO ADOPT THE RULES OF CIVIL PROCEDURE.

The General Assembly of North Carolina enacts:

Section 1. G.S. 7A-34 reads as rewritten:

"**§ 7A-34. Rules of practice and procedure in trial courts.**

~~The Supreme Court is hereby authorized to prescribe rules of practice and procedure for the superior and district courts supplementary to, and not inconsistent with, acts of the General Assembly.~~ Pursuant to the authority hereby delegated to it by the General Assembly under Article IV, section 13 of the Constitution of North Carolina, the Supreme Court shall adopt and may from time to time amend the rules of civil practice and procedure for the superior courts and district courts. The Supreme Court may appoint an advisory committee on civil practice and procedure. Each new rule or amendment shall become effective sixty days after publication in the North Carolina Register, unless the Supreme Court specifies a later effective date. The General Assembly may alter, amend, or repeal any rule of civil practice or procedure adopted by the Supreme Court, and it may enact new rules.

Section 2. Effective January 1, 1999, Chapter 1A of the General Statutes (Rules of Civil Procedure) are repealed. The Rules of Civil Procedure as set out in Chapter 1A of the General Statutes on December 31, 1998 are deemed adopted by the Supreme Court pursuant to G.S. 7A-34, as enacted in this act, until repealed or modified by the Supreme Court or the General Assembly.

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Section 3. The Revisor of Statutes shall delete references to "G.S. 1A-1" and make appropriate punctuation changes as a result of the deletions in the following statutes:

(1) G.S. 7A-211.1. Actions to enforce motor vehicle mechanic and storage liens.
(2) G.S. 15A-711. Securing attendance of criminal defendants confined in institutions within the State; requiring prosecutor to proceed.
(3) G.S. 15A-801. Subpoena for witness.
(4) G.S. 15A-802. Subpoena for the production of documentary evidence.
(5) G.S. 35A-1101. Definitions.
(6) G.S. 35A-1108. Issuance of notice.
(7) G.S. 35A-1109. Service of notice and petition.
(8) G.S. 35A-1110. Right to jury.
(9) G.S. 35A-1112. Hearing on petition; adjudication order.
(10) G.S. 35A-1130. Proceedings before clerk.
(11) G.S. 35A-1202. Definitions.
(12) G.S. 35A-1207. Motions in the cause.
(13) G.S. 35A-1211. Service of application, motions, and notices.
(14) G.S. 35A-1222. Service of application and notices.
(15) G.S. 35A-1251. Guardian's powers in administering minor ward's estate.
(16) G.S. 46-28.1. Petition for revocation of confirmation order.
(17) G.S. 50-8. Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.
(18) G.S. 53B-5. Service on customer certification.
(19) G.S. 95-135. Safety and Health Review Board.
(20) G.S. 104E-6.2. Local ordinances prohibiting low-level radioactive waste facilities invalid; petition to preempt local ordinance.
(21) G.S. 110-136. Garnishment for enforcement of child support obligation.
(22) G.S. 110-136.3. Income withholding procedures; applicability.
(23) G.S. 110-136.4. Implementation of withholding in IV-D cases.
(24) G.S. 110-136.5. Implementation of withholding in non-IV-D cases.
(25) G.S. 130A-293. Local ordinances prohibiting hazardous waste facilities invalid; petition to preempt local ordinance.
(26) G.S. 143-129.1. Withdrawal of bid.
(27) G.S. 143-215.57. Procedures in issuing permits.

(28) G.S. 143-298. Duty of Attorney General; expenses; subpoenas.

(29) G.S. 150B-33. Powers of administrative law judge.

(30) G.S. 153A-123. Enforcement of ordinances.

(31) G.S. 160A-175. Enforcement of ordinances.

The Revisor of Statutes may delete statutory references to G.S. 1A-1, consistent with this act, in any other statute.

Section ~~3~~ 4. This act becomes effective January 1, 1999.