

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1999

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SENATE BILL 393
Judiciary II Committee Substitute Adopted 3/24/99
House Committee Substitute Favorable 7/14/99

Short Title: Written Motions/Supporting Briefs.

(Public)

Sponsors:

Referred to:

March 17, 1999

1 A BILL TO BE ENTITLED
2 AN ACT TO AMEND THE RULES OF CIVIL PROCEDURE TO REQUIRE BRIEFS
3 AND MEMORANDA IN SUPPORT OR OPPOSITION OF DISPOSITIVE
4 MOTIONS AND OPPOSING AFFIDAVITS TO BE SERVED UPON ALL
5 PARTIES AND TO REQUIRE WRITTEN MOTIONS TO STATE THE GROUNDS
6 FOR THE MOTION WITH PARTICULARITY.
7 The General Assembly of North Carolina enacts:
8 Section 1. G.S. 1A-1, Rule 5 reads as rewritten:
9 "Rule 5. Service and filing of pleadings and other papers.
10 (a) Service of orders, subsequent pleadings, discovery papers, written motions,
11 written notices, and other similar papers – When required. – Every order required by its
12 terms to be served, every pleading subsequent to the original complaint unless the court
13 otherwise orders because of numerous defendants, every paper relating to discovery
14 required to be served upon a party unless the court otherwise orders, every written motion
15 other than one which may be heard ex parte, and every written notice, appearance,
16 demand, offer of judgment and similar paper shall be served upon each of the parties, but
17 no service need be made on parties in default for failure to appear except that pleadings

1 asserting new or additional claims for relief against them shall be served upon them in the
2 manner provided for service of summons in Rule 4.

3 (a1) Service of briefs or memoranda in support or opposition of certain dispositive
4 motions – When required. – In actions in superior court, every brief or memorandum in
5 support of or in opposition to a motion to dismiss, a motion for judgment on the
6 pleadings, a motion for summary judgment, or any other motion seeking a final
7 determination of the rights of the parties as to one or more of the claims or parties in the
8 action shall be served upon each of the parties at least two days before the hearing on the
9 motion. If the brief or memorandum is not served on the other parties at least two days
10 before the hearing on the motion, the court may continue the matter for a reasonable
11 period to allow the responding party to prepare a response, proceed with the matter
12 without considering the untimely served brief or memorandum, or take such other action
13 as the ends of justice require. The parties may, by consent, alter the period of time for
14 service. For the purpose of this rule only, service shall mean personal delivery, facsimile
15 transmission, or other means such that the party actually receives the brief within the
16 required time.

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

31 (c) Service – Numerous defendants. – In any action in which there are unusually
32 large numbers of defendants, the court, upon motion or of its own initiative, may order
33 that service of the pleadings of the defendants and replies thereto need not be made as
34 between the defendants and that any crossclaim, counterclaim, or matter constituting an
35 avoidance or affirmative defense contained therein shall be deemed to be denied or
36 avoided by all other parties and that the filing of any such pleading and service thereof
37 upon the plaintiff constitutes due notice of it to the parties. A copy of every such order
38 shall be served upon the parties in such manner and form as the court directs.

39 (d) Filing. – All pleadings subsequent to the complaint shall be filed with the
40 court. All other papers required to be served upon a party, including requests for
41 admissions, shall be filed with the court either before service or within five days
42 thereafter, except that depositions, interrogatories, requests for documents, and answers
43 and responses to those requests may not be filed unless ordered by the court or until used

1 in the proceeding. The party taking a deposition or obtaining material through discovery
2 is responsible for its preservation and delivery to the court if needed or so ordered. With
3 respect to all pleadings and other papers as to which service and return has not been made
4 in the manner provided in Rule 4, proof of service shall be made by filing with the court a
5 certificate either by the attorney or the party that the paper was served in the manner
6 prescribed by this rule, or a certificate of acceptance of service by the attorney or the
7 party to be served. Such certificate shall show the date and method of service or the date
8 of acceptance of service.

9 (e) (1) Filing with the court defined. – The filing of pleadings and
10 other papers with the court as required by these rules shall be made by
11 filing them with the clerk of the court, except that the judge may
12 permit the papers to be filed with him, in which event he shall note
13 thereon the filing date and forthwith transmit them to the office of the
14 clerk.

15 (2) Filing by telefacsimile transmission. – If, pursuant to G.S. 7A-34 and
16 G.S. 7A-343, the Supreme Court and the Administrative Officer of the
17 Courts establish uniform rules, regulations, procedures and
18 specifications for the filing of pleadings or other court papers by
19 telefacsimile transmission, filing may be made by the transmission
20 when, in the manner, and to the extent provided therein."

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

22 "(b) Motions and other papers. –

23 (1) An application to the court for an order shall be by motion which, unless
24 made during a hearing or trial or at a session at which a cause is on the
25 calendar for that session, shall be made in writing, shall state with
26 particularity the grounds therefor, and shall set forth the relief or order
27 sought. The requirement of writing is fulfilled if the motion is stated in a
28 written notice of the hearing of the motion.

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

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

35 Section 3. The Revisor of Statutes shall cause to be printed along with this act
36 the following statement to the Official Comment for G.S. 1A-1, Rule 5(a1):

37 "The rule does not require any party to submit a brief or memorandum; it only applies
38 in certain instances in which a party intends to submit a brief or memorandum to the
39 court. The rule would not preclude a party from providing the judge with copies of cases
40 or statutes at a hearing."

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

1 Section 4. The Revisor of Statutes shall cause to be printed along with this act
2 the following statement to the Official Comment for G.S. 1A-1, Rule 7(b):

3 "The 1999 amendment conforms the North Carolina rule to federal Rule 7(b). The
4 federal courts do not apply the particularity requirement as a procedural technicality to
5 deny otherwise meritorious motions. Rather, the federal courts apply the rule to protect
6 parties from prejudice, to assure that opposing parties can comprehend the basis for the
7 motion and have a fair opportunity to respond."

8 This addition to the Official Comment shall only be for annotation purposes
9 and shall not be construed to be the law.

10 Section 5. G.S. 1A-1, Rule 6(d) reads as rewritten:

11 "(d) For motions, affidavits. – A written motion, other than one which may be heard
12 ex parte, and notice of the hearing thereof shall be served not later than five days before
13 the time specified for the hearing, unless a different period is fixed by these rules or by
14 order of the court. Such an order may for cause shown be made on ex parte application.
15 When a motion is supported by affidavit, the affidavit shall be served with the motion;
16 and except as otherwise provided in Rule 59(c), opposing affidavits ~~may unless the court~~
17 ~~permits them to be served at some other time be served not later than one day shall be served at~~
18 least two days before the hearing. If the opposing affidavit is not served on the other
19 parties at least two days before the hearing on the motion, the court may continue the
20 matter for a reasonable period to allow the responding party to prepare a response,
21 proceed with the matter without considering the untimely served affidavit, or take such
22 other action as the ends of justice require. For the purpose of this rule only, service shall
23 mean personal delivery, facsimile transmission, or other means such that the party
24 actually receives the affidavit within the required time."

25 Section 6. G.S. 1A-1, Rule 56(c) reads as rewritten:

26 "(c) Motion and proceedings thereon. – The motion shall be served at least 10 days
27 before the time fixed for the hearing. The adverse party ~~prior to the day of hearing may~~
28 ~~serve opposing affidavits.~~ affidavits at least two days before the hearing. If the opposing
29 affidavit is not served on the other parties at least two days before the hearing on the
30 motion, the court may continue the matter for a reasonable period to allow the responding
31 party to prepare a response, proceed with the matter without considering the untimely
32 served affidavit, or take such other action as the ends of justice require. For the purpose
33 of this rule only, service shall mean personal delivery, facsimile transmission, or other
34 means such that the party actually receives the affidavit within the required time.

35 The judgment sought shall be rendered forthwith if the pleadings, depositions,
36 answers to interrogatories, and admissions on file, together with the affidavits, if any,
37 show that there is no genuine issue as to any material fact and that any party is entitled to
38 a judgment as a matter of law. A summary judgment, interlocutory in character, may be
39 rendered on the issue of liability alone although there is genuine issue as to the amount of
40 damages. Summary judgment, when appropriate, may be rendered against the moving
41 party."

1 Section 7. This act becomes effective October 1, 1999, and applies to motions
2 subject to this act and to briefs, memoranda, and affidavits subject to this act filed on or
3 after that date.