CIVIL LITIGATION STUDY COMMISSION

REPORT TO THE

2001 SESSION OF THE

2001 GENERAL ASSEMBLY

OF NORTH CAROLINA

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TABLE OF CONTENTS

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PREFACE

The Civil Litigation Commission, established by Part XI of S.L. 1999-395, was directed to study a broad range of issues involving civil litigation including all practices and procedures that affect the speed, fairness, and accuracy with which civil actions are disposed of in the trial divisions of the General Court of Justice, including the rules of civil procedure, rules of evidence, other relevant statutes, statewide and local court-adopted rules of practice and procedure, administrative rules, appellate opinions, and all other relevant practices, customs, and traditions in the trial courts of North Carolina and practices and procedures that (i) reduce the time required to dispose of civil actions in the trial divisions; (ii) simplify pretrial and trial procedure; (iii) guarantee the fairness and impartiality with which the claims and defenses are heard and resolved; and (iv) increase the parties' and the public's satisfaction with the process of civil litigation.

The Commission was comprised of eighteen members, six appointed by the President Pro Tempore of the Senate, six appointed by the Speaker of the House and six appointed by the Chief Justice of the Supreme Court. Cochairs of the Commission were appointed by the President Pro Tempore and the Speaker.

The Commission was directed to make a final report to the 2001 General Assembly no later than March 1, 2001. Upon issuing its final report, the Commission shall terminate.

The relevant portions of Part XI of S.L. 1999-395 are included in Appendix A. The full membership of the Committee is listed in Appendix B of this report. A committee notebook containing the committee minutes and all information presented to the committee will be filed in the Legislative Library.

COMMISSION PROCEEDINGS

First Meeting – March 28, 2000

The Civil Litigation Study Commission held its initial meeting on March 28, 2000.

O. Walker Reagan, Commission Co-counsel explained the charge to the Commission, as set out in the authorizing legislation, as being a study of the following:

- Civil Litigation trial procedures.
- District Court jurisdiction.
- Pre-litigation disclosure of insurance policy limits and mandatory mediation.
- Workers' compensation benefits.
- Public duty doctrine issues.

He also stated that the trial procedure issues were carry-overs from the former Civil Procedure Study Commission that had recommended fifteen changes to the Rules of Civil Procedure in 1998. Of those recommendations, he noted that only one rule, Rule 55, had been changed.

The Honorable Henry Frye, Chief Justice of the North Carolina Supreme Court, addressed the Commission. He noted the broad scope of the legislation outlining the Commission's work and suggested that the Commission not attempt to do too much, but rather make concrete recommendations to improve the administration of justice. He also urged the members to consider the financial impact of their recommendations and suggested coordination with other commissions when feasible. Chief Justice Frye briefly discussed some matters that have been, or would be presented to the Courts Commission:

- What happens when the courts are closed due to natural disasters and emergencies?
- Speeding up the jury selection process.
- Jurisdiction levels for the various courts and court officials.

He also spoke of the need for improvement in technology in the court system, noting that the system of electronic filing of briefs has worked very well in the Supreme Court and that it is hoped that this will soon be expanded to the Court of Appeals.

Mr. Peter Powell, Deputy Director, Administrative Office of the Courts, suggested that if the Commission studied the issue of the division between jurisdictional levels, it should look at the entire spectrum and determine the caseload levels and the resources needed to address the problem at every level. He also spoke of efforts underway to provide electronically published calendars. He stated that the cost and labor intensity of making copies, printing and mailing calendars is not justified in today's high technology world when such a high percentage of attorneys can access electronically published calendars. Mr. Powell stated that the AOC hoped to suggest to the court that they consider a revision to the general rules of practice to update those rules.

Mr. Powell recommended that the Commission consider making the following changes to the Rules of Civil Procedure:

- An amendment to Rule 9(j) regarding extending the statute of limitations in malpractice actions.
- An amendment to Rule 63 regarding entry of judgment by substitute judge.

Mr. Powell also stated that the Superior Court Judges Conference may offer some suggestions to the Commission including:

- An amendment to Rule 26 (f) regarding case management authorities of senior resident superior court judges.

- An amendment to Rule 4 regarding the failure to provide for consequences if returns of service are not filed.

Next the Commission heard from Mr. Burton Craige, cochair of the 1997 Civil Procedure Study Commission. Mr. Craige noted that the charge of the previous Commission was limited to the study of the Rules of Civil Procedure. He said that various groups submitted ideas, and it was determined by the Commission to omit the more controversial proposals. Mr. Craige said that fifteen proposed changes in Rules, which were consensus recommendations, were submitted to the General Assembly. Those changes were not enacted and Mr. Craige urged the Commission to work toward achieving passage of the proposals by the Legislature.

Mr. Richard Taylor, Executive Director, North Carolina Academy of Trial Lawyers, spoke to the Commission. He discussed Senate Bill 393 of the 1999 Session regarding the advanced circulation of briefs on dispositive motions in civil matters in superior court. He noted that this was the most successful of the proposals offered by the 1997 study commission. The problem that the bill sought to address was "motion practice by ambush." He said that the bill was pending consideration during the 2000 Legislative Session and urged the Commission to review this proposal. He also discussed the issue of district court jurisdiction and urged the Commission to look into the question of small insurance claims and what can be done to promote settlement. Mr. Taylor expressed support for study of the public duty doctrine issue and for changes to Rule 9(j) to develop proposals for the next long session of the General Assembly.

Mr. Sam Woodley, Past-President, North Carolina Association of Defense Attorneys, stated that the Civil Procedure Study Commission made an excellent bipartisan effort to offer proposals that made corrections to the Rules of Civil Procedure and expressed disappointment that none of the proposals had been enacted by the Legislature. He suggested to the members that they review those proposals and offer them to the General Assembly again. Mr. Woodley noted the broad charge of the Commission, and urged the members to limit their efforts in a practical way. He believes that the Association would support efforts to offer amendments to the public duty doctrine and Rule 9(j). He said, however, that the issue regarding small claims was more complex and would require much study.

Representative Phil Haire, Commission cochair, stated that he felt the charge given to the Commission to study all practices and procedures affecting the speed, fairness and accuracy with which civil actions are disposed of in the trial divisions of the General Court of Justice was too broad to be considered in the time given to the Commission. With regard to the public duty doctrine, Representative Haire noted that the LRC State Tort Liability and Immunity Committee was also considering studying that issue.

Second Meeting – August 23, 2000

The second meeting of the Civil Litigation Study Commission was held on August 23, 2000. The meeting began with a review of actions taken in the 2000 Session of the General Assembly involving issues before the Commission. Frank Folger, Commission Co-Counsel, reviewed Senate Bill 393 that was enacted into law. He explained that the bill mandates that, to the extent offered, briefs or memoranda supporting or opposing dispositive motions being heard in civil superior court must be served on each party at least two days before the hearing on the motion. The law requires that the served party must actually receive the document within the required time. The act applies the same rules

to affidavits in opposition to all non-ex parte written motions and to affidavits in opposition to a motion for summary judgment.

Cochair Nick Ellis noted that the requirement appeared to apply only to superior court and asked if there was conscious decision to limit it to superior court. Mr. Burton Craige recalled that there had been some opposition from district court practitioners to the act applying to district court cases. Cochair Phil Haire said that he did not want to see a situation develop that would establish two rules of practice between superior court and district court. Cochair Ellis suggested that the Commission might include in its report that the briefing requirement is only applicable to superior court. Mr. Craige noted that the new legislation is an improvement over prior practice and that over time it may be realized that the procedure works well in superior court and that the logical next step might be to include district court.

Next the Commission heard remarks from Mr. Howard McClure addressing the need for the appointment of counsel in civil actions. Mr. McClure, a former employee of the City of Charlotte, was injured on the job and was discharged. He brought an action in federal court that he ultimately lost despite having previously been awarded unemployment compensation, because he was unable to afford counsel to represent him after his first attorney withdrew from the case because of a conflict of interest. Mr. McClure spoke of the need for appointed counsel in civil actions comparable to that of criminal cases for persons who cannot afford counsel.

Next the Commission began a detailed review of the legislation recommended in 1998 by the Civil Procedure Study Commission. Mr. Frank Folger stated that eleven recommendations were made by the Civil Procedure Study Commission and were rolled into Senate Bill 1277 in 1998. Mr. Folger noted that the recommendations could be divided into three categories: 1. service of process related recommendations; 2. discovery related recommendations, and 3. trial proceeding recommendations. The bill was referred to the Senate Judiciary Committee. A proposed committee substitute eliminating two of the recommendations having to do with service of summons by notaries public and offers of judgment was reported out of committee. The bill passed the Senate and was referred to the House Judiciary II Committee where it was not considered.

Representative Pope asked if a similar bill had been introduced during the 1999 Session of the General Assembly. Mr. Walker Reagan stated that Senate Bill 393 was enacted in 2000 as S.L. 2000-127 amending Rule 5(f) requiring filing briefs in support of motions two days prior to a hearing on the motion and Senate Bill 921 was enacted in 1999 as S.L. 1999-187 amending Rule 55(b) concerning entry of default judgment. He commented that the bulk of the recommendations were not re-introduced.

Ms. Trina Griffin, Commission Co-Counsel, was recognized to review four possible changes to the Civil Procedure Rules that were suggested by the Superior Court Judges Conference. The four rules discussed were:

- Rule 4 - Service of Process
- Rule 9(j) - Extension of statute of limitations in medical malpractice cases by resident superior court judge
- Rule 26(f) - Discovery rule having to do with case management authority of a resident superior court judge in setting a discovery conference and issuing an order
- Rule 63 - To allow for a substitute judge to perform duties when a judge is unable to do so because of death, sickness or other disability

Ms. Griffin noted that Senate Bill 1012, introduced in 1999 by Senator Roy Cooper had sought to make corrections to Rule 9(j).

Representative Pope commented on the failure of Senate Bill 1012 that addressed Rule 9(j). He said that the bill was debated in terms of "judge shopping" and he felt that was the reason the bill had failed to pass in the House. He noted that if hardship and unavailability was the problem, and there was no resident judge in a county, the rule should allow a broader class of judges who can sign the order conditioned only upon the unavailability of a resident superior court judge of the county in which the claim arose. As now proposed, it unconditionally adds an entire new class of judges who may sign the order.

Mr. Pete Powell, from the Administrative Office of the Courts, presented several additional issues for possible study by the Commission. Mr. Powell spoke of sufficiency of notice and calendaring of cases. He said that the AOC has encouraged the use of a number of practices including printing and mailing calendars to out-of-county attorneys and pro se litigants, placing copies of calendars in boxes in the clerk's offices, and publishing calendars electronically. He stated that the high cost and labor intensity of making copies of, printing and mailing calendars is not justified in today's technology-based world where a high percentage of attorneys can access electronically published calendars. He said that the AOC would like to remove any questions regarding the sufficiency of any of the previously mentioned notices and suggest language that would say, "publish under methods, procedures or guidelines suggested or approved by the Administrative Office of the Courts." He noted that out of county attorneys and pro se litigants should continue to receive mailed copies of the calendar.

Cochair Haire asked how well equipped the courthouses currently are with respect to electronic technology. Mr. Powell replied that the technology capabilities are woeful and resources would be needed to aid the implementation. He reviewed efforts underway to assess those needs.

Cochair Ellis stated that he would like for the Commission to study the provisions of law governing motions in limine. Specifically, he noted that there is currently no provision that would allow a judge to rule on a motion in limine prior to the beginning of a trial. He added that such a provision might improve the efficiency of the judicial system and promote settlement.

The Commission discussed the issue of raising the Civil District Court jurisdiction, and a suggestion was made to the cochairs to consider appointing a subcommittee to review this issue and report back to the full Commission.

Subcommittee on Civil District Court Jurisdiction Meeting – September 22, 2000

The Subcommittee on Civil District Court Jurisdiction of the Civil Litigation Study Commission consisting of Representative Lyons Gray, chair and Ms. Janet Ward Black, Mr. Burton Craige, Mr. James Cooney and Mr. Keith Kapp met on Friday, September 22,

Mr. Frank Folger, Commission Co-Counsel, briefed the subcommittee on current law and the legislative history of recent attempts to change the jurisdictional amount for civil actions. He reviewed Senate Bill 955, AN ACT TO RAISE THE AMOUNT IN CONTROVERSY THAT DETERMINES THE PROPER DIVISION FOR TRIAL OF CIVIL ACTIONS AND TO ALLOW COUNSEL FEES AS PART OF COSTS IN CERTAIN CIVIL ACTIONS, a bill that was introduced during the 1999 Session of the General Assembly. The bill sought to change the civil district court jurisdictional amount from $10,000 to $20,000 and to amend the statute allowing for plaintiff's attorney's fees in cases between an

insured and his insurer where the court finds the insurer's unwarranted refusal to pay a claim. He also commented briefly on Senate Bill 116 (1998 Session), and Senate Bill 1231 (1997 Session). These bills, which were never heard in committee, attempted to increase the amount in controversy for civil cases heard in district court from $10,000 to $25,000 and resulted from recommendations of the Courts Commission. These bills also included additional provisions other than increasing the jurisdictional amount that may have been a source of dispute.

Mr. Pete Powell, Deputy Director, Administrative Office of the Courts, told the subcommittee that the AOC feels that a comprehensive study of jurisdiction should be undertaken throughout the courts system, and that district court judges, clerks, and magistrates should be consulted as well as superior court judges. He further noted the need to consider the resources needed at each level to hear, decide and handle those cases. He discussed the potential impact of Senate Bill 955 on the Judicial Branch.

The subcommittee considered a proposed draft requested by Representative Gray that would raise the amount that may be in controversy in district civil court from $10,000 to $20,000. Representative Gray noted that the proposed language does not include the insurance issue or other Rule 8 matters.

Mr. Craige expressed support for increasing the jurisdictional amount noting the length of time since the last increase. In terms of the number of cases that would be shifted from superior court to district court, Mr. Craige suggested that the estimate might be too high. He said that he felt that the number of superior court judges would not be cut, but that there would be less pressure on them if their caseloads were diminished and the cases were shifted into a place where they could be handled more efficiently.

Mr. Kapp noted the probability of the need to add district court judges and expressed support of the shift to $20,000. He agreed that the insurance issue should not be included in the legislation. He noted support for inclusion of the Rule 8(a) provision and for input from judges.
Ms. Black and Mr. Craige also stated that Rule 8(a) should be included and expressed support for input from judges. Mr. Powell noted that there might be a need for changing the jurisdiction for arbitration cases.

Mr. Robert Kaylor, North Carolina Association of Defense Attorneys, said that he felt that the association would support the proposed civil district court jurisdictional amount of $20,000, and the inclusion of arbitration. He said that he felt they would oppose any change regarding the insurance cap.

Representative Gray noted that there appeared to be agreement with respect to raising the jurisdictional amount to $20,000, and agreement for inclusion of arbitration and provisions of Rule 8(a). Mr. Folger noted that the language included in the draft was essentially what the subcommittee had agreed upon except that the amount in controversy would be $20,000 instead of $25,000. The subcommittee decided to recommend the draft with these changes to the full Commission.

Third Meeting – October 4, 2000

The third meeting of the Commission was held on October 4, 2000. Mr. Frank Folger, Commission Co-counsel, explained proposed changes to Rule 4(a). The first would change the service of process rules to allow notary publics to serve summons in addition to sheriffs. The second change

would allow substitute personal service by a private delivery service. The third change to Rule 4 would extend the life of a summons from thirty to sixty days.

Mr. David Ferrell, representing the North Carolina Sheriff's Association, stated that the association had historically opposed the private service of process by notaries or other private individuals. He noted that there were safety concerns regarding the serving of papers by private individuals in potentially tense situations.

Mr. Dick Taylor, representing the North Carolina Academy of Trial Lawyers, stated that the sheriffs were concerned about the possible loss of revenue. He noted that the draft was very similar to the bill that was introduced in the last session of the General Assembly and that the Academy had supported that bill.

Cochair Ellis noted that a summons is the only pleading that is currently limited to service by the sheriff's department.

Mr. Pete Powell, Deputy Director of the Administrative Office of the Courts, noted that Section 3.3 regarding service by private delivery service called for certification by the AOC and asked what standard they would use in determining certification? He questioned whether the AOC was the proper authority to certify. He suggested that the Office of the Secretary of State might be the proper place for certification. Mr. Powell also suggested that the staff consider taking a look at the process for naming an agent for the purpose of effecting service of process, which is a matter of registering with the Secretary of State.

Mr. Folger stated that notes from the original Civil Procedures Study Commission indicated discussion of minimum standards of reliability such as being bonded and securing approval by an entity such as the State Bar, but did not include specific standards.

Mr. Kapp expressed concern regarding including a requirement for certification, but not establishing a procedure for obtaining it. He noted that he saw no benefit for certification because it would be up to the person who was allegedly wrongfully served or not served to bring the proof as to why they were not served properly. He noted that certification by a state agency, being the Secretary of State or the AOC, would not help that much except perhaps in a technical defense to the propriety of the service. He suggested that language could be included saying that service could be done by a private delivery service that obtains a delivery receipt after delivering to the addressee.

Mr. Reagan said that the Secretary of State could certify, if criteria are established. He also pointed out that there was little difference between establishing registration rules and using federal rules. He questioned the advantage of registration other than being able to go to a central location to determine if the person has paid a fee and is on record. He asked if anything is gained in terms of protection of the process of service.

Mr. Armstrong stated that registration would create more of a problem than it would solve. He suggested that a process similar to the federal rule be established.

Representative Pope suggested that a registration process be established. He thought the issue could be resolved by statutory definition of criteria and noted his opposition to the use of the federal rules.

Mr. Folger was recognized to explain Section 4 regarding service of pleadings and papers by fax. He stated that the section authorizes service of pleadings subsequent to the original complaint by fax and states that it must be sent to the attorney's office between the hours of 9:00 a.m. and 5:00 p.m. on a regular business day. If delivery is outside the permitted times, service will be deemed to have been completed on the next business day.

Representative Michaux asked why the time could not be extended to 6:00 p.m. to allow time for the transmittal of a fax if one missed the last run at the post office. Cochair Haire replied that he thought the 5:00 time was used to coincide with normal business hours. Representative Pope noted that a fax may be "sent" by specific deadline, but that it may not be transmitted and "received" by that deadline.

Mr. Dick Taylor, North Carolina Academy of Trial Lawyers, was recognized and stated that the General Assembly passed a bill in the last session regarding the exchange of briefs on dispositive motions that authorized the exchange of briefs by facsimile two days prior to hearing and required actual receipt.

There was considerable discussion regarding the definition of "delivery" of service and whether delivery is considered complete when the fax is transmitted or when it is received. Representative Pope stated that he thought clarification was needed to indicate that delivery includes receipt. Ms. Black suggested that the word "delivery" on line 24 of page 13 be changed to "receipt." Ms. Duncan noted the need to extend the time to 6:00 to allow faxing transmittals that may have been sent prior to the deadline, but were stored for a while before being received. Ms. Black stated that the fax should be received by 5:00 p.m.

Mr. Armstrong stated that a requirement should be included that a hard copy should also be sent by mail when service is made by fax. He also said that he felt that there should be no difference in service by fax than by mail with regard to the time restraints and that the fax should not be limited to 9:00 a.m. to 5:00 p.m. He said it should be deemed served when received, with electronic proof of receipt.

Representative Gray suggested the following language: "by sending it to the attorney's office by telefacsimile. If receipt by fax is outside the normal business hours, service shall have been deemed received the next business day."

Mr. Reagan stated that confirmation of receipt language could be included. He noted that the discussion seemed to indicate a desire to keep a distinction between the mailbox rule and the personal service rule.

Ms. Trina Griffin, Commission Co-counsel, noted that sometimes a fax machine indicates a fax has gone through, but the receiving machine may be out of paper or ink and the fax was not actually transmitted. Mr. Kapp noted that the time should not be tied to the clock on a machine. Mr. Armstrong stated that a hard copy should be provided within 3 days.

Cochair Haire summarized by saying that he felt the general consensus was to follow the personal service rule with regard to the faxing of service and leave the service by mail rule the way it currently is. He said this could be accomplished by defining the receipt date on the fax and mailing a

hard copy. Cochair Ellis agreed that the 5:00 p.m. time should be included. Staff was asked to draft additional proposals to reflect these issues for the Commission's review.

Mr. Folger was recognized to explain Section 6 of the proposed draft. The section would amend Rule 28 regarding videotaped depositions. He said that the amendment would allow a videotaped deposition to be taken by a party otherwise disqualified, provided that the depositions is taken in compliance with rules for a videotaped deposition, and if the notice of deposition provides information of who the person is who is taking the deposition and their relationship and interest in the proceeding. Cochair Haire noted that this provision is a matter of convenience rule and Cochair Ellis noted that it would be a cost-saving rule. Upon vote of the Commission, the proposed rule change received unanimous support.

Mr. Folger explained the proposed change to Rule 37(a) in Section 7 of the bill regarding mediation of discovery disputes. The amendment would require that a party who is filing a motion for discovery attempt to resolve the matter informally by negotiation with the other party and to include in the motion a certification that an attempt was made in good faith to resolve the issue. Upon a vote of the members, the proposed language received unanimous approval.

Mr. Folger explained the proposed changes to Rule 46 in Section 8 of the bill dealing with preserving exceptions to rulings. The amendment makes changes to include pretrial rulings, interlocutory orders, trial rulings, and other orders not directed to the admissibility of evidence. It also clarifies that in order to preserve exceptions to these rulings and orders for appellate review, a party must 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 the opportunity to do so. The members voted unanimously to support the proposed change.

Mr. Folger explained the proposed changes to Rule 63 in Section 9 regarding the disability of a judge and the ability of a substitute judge to perform duties. The language lays out specifically that death, sickness, resignation, retirement, expiration of term, removal from office or other reasons constitute disabilities for purposes of this rule. It also makes clear that this rule applies to trials or hearings. The rule, among other changes, clarifies that a substitute judge may enter judgment on behalf of a disabled judge, if the hearing or trial has been concluded. The need to address this rule came about in part because of the statutory change, which makes judgments, orders and rulings effective when signed rather than when rendered. The proposed change received unanimous approval.

Mr. Folger explained the proposed changes to Rule 65(b) in Section 10 of the bill regarding notice for temporary restraining orders. Under the proposed change, the order may only be granted without written or oral notice to the adverse party or that party's attorney if it clearly appears from specific facts shown by affidavit or verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or attorney can be heard. Cochair Haire expressed mixed feelings about the recommendation. Representative Michaux also expressed opposition. Mr. Kapp pointed out that some superior court judges are already using this rule. The proposed rule change received approval with one dissenting vote.

Mr. Folger explained the proposed changes to Rule 68 in Section 11 regarding offer of judgment and disclaimer. The change would require that an offer of judgment be made at least 30 rather than 10 days before the trial and clarifies that the offer of judgment must state that the stated offer is the principal judgment that will later include interest and costs and any other awarded fees. The statutory

definition of “offer” in the bill defines what monetary elements can be included in the offer. Following considerable discussion, the staff was directed to prepare new language to more clearly define what constitutes an offer and that it would be discussed at the next meeting of the Commission.

Mr. Reagan explained the proposed changes to Rule 9(j). He stated that under current law, in medical malpractice actions, the statute of limitations can be extended under certain circumstances for up to 120 days. The problem that has arisen is that current law basically says that the judge who can sign an order extending the statute of limitations would be a resident judge of superior court of the county in which the cause of action arose. Mr. Reagan said that the troublesome language is "of the county," noting that some counties in the State do not have a resident superior court judge. He also spoke of the venue issue where the judge has to be of the county in which the cause of action arose although the venue where the lawsuit may be brought may not necessarily be the county where the cause of action arose. Currently, venue is based on either the county of residence of the plaintiff or the defendant, or if they are both out-of-state, in any county. He noted the additional concern that the resident superior court judge may not be holding court or be physically present in the county where an order needs to be signed.

Mr. Reagan said that staff had attempted to address the concern raised by Representative Pope regarding creating a judge-shopping situation. The staff also attempted to address the issue of whether the judge had to be physically located within the judicial district or could be holding court at another location by considering several alternatives.

Mr. Reagan briefly explained various alternatives that addressed the appropriate judge issue:

Alternative 1 would change the word "of" to "for" and would basically say that any resident superior court judge for that county could sign an order. That superior court judge could be holding court in that judicial district or anywhere in the State.

Alternative 2 states that a resident superior court judge for the county or a presiding superior court judge could sign an order. A judge from another judicial district, but holding court in that district, would have the authority to sign the order.

Alternative 3 states that if the resident superior court judge for the county is not physically present in that district, then a presiding judge of the superior court designated for that purpose by the chief resident superior court judge or the Administrative Office of the Courts could sign.

Alternative 4 provides that only the **chief** superior court judge for the county, rather than **any** superior court judge, could allow the motion. If that judge was not physically present in the district, then another judge specifically designated for Rule 9(j) matters could sign the order.

Mr. Steve Keene, North Carolina Medical Society, reminded the Commission that extending the statute of limitations is an extraordinary measure that should not be taken lightly. He said that the language in the current rule is a product of a very hard-developed compromise from 1995. He pointed out that there is no opportunity in the proposed changes for potential defendants to appear at the hearing on a motion and no notice is given to potential defendants. He said that there was a potential to get into a very difficult dialogue in the legislature about whether this rule is entirely fair one way or the other. He said that there are many reasons why this rule currently has the provisions that are in place. He stated that the notion of providing an opportunity to extend the statute of limitations came out of the debate about the special pleading requirement and Rule 702. He said that the very idea that the rule would allow for the extension of the statute of limitations drove some of the language that is in the rule

regarding who can hear the motion. He again reminded the Commission that this could open a very controversial and potentially contentious area for the upcoming session.

Cochair Haire stated that this language was not extending the statute of limitations but it was addressing who has the authority to sign an order. He said that the language makes the rule more logical and reasonable.

Mr. Taylor stated that there are a number of counties in the state where the 120-day motion is unavailable. This is not only because of the physical absence of the resident judge, but also because in some places, the resident judge cannot hear, or decides not to hear these motions. He said that the remedy is not available to the people who reside in those counties. He said that there should not be categories of citizens in North Carolina who cannot take advantage of the remedy.

Mr. Armstrong said that one side wants to keep a cork in the bottle that serves their best interest and restricts the granting of relief that the statute requires and the other side wants free access to it. He said that the restriction would make it less likely that a medical malpractice action will be filed.

Ms. Black noted that it is very difficult to be on the plaintiff's side in a medical malpractice suit in North Carolina. She said that alternatives 1, 3 and 4 would not solve the problems that she faces as a practitioner.

Cochair Ellis stated that alternative #3 is a compromise between the medical society's perspective and the Academy's perspective.

Cochair Haire suggested that the word **a** be changed to **any** on line 4 of alternative #3 so that the sentence would read, " or if no resident judge for the county is physically present or otherwise available in the judicial district, then any presiding judge of the superior court for the county as designated for this purpose by the chief resident superior court judge or the Administrative Office of the Courts."

It was the consensus of the Commission that this language was too vague. Cochair Haire asked the staff to redraft alternative #2 to comply with the amendment and develop new language for alternate #3 to be considered by the Commission at its next meeting. He also stated that the question of venue would be discussed at the next meeting.

Representative Gray was recognized to make a report of the District Court Jurisdiction Subcommittee. He stated that the subcommittee met on September 22, 2000 to discuss whether to raise the limit on matters being heard before the district courts from $10,000 to $20,000. The subcommittee agreed to do so and to make conforming changes to the statutes and rules. He noted that the last time a change was made was in 1982 when the limit went from $5,000 to $10,000. He called attention to a fiscal analysis indicating a decrease slightly over $50,000 to the General Fund for FY 2000-2001 as a result of such a change.

Mr. Powell commented on the fiscal analysis noting that it presumed that superior judgeships would be eliminated because some of the caseload would be moved to district court. He said that the analysis understates the actual effect by some $350,000 to $450,000. He noted that he thought it would be the intention of the legislature, if they make this move, to have superior court focus on felonies, and on very serious criminal matters, but would not eliminate the court's judges and personnel. He said that

the cost figures should focus on what would be needed to hear these cases in district court and that the Commission should not be misled that there would be no cost.

Cochair Haire asked if the decrease indicated in the fiscal analysis referred to eliminating 3 judges, or if it meant that 3 more would not be needed in the future. Mr. Powell said that the fiscal analysis appears to indicate a savings, but asked that the Commission include in the legislation whatever expenses that would be needed to add additional district court judges and personnel if it decides to send the proposed legislation forward. Mr. Folger said that Ms. Wolper's presentation at the subcommittee meeting indicated that the legislation would not lead to the elimination of 3 positions, but that 3 additional judges would, as a result, not have to be added. He said that a fiscal cost would result, but not to the extent that was originally analyzed by AOC and presented at the subcommittee meeting. The AOC analysis did not consider or recommend that there be an elimination of future judgeships as a result of this change.

Ms. Black noted that the subcommittee had felt somewhat disadvantaged because it did not know the position of the district court judges with respect to the proposed change. She said that she had spoken to some judges since the subcommittee meeting and was told that the district courts are greatly overworked and need new judges, whereas the superior court judges often complete their civil terms very early. She said that the plaintiff's bar has not indicated huge support to increase the jurisdictional limits, because they are not sure that this would solve the small car wreck case problem that the superior court judges complain about. Mr. Ellis stated that the defense attorneys, at their board meeting, voted to leave things as they are.

Cochair Haire asked for input from the Superior Court Judges Conference and the District Court Judges Conference. He said that the Commission would continue discussion on this issue at the next meeting.

Fourth Meeting – November 20, 2000

The fourth meeting of the Commission was held on November 20, 2000. The Commission heard a presentation on the distribution of proceeds arising out of a wrongful death action and the division of those proceeds for a minor child where the child’s parents are not married to each other at the time of death. Ms. Trina Griffin, Commission Co-counsel, presented a brief overview of the wrongful death statute, including the current North Carolina law for acts barring rights of parents and an excerpt from Georgia statutes.

Ms. Rise Hoyle, of Asheville, made a presentation to the Commission requesting that North Carolina reconsider its current law regarding the distribution of wrongful death proceeds of a minor child. Ms. Hoyle's nineteen-year-old son was killed in an auto accident. When she decided to bring a wrongful death action against the other driver she was told that the proceeds would have to be shared equally with her son's father to whom she had never been married and who had only provided minimal support for her son. She was told that unless the father was considered to have "abandoned" the child that the father was entitled to an equal share. Since the father had generally financially supported the child under court order, it was felt abandonment would not apply in this situation. Ms. Hoyle has learned that some other states allow the court to review these situations and distribute the award on an equity basis, giving consideration of the percentage of support each parent had contributed to the child. She stated that the term "abandonment" is too vague under current North Carolina law, and urged the Commission to recommend that the statute be revised.

Mr. Ross Hixson, Jr., of Creedmoor, made brief comments also asking that the statutes regarding distribution of wrongful death proceeds be revised. His daughter was killed nine years ago at the age of eighteen. He has spent the last six years in legal battles to determine who will collect insurance proceeds. Mr. Hixson said that his wife left home when his daughter was eighteen months old and that she saw her mother only about twenty times during her lifetime. He stressed that the issue is not about the money, but about who raised the child. He said that the laws of North Carolina should be more explicit, and urged the Commission to recommend changes to the current statutes.

Ms. Ann D. Wischer, paternal grandmother of Ms. Hoyle's son from Florida, made a brief statement regarding the distribution of wrongful death proceeds issues. She stated that her son had spent time with his son but that he believed that clarifying this issue would be most appropriate, as too many parents do abandon their legal and moral obligations.

Cochair Ellis directed the staff to look at Georgia statutes and other states' statutes to determine how they address the issue of distribution of proceeds. Mr. Hankins stated that it was his recollection that Georgia's wrongful death act is a "value to the estate" act as opposed to a "damages to the beneficiaries" act and is a very different situation in terms of the way in which wrongful death damages are calculated under the statute. He said that the Commission needs to be sure that it follows the path that our wrongful death statute puts us on if an attempt is made to revise it.

Mr. Pete Powell, Administrative Office of the Courts, spoke briefly regarding the shifting of inheritance rights because of either adoptions or termination of parental rights. He said that a child's inheritance rights are shifted at the time of adoption to the adoptive parents. However, he said that a parent's inheritance rights are severed by a termination of parental rights and that there is a gap from the time of the termination of parental rights to the time of adoption. He said that if, during that time, a child dies, the parent whose rights have been severed should not be able to inherit, but that termination of parental rights actions are confidential. Unless someone happens to know that those rights have been terminated and make a motion before a district court judge to open that for the purpose of recording a memorandum of the order, no one would ever know. It is therefore possible for someone to inherit whose rights have actually been terminated. He said that there are many good public policy reasons that termination of parental rights are not public and there may be a remedy in that it is possible to have a motion to have the file viewed, although it is not clear that information can be copies or released from the file.

Mr. Craige noted concern about opening a new front of litigation where assets are torn apart in litigation after a settlement. He said that he thought more study should take place to determine how this would be done.

Cochairs Haire and Ellis suggested that the Commission consider recommending in its final report that include a statement indicating that this is an area of the law that needs to be reviewed by the General Assembly. Mr. Reagan noted that the study should determine whether to make the change apply to the wrongful death statute only or apply to the Intestate Succession Act as well.

Cochair Ellis stated that the Legislative Research Commission had referred an issue regarding the desirability and feasibility of requiring unsuccessful parties in lawsuits to pay attorney's fees as a means of discouraging frivolous lawsuits to the Commission for study.

Ms. Griffin was recognized to present an overview of the laws that are currently in place. Mr. Reagan noted that House Bill 1681 was introduced during the 2000 Short Session and was incorporated into the Studies Bill. He noted that the staff felt that this issue could be complex enough to require a full legislative year to study.

Following brief discussion, Mr. Hankins moved that the Commission decline to make a recommendation regarding any changes relative to the awarding of attorneys fees or other sanctions against the losing party designed to discourage frivolous lawsuits. The motion passed unanimously.

Next, the Commission continued its discussion of the proposed civil procedure changes. The staff had been directed to prepare new drafts and alternatives in response to questions raised at the previous meeting of the Commission. Ms. Griffin discussed Service by Private Mail Delivery - Rule 4(j). The question that had arisen was how to define private delivery service. She said the staff recommendation is to add a provision to Rule 4 that defines a delivery service by referencing the federal statute in the Internal Revenue Code that defines a designated delivery service. A motion to approve the recommendation was unanimously approved.

Mr. Reagan explained proposed changes to Rule 5(b), Service of Pleadings by Fax. A handout outlining two suggested alternatives and a letter from Mr. John N. Fountain offering comments on suggested changes was distributed. Mr. Reagan reviewed the discussion that occurred at the previous meeting regarding determining when a fax would be considered "received." He presented two proposed alternatives based on the mailbox rule and the personal service rule. Following considerable discussion, Alternative #2, based on the personal service rule was approved unanimously.

Mr. Reagan continued the discussion to clarify the appropriate judge to extend statute of limitations under Rule 9(j). A handout was distributed outlining current law, problems with current law and suggested alternatives (Attachment X). Mr. Reagan noted that currently under Rule 9(j), a motion can be made before the statute of limitations expires requesting a judge of the county in which the cause of action arose to extend the statute of limitation for a period of up to 120 days. He stated that the problem that has arisen is that there are not always superior court judges "of the county." He further explained that under current law governing venue, venue could be where the plaintiff resides, where the defendant resides, or if neither of the parties lived in the state, the proper venue could be any county designated by the plaintiff. Mr. Reagan reminded the members that at the previous meeting, it was agreed that the language "of the county" should be changed to "for the judicial district.

Mr. Steve Keene, representing the North Carolina Medical Society, spoke in support of alternative #3, and reminded the Commission of the consequences of bringing this issue to the General Assembly during the upcoming session. He said that extending the statute of limitations is extraordinary and that if it is done, the General Assembly should address questions related to lack of notice.

Mr. Craige stated his concern with Alternative #3 is that it opens a new industry of litigation. He said that the purpose is to simplify the process to allow people to pursue claims, and that the new requirement put on plaintiffs to have certification in advance is an onerous requirement that applies to no other kind of case. He said that the balance that was struck was the 120-day extension. He said that a whole industry of litigation has been generated regarding how this rule is applied and that it is a tremendous waste of resources. He expressed his support for Alternative #2 and his opposition to Alternative #3.

Upon a motion for the adoption of alternative #3, the motion carried by a 5-3 vote.

Mr. Reagan explained the suggested alternatives regarding the venue in which an order extending the statute of limitations must be filed. The alternatives were listed in Attachment X. He stated that Alternative #1 was basically current law with a change to "for the judicial district" in the county in which the cause of action arose. The Alternative #2 would require the plaintiff to elect a venue and go to that venue where they intend to file the lawsuit and seek a judge to sign the order extending the statute of limitations. The Alternative #3 would allow a judge where the action could be brought, where venue is proper, to sign the order.

Mr. Dick Taylor, North Carolina Academy of Trial Lawyers, stated that the problem with the statute as it is currently written is that there are times when there may be no way to know a county where the cause of action arose. He further stated that the Academy feels that there should be a judge before whom one could have a motion heard, and that one should be able to know whom that judge is.

Mr. Hankins expressed concern regarding the phrase "is proper" in alternative #3. Ms. Black suggested that "is appropriate" be substituted for "is proper." Mr. Craige agreed with the suggestion.

The motion to adopt Alternative #3 as amended carried unanimously.

Mr. Frank Folger, Commission Co-counsel, discussed suggested changes to clarify offer of judgment under Rule 68. A revised version of Rule 68 based upon the discussion from the previous meeting of the Commission was distributed (Attachment XI). He reminded the Commission that discussion had centered on whether lump sum offers would be acceptable as offers of judgment. He said that lump sum offers would include attorneys' fees and costs.

Mr. Craige spoke in opposition to the revised version, noting that years of work with plaintiffs and defense attorneys had taken place in coming up with a compromise. He said that the compromise was agreed to by consensus of the previous Civil Litigation Commission and that this change alters that compromise.

Representative Pope and Mr. Hankins spoke in support of the revised language. Ms. Black expressed concern regarding adopting language that encourages lump sum offers where attorneys' fees are not in any way distinguished.

Cochair Ellis stated that the language found in the draft involved participation and input by the Litigation Section of the North Carolina Bar Association which consisted of plaintiffs and defense attorneys, and that the Academy of Trial Lawyers had indicated that they would work with it as a compromise position. Mr. Craige said that the North Carolina Defense Attorneys had endorsed the bill.

Mr. Taylor indicated that the definition for "offer" on page 20 of the draft bill was not consistent with the language on page 19. He suggested striking the language after the word "offer" on line 25 on page 19 of the bill. He said that with that question of clarity corrected, the Academy stood ready to support the bill. Mr. Powell was recognized and spoke briefly regarding the definition of "offer." He said that the definition of "offer" does not include costs, interest or attorneys' fees and agreed with Mr. Taylor that the language was not consistent.

Mr. Reagan offered clarification of the language on page 19 of the draft saying that it reads, "a party defending against a claim may serve a written offer to allow judgment to be entered," and defines the judgment as being “the offer, plus the interest, plus the court costs, plus the attorneys' fees.”

Mr. Craige moved adoption of the original proposal as it came out of the previous Civil Procedures Study Commission with the 30-day, 60-day and 10-day provision found on page 19 of the proposed draft (Attachment XII). The motion for adoption of the original proposal in the draft dated September 20, with time changes, was adopted by a vote of 6-2.

District court jurisdiction was the next matter on the agenda. Cochair Ellis stated that the Defense Attorneys Association, the Academy of Trial Lawyers and the AOC were not in favor of changing the jurisdiction of the district court at this time and that if the members were in agreement, the matter would not go forward. There was no objection to Cochair Ellis’ suggestion.

Mr. Folger was recognized to discuss filing briefs with motions in district court. Mr. Folger stated that during the 2000 Short Session a change was made to Rule 5 to add a two-day requirement for filing briefs. The Commission was asked to consider whether to expand this to district court. He said that during research, staff had discovered a statute (G.S. 7A-193) that states that in Chapters 1 and 1A, when a statute refers to superior court, it also applies to all district court actions in district court (Attachment XIII). He said that it had been suggested that many attorneys might not be aware of that statute and that proposed language should be prepared to clarify that. A copy of a proposed draft was distributed (Attachment XIV).

Mr. Craige stated that the legislation passed in the Short Session was a compromise bill, and that one of the compromises that was struck was that it would not apply to district court. Mr. Taylor noted that the bill was negotiated among various parties and legislators that it only apply to superior court actions. Mr. Craige noted that there is a conflict and that the Commission should make an effort to clarify it, but that more input should be sought before a policy change could be made to broaden this to district court. He said that he would favor the staff recommending the proper clarification of what the intent originally was.

Discussion followed and Cochair Ellis asked that the Commission receive input from the Family Law Section of the Bar Association.

Cochair Haire suggested that because of the complexity of this issue and the lack of time before the Commission needs to complete its work, the Commission should not consider the issue at this time, and that he might consider legislation of his own during the next session to address the matter. The Commission agreed with Cochair Haire’s suggestion on this issue.

The Commission asked staff to put these changes in final bill form and prepare a report for the Commission’s consideration at its next meeting.

Fifth Meeting – January 23, 2001

The final meeting of the Commission was held on January 23, 2001. The final report of the Commission of the General Assembly was discussed and approved.

FINDINGS AND RECOMMENDATIONS

Finding One

The Commission finds that the North Carolina Rules of Civil Procedure should be amended. Specifically, the Commission finds that:

- There are benefits in expanding the means by which personal service of civil summons and complaints may be accomplished. The Commission further finds that the complaint and summons are the only pleadings or papers for which personal service must be completed by the sheriff's department. Additionally, the Commission finds that the Federal Rules of Civil Procedure allow for personal service of process by anyone not a party who is at least 18 years old, a substantially broader approach. The Commission finds that it would be beneficial to allow notaries public to provide personal service of complaints and summonses.
- The requirement that a summons be served 30 days from the time of issuance provides insufficient time for service and often results in inefficient use of time in a party having to obtain an alias and pluries summons or endorsement. The Commission also finds that the Federal Rules of Civil Procedure allows 120 days from issuance for the service of a summons. The Commission further finds that 60 days provides sufficient time for service of the summons after its issuance.
- In addition to the U.S. Postal Service, other reliable private delivery services should be allowed to provide substitute personal service of pleadings. The Commission further finds that the reliability of a private delivery service is sufficiently manifested by its qualification as a "designated delivery service" pursuant to federal statute 26 U.S.C §7502(f)(2).
- Service of pleadings, other than the complaint, and other papers should be allowed by telefacsimile machine, as well as by mail or personal delivery. The Commission further finds that to ensure parties served by fax have adequate time under the rules, evidence that the faxed documents have been received by the served party should be received by the serving party by 5:00 p.m. on that day or the served party is deemed served the following business day.
- The rule which allows a judge to extend the statute of limitations for medical malpractice actions up to 120 days is worded in a way that statutorily precludes parties from being able to seek an extension in some multi-county districts. The Commission further finds that the rule's current wording regarding the venue for the hearing on the extension raises doubt about where the hearing should occur and is inconsistent with the generally applicable rules on venue. The Commission finds that there is a need to eliminate the disparity of treatment created by the current wording of the statute and make the venue provisions consistent with the generally applicable rules of venue.
- Interested persons such as legal support staff, otherwise disqualified from participating in depositions, should be allowed to conduct videotape depositions, with notice to the adverse party but without obtaining a stipulation, as long as the deposition is also recorded by stenographic means by a non-disqualified person.
- A party to a civil action should attempt to resolve discovery disputes informally before filing a motion to compel discovery with the court and to ensure compliance with the rule, a party filing a motion to compel should certify those attempts in the motion to be eligible for an order against an adverse party compelling discovery.

- The rule providing for objections to rulings and orders other than those directed at the admissibility of evidence is unclear regarding its applicability to pretrial rulings and interlocutory orders, in addition to trial rulings. The Commission finds that the rule's applicability to pretrial rulings and interlocutory orders should be clearly stated. Additionally, the Commission finds that the rule is unclear about a party's need to make exceptions on the record in these matters and that the rule should clearly state that requirement. The Commission further finds the need to remove from the rule a provision which conflicts with the North Carolina Rules of Appellate Procedure.
- The term "disability" as used in Rule 63 is too narrow and should be broadened to include other circumstances, such as retirement or removal, for purposes of authorizing a substitute judge. The Commission further finds that there is a need to clarify which judicial duties may be performed by a substitute judge if the judge presiding over a trial or hearing becomes disabled before written entry of an order or judgment. The Commission finds this clarification necessary in light of the change in Rule 58 of the Rules of Civil Procedure which declares that entry of judgment or order does not occur until the ruling is reduced to writing.
- There is a need to enhance the notice requirements and showing required before a party can be granted an ex parte temporary restraining order to ensure that the opposing party has an opportunity for notice and a hearing whenever possible. The Commission further finds that the Federal Rules of Civil Procedure have this enhanced notice and showing requirement for the granting of ex parte temporary restraining orders.
- The manner in which offers of judgment can be made under the current rule may create confusion when the comparison is made between a denied offer of judgment and a judgment finally obtained in the matter. The Commission also finds that the use of lump sum offers of judgment may create a conflict of interest between the offeree party and that party's attorney. The Commission further finds that allowing submission of offers of judgment up to 10 days before trial provides insufficient time for consideration of the offer; that allowing offers of judgment to be made up to 30 days before trial provides sufficient time for response and allows parties in unresolved matters sufficient time after denial of the offer to prepare for trial; and that an offeree of an offer received more than 60 days before trial should be allowed up to 30 days to respond to the offer.

Recommendation One

The Commission recommends that the General Assembly enact legislation to amend the North Carolina Rules of Civil Procedure and make conforming changes to statutes concomitantly with changes to the Rules. Specifically, the Commission recommends amending:

- Rule 4(a), to allow notaries public to provide personal service of process of complaints and summons, in addition to sheriffs;
- Rule 4(c), to extend the time in which a summons is allowed to be served from the time of issuance from 30 days to 60 days;
- Rule 4(j)-4(j2) and N.C.G.S. §1-75.10, to allow substitute personal service of process by designated private delivery services, in addition to the U.S. Postal Service;
- Rule 5(b), to allow service by fax of pleadings, other than the complaint, and other papers;
- Rule 9(j), to correct provisions for seeking extension of the statute of limitations in medical malpractice cases, to alleviate the anomaly that in certain counties in multi-county judicial districts, the extension is statutorily unavailable and to resolve the inconsistency between

this rule's venue provisions with the generally applicable venue rules. The Commission recommends eliminating the disparity of treatment and inconsistencies created by the current statutory language;

- Rule 28(c), to allow interested persons such as legal support staff, otherwise disqualified from participating in depositions, to conduct videotape depositions with notice to the adverse party but without a stipulation being required as long as the deposition is also recorded by non-disqualified stenographic means;
- Rule 37, to require a party to attempt to resolve discovery disputes informally before filing a motion to compel discovery with the court and to include a certification of the same with the filing of the motion;
- Rule 46, to clarify that the rule providing for objections to rulings and orders other than those directed at the admissibility of evidence applies to pretrial rulings and interlocutory orders, as well as trial rulings; provide that when objections or exceptions cannot be made in these matters at the time they are made, a party must present the court with the request, objection or motion with specific grounds upon having an opportunity to do so; and remove any provisions inconsistent with the language of the North Carolina Rules of Appellate Procedure;
- Rule 63, to broaden the circumstances under which a substitute judge is authorized and to clarify that judicial duties following the rendering of a verdict or the conclusion of a trial or hearing, including written entry of judgment, may be performed by a substitute judge if the judge presiding over the trial or hearing becomes unable to perform his duties because of one of the reasons listed in the statute;
- Rule 65, to require, for the granting of an ex parte temporary restraining order, a party to show that the requisite injury will result to the requesting party before the opposing party or the opposing party's attorney can be heard and that neither oral nor written notice could be provided beforehand; and to require the requesting party to certify, in the motion, efforts to provide notice to the adverse party and reasons why notice should not be required;
- Rules 68 and 84, to require that offers of judgment not be in lump sum form but specify the principal judgment offer with a stipulation that interest, costs, and statutorily-awarded attorney's fees will be included; provide that offers of judgment be made at least 30 days in advance of trial; and provide that the offeree of an offer made more than 60 days in advance of trial be given 30 days to respond to the offer.

(See Appendix D for legislation supporting this recommendation)

Finding Two

The Commission finds that the issue of how to distribute wrongful death action proceeds arising from the death of a minor child between divorced parents or parents otherwise alienated from each other should be studied further to determine if any statutory changes should be made.

Recommendation Two

The Commission recommends that the General Assembly study the issue of distribution of wrongful death action proceeds arising from the death of minor child whose parents are divorced or otherwise alienated from each other. In particular, the Commission recommends that the General Assembly examine N.C.G.S. §28A-18-2, Death by wrongful act of another, and N.C.G.S. §31A-2, Acts barring rights of parents, in considering the issue.
(See Appendix E for legislation supporting this recommendation)

Finding Three

The Commission finds that the issue of appointment of counsel in civil actions is not presently ripe for study.

Recommendation Three

The Commission recommends no action be taken at this time on the issue of appointment of counsel in civil actions.

Finding Four

The Commission finds that there already exists adequate statutory punishment to deter the filing of frivolous lawsuits. In particular, the Commission finds that N.C.G.S. §6-21.5 deters a party from asserting frivolous claims by allowing for attorney's fee for the prevailing party when the court determines the losing party completely failed to raise any justiciable issue of law or fact in any pleading. Additionally, the Commission finds that Rule 11(a) of the North Carolina Rules of Civil Procedures deters a party or the party's attorney from asserting and filing frivolous claims by allowing the court to sanction a party, a party's attorney or both monetarily or otherwise if the pleading, motion, or other paper is frivolous or interposed for improper purposes.

Recommendation Four

The Commission recommends that no action be taken on the issue of deterring the filing of frivolous lawsuits.

Finding Five

The Commission finds that, although the jurisdictional amount limits for civil district court actions has remained unchanged at $10,000 since 1982 and although a subcommittee of the Commission initially supported increasing the jurisdictional amount limit to $20,000, there presently is no support among interested parties for a change solely of the jurisdictional amount limits for civil district court. In particular, the Commission finds that the Administrative Office of the Courts, the North Carolina

Association of Defense Attorneys, and the North Carolina Academy of Trial Lawyers do not support this specific change at this time.

Recommendation Five

The Commission recommends that no action be taken at this time on the issue of raising the jurisdictional amount limits for civil district court.

Finding Six

The Commission finds that the newly-enacted amendment to Rule 5 of the North Carolina Rules of Civil Procedure requiring, in superior court, that briefs for dispositive motions be served on the adverse party at least two days in advance of a hearing on the matter, may already be applicable to district court practice as well. The Commission finds that, because of time constraints and lack of opportunity for input from district court judges and other interested parties, it cannot recommend to either clarify or change the existing law.

Recommendation Six

Because of time constraints and lack of opportunity for input from district court judges and other interested parties, the Commission takes no action at this time on the issue of amending Rule 5 of the North Carolina Rules of Civil Procedure as to the applicability to district court of the rule that briefs for dispositive motions be served on the opposing party at least two days before a hearing on the matter.

APPENDIX A

SESSION LAWS 1999 - 395

AN ACT TO AUTHORIZE STUDIES BY THE LEGISLATIVE RESEARCH COMMISSION, TO CREATE VARIOUS STUDY COMMISSIONS, TO DIRECT STATE AGENCIES AND LEGISLATIVE OVERSIGHT COMMITTEES AND COMMISSIONS TO STUDY SPECIFIED ISSUES, AND TO AMEND OTHER LAWS.

The General Assembly of North Carolina enacts:

PART I.-----TITLE

Section 1. This act shall be known as "The Studies Act of 1999".

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PART XI.-----CIVIL LITIGATION STUDY COMMISSION

Section 11.1.(a) The Civil Litigation Study Commission is created. The Commission shall consist of 18 voting members: six members to be appointed by the President Pro Tempore of the Senate, six members to be appointed by the Speaker of the House of Representatives, and six 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.

Section 11.1.(b) The Commission shall:

(1) Study all practices and procedures that affect the speed, fairness, and accuracy with which civil actions are disposed of in the trial divisions of the General Court of Justice, including the rules of civil procedure, rules of evidence, other relevant statutes, statewide and local court-adopted rules of practice and procedure, administrative rules, appellate opinions and all other relevant practices, customs, and traditions in the trial courts of North Carolina;

(2) Devise and recommend improved practices and procedures that (i) reduce the time required to dispose of civil actions in the trial divisions; (ii) simplify pretrial and trial procedure; (iii) guarantee the fairness and impartiality with which the claims and defenses are heard and resolved; and (iv) increase the parties' and the public's satisfaction with the process of civil litigation;

(3) Raising the amount in controversy that determines the proper division for trial of civil actions and allowing counsel fees as part of costs in certain civil actions (S.B. 955 - Dalton);

(4) Requiring insurers to provide information prior to litigation requiring policy provisions and policy limits upon written request and giving an insurer who provides such information the option of initiating mediation with the person who sought the information (S.B. 24 - Dalton);

(5) Allowing prisoners who suffer death or total and permanent disability to receive compensation under the Workers' Compensation Act based on the minimum wage (S.B. 992 - Ballance);

(6) Public duty doctrine issues (Ballance).

Section 11.1.(c) The Commission may report to the General Assembly and the Chief Justice by making an interim report no later than the convening of the 2000 Regular Session and shall make a final report not later than March 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 11.1.(d) The Speaker of the House of Representatives and the President Pro Tempore of the Senate shall each designate one of their appointees to serve as cochair. The Commission shall meet at such times and places as the cochairs designate. The facilities of the State Legislative Building and the Legislative Office Building shall be available to the Commission, subject to the approval of the Legislative Services Commission. Legislative members of the Commission shall be reimbursed for subsistence and travel expenses at the rates set forth in G.S. 120-3.1. Members of the Commission who are officers or employees of the State shall receive reimbursement for travel and subsistence expenses at the rates set forth in G.S. 138-6. All other members shall receive compensation and reimbursement for travel and subsistence expenses at the rates specified in G.S. 138-5.

Section 11.1.(e) The Commission may solicit, employ, or contract for technical assistance and clerical assistance, and may purchase or contract for the materials and services it needs. Subject to the approval of the Legislative Services Commission, the staff resources of the Legislative Services Commission shall be available to the Commission without cost except for travel, subsistence, supplies, and materials.

Section 11.2. Of the funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds to implement the provisions of this Part.

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PART XXIII.-----EFFECTIVE DATE AND APPLICABILITY

Section 23.1. Except as otherwise specifically provided, this act becomes effective July 1, 1999. If a study is authorized both in this act and the Current Operations Appropriations Act of 1999, the study shall be implemented in accordance with the Current Operations Appropriations Act of 1999 as ratified.

In the General Assembly read three times and ratified this the 21st day of July, 1999.

s/ Dennis A. Wicker
President of the Senate

s/ James B. Black
Speaker of the House of Representatives

s/ James B. Hunt, Jr.
Governor

Approved 9:03 p.m. this 5th day of August, 1999

APPENDIX B

CIVIL LITIGATION STUDY COMMISSION

1999-2000

S.L. 1999-395

Pro Tem's Appointments

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