

**CIVIL PROCEDURE
MADE EASY:**



**FUNCTIONAL KNOWLEDGE
AND DISPELLING MYTHS**

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This paper is designed to distill the rules of civil procedure, adding interpretive case law. Framed to provide *functional knowledge*, this paper unearths useful pearls and dispels myths in the rules of civil procedure. Special recognition is due to Timothy J. Reading, Esq., for his research and able assistance in drafting this paper. Resources include Lee C. Hawley & Katharine Y. Barnes, *Civil Procedure, Discovery, Depositions, and Courtroom Procedure* (2018); N.C. Gen. Stat. §§ 1, 5A, 7A, 7B, 28A, 48, 49, 50, 50A, 50B, 50C, 51, 52, 52A and 52B; G. GRAY WILSON, *NORTH CAROLINA CIVIL PROCEDURE* (3d ed. 2007); and over 180 CLEs. Pronouns are in the masculine in accord with holdings of the cases referenced. My approach to seminars is simple: *if it does not work, I am not interested.*

Family law intersects with various court divisions, causes of action, and areas of law. Claims in excess of \$25,000.00 are generally heard in Superior Court. Claims of \$25,000.00 or less are heard in District Court. Custody and child support actions are governed jurisdictionally by Chapters 50A and 52C. Chapter 50 actions—including, *inter alia*, child custody, child support, post-separation support, alimony, equitable distribution, absolute divorce, divorce from bed and board, and attorney fees—are heard in District Court. District Court also has jurisdiction of disputes involving contracts related to marriage and the recovery or breach thereof. N.C. Gen. Stat. § 7A-244; *see also* N.C. Gen. Stat. § 52B (antenuptial agreements); § 52-10 (postnuptial agreements); § 52-10.1 (separation agreements); § 52-10(a1) (reconciliation agreements). Domestic Violence Protective Orders and Civil No-Contact Orders are found in N.C. Gen. Stat. § 50B and § 50C, respectively, and contempt in N.C. Gen. Stat. § 5A. Family related torts which may be brought in Superior Court include alienation of affection, criminal conversation, among others. Juvenile matters—neglect, abuse, and dependency—are tried in juvenile court with its own set of rules, statutes, and procedures. N.C. Gen. Stat. § 7A. Adoption and legitimation actions are heard by the Clerk of Court. N.C. Gen. Stat. §§ 48 and 49. Enforcement is typically effectuated through claims, contract remedies, contempt proceedings, and executions on judgments. Knowledge is power: mastery of domestic violence rules resulted in a curative instruction to the jury against the State in a murder trial years ago, ultimately resulting in—after three days of

deliberation—a lesser included, second degree murder verdict. The defendant is now living with family in West Virginia.

This paper is intended to provide current and accurate information and is designed to assist in maintaining professional competence. All sources of authority should be researched independently regarding a specific legal matter. This paper is for educational purposes only and does not constitute legal advice or services or an attorney-client relationship.

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Let's get started.

Rule 1. Scope of rules.

Meaning: The rules govern superior and district courts in North Carolina unless excepted by statute.

Rule 4. Process.

Meaning: The rule governs *initial* service of process. Know the acronym “CAP³” and a few cases.

- C** Certified mail, return receipt requested, signed by the addressee via U.S. Mail or a designated delivery service (UPS, FedEx, etc.). Rule 4(j)(1)d. This type of service creates a *presumption* of lawful service. *See Carpenter v. Agee*, 171 N.C. App. 98 (2005) (holding that an affidavit, filed with a return receipt signed by the individual receiving the mail, “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”); *see also* Rule 4(j)(2). The rule also provides for service through signature confirmation via the U.S. Postal Service.
- A** Acceptance of service.
- P** Personal service upon the opposing party by law enforcement, an authorized agent, or a person of suitable age and discretion residing in the opposing’s dwelling or usual place of abode. Rule 4(j)(1)a.; *see Greenup v. Register*, 104 N.C. App. 618, (1991) (holding when an officer's return of the summons shows legal service, a *presumption* of valid service of process is created); *Hamilton v. Johnson*, 228 N.C.

App. 372 (2013) (holding service upon a concierge is improper if not a duly authorized agent).

- P** Publication applies only when a party cannot—with due diligence—be served. *Chen v. Zou*, 244 N.C. App. 14 (2015) (holding a divorce decree is void if a plaintiff has actual knowledge of information for personal service or if discoverable by due diligence). You must use due diligence to find the party. Check for a P.O. Box.
- P** Private process server. If process is returned unexecuted by a law enforcement officer, substitute service may occur by anyone not a party, unrelated by blood or marriage to a party or the person served, and 21 years of age or older. Rule 4(h1).

Other Important Rule 4 Takeaways:

1. Service can affect personal jurisdiction. A party served in North Carolina results in personal jurisdiction without the required long-arm jurisdiction and minimum contacts analysis. *Hedden v. Isbell*, ___ N.C. App. ___, 792 S.E.2d 571 (2016) (holding a non-resident party served in North Carolina satisfies personal jurisdiction without a minimum contacts analysis); N.C. Gen. Stat. § 1-75.4 (grounds for personal jurisdiction).
2. A summons must be issued within five days of the filing of the complaint. Rule 4(a). A summons is initially valid for 60 days (then dormant an additional 30 days) and may be extended via endorsement or alias and pluries summons within 90 days after issuance or the last endorsement. Rule 4(d).
3. The rule provides for service of process outside of the United States. Rule 4(j3) (e.g., authorized means include the Hague Convention or other internationally agreed upon means of service).

Rule 5. Service and filing of pleadings and other papers.

Meaning: This rule governs service *after* initial service of process.

1. Certain papers *must* be filed. Pleadings, motions, notices of hearing, notices of appearance, orders, any application to the court for an order or commands an act or to forgo an act (e.g., motions, subpoenas, injunctive relief), and any other paper required by rule, statute, or ordered by the court to be filed. Rule 5(d)(1)–(7).
2. All other papers should *not* be filed unless agreed to by the parties, in response to a motion or requested relief, or permitted by another rule or statute. Rule 5(d).
3. Do *not* file briefs, memoranda, or any form of discovery unless ordered by the court. Simply preserve the same for trial. Rule 5(d).

4. For *dispositive* motions (dismiss, summary judgment, judgment on the pleadings, etc.), briefs or memoranda in support of or in opposition to shall be served on the other party at least two days before the hearing. Rule 5(a1).
5. You may *serve* by facsimile, personal delivery, or mail to the attorney or opposing party if unrepresented. Rule 5(b). Rule 4 service is available and includes a designated delivery service (e.g., UPS, FedEx, etc.). Rule 4(j)(1)d. Service is complete upon deposit. Rule 5(b). A certificate of service is required, and service by facsimile shall include the facsimile number of each person served under that method. Rule 5(b1).
6. If the opposing party fails to appear or is in default, no further service is required under this rule. However, if new or additional claims are asserted, parties in default shall be served through Rule 4. Rule 5(a); *see First Union Nat'l Bank v. Rolfe*, 83 N.C. App. 625 (1986).
7. *Nunc pro tunc* only applies to a previously filed court order or judgment, granting retroactive effect. Rule 5(e)(3). *Dabbondanza v. Hansley*, ___ N.C. App. ___, 791 S.E.2d 116 (2016) (holding a trial court does not have authority to enter a *nunc pro tunc* order if a prior order had not been entered with Rule 58 formalities or third parties are prejudiced).
8. A plaintiff's failure to open his mail containing trial notice by the trial court administrator did not excuse his absence, resulting in dismissal of his action. *Purcell v. Old Mill Stream Nursery*, 243 N.C. App. 207 (2016) (unpublished).

Rule 6. Time.

Meaning: Do not count the first day; count weekends and holidays *only if* the time period exceeds seven days. If the time runs on a Saturday, Sunday, or legal holiday, the time period is extended until the next business day. Rule 6(a). The last day of any time period prescribed or allowed by court order is included within the period. *Wilson v. Curtis*, ___ N.C. App. ___, 791 S.E.2d 877 (2016) (unpublished).

1. The court may enlarge time in its discretion—with or without notice or motion—if requested before expiration of the time prescribed or extended by prior order. Rule 6(b).
2. Parties may enlarge the time by binding stipulation up to thirty days *except* for Rules 50(b); 52; 59(b), (d), (e); or 60(b). Rule 6(b); *see also* Rule 4 of the General Rules of Practice for the Superior and District Courts (stating when counsel agree to an enlargement of time, the same shall be written and filed).
3. Written motions and notices of hearing shall be served not later than five days before the hearing unless otherwise ordered by the court. Rule 6(d).

4. When a motion is supported by affidavit, the affidavit shall be served with the motion, and—except as provided in Rule 59(c)—opposing affidavits shall be served at least two days before hearing. Rule 6(d).
5. Consent for signing and entry of a judgment out-of-term, session, county, and district shall be deemed to have been given unless an express objection was made on the record prior to the end of term or session. Rule 58.
6. If you serve by mail, add three days to the prescribed period. Rule 6(e). *But see* N.C. R. App. Pro. 3(c) (“In computing the time for filing a notice of appeal, the provision for additional time after service by mail in Rule 27(b) of these rules and Rule 6(e) of the Rules of Civil Procedure *shall not apply.*”) (emphasis added).

Rule 7. Pleadings allowed; motions.

Meaning: Pleadings consist of a complaint and answer; counterclaim and reply; crossclaim and answer; and third party complaint, third party answer, and reply.

1. A motion is an application to the court for relief. Rule 7(b).
2. Pleadings shall not be read to the jury unless otherwise ordered by the court. Rule 7(b).
3. Oral motions may be made during a hearing or trial or at a session at which a cause of action is on the calendar. Rule 7(b)(1). When a written motion is required, it may be stated in the notice of hearing. *Id.* Otherwise, the motion must be in writing, state with particularity the grounds therefor, and set forth the relief sought. *Id.*; *see Crews v. Paysour*, ___ N.C. App. ___, 797 S.E.2d 380 (2017) (unpublished) (holding although a court may have a statutory basis to act, the court does not have legal authority to act absent a motion).

Rule 8. General rules of pleadings.

Meaning: A short and plain statement of the claim showing the pleader is entitled to relief with a demand for judgment for the relief entitled is sufficient.

1. Rule 8 requires only notice pleading. *Smith v. Charlotte*, 79 N.C. App. 517 (1986) (holding a plaintiff must plead with sufficient particularity to identify the legal issues and allow a defendant to frame a response); *contra Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (holding Fed. R. Civ. Pro. 8 requires a plaintiff to show plausible factual allegations to state a claim for relief plausible on its face).
2. Answers shall fairly meet the substance of the averment, including denial of part of an averment and an admission of what is true. Rule 7(b).

3. A party shall set forth affirmative defenses. Rule 7(c).
4. Averments are admitted when not denied in a responsive pleading. Rule 7(d). However, averments are deemed denied in actions for absolute divorce and annulment. N.C. Gen. § Stat. 50-10(a). Alimony claims are also deemed denied. *Phillips v. Phillips*, 185 N.C. App. 238 (2007). Averments are deemed denied when a responsive pleading is not allowed. Rule 8(d).
5. Although the rule says a claim shall contain *a demand for judgment for relief entitled*, case law does not support the same provided the pleadings give sufficient notice. See, e.g., *Smith v. North Carolina Farm Bureau Mut. Ins. Co.*, 84 N.C. App. 120 (1987); *Holton v. Holton*, ___ N.C. App. ___, 813 S.E.2d 649 (2018) (holding a plaintiff's complaint met the requirements of notice pleading under Rule 8 and was not required to enumerate a specific rescission claim).
6. A party may request a written statement of monetary relief sought (which may be amended). Rule 8(a)(2).

Rule 9. Pleading special matters.

Meaning: Pleadings involving fraud, duress, mistake, condition of the mind, and representative capacity and authority to sue must be stated with particularity. A demand for punitive damages shall be specifically stated, and any aggravating factor supporting same shall be averred with particularity.

Rule 11. Signing and verification of pleadings.

Meaning: The attorney or party must certify he has read the pleading and—to the best of his knowledge, information, and belief, formed after reasonable inquiry—it is well grounded in fact, warranted by existing law or a good faith argument, and not interposed for any improper purpose.

1. Every pleading, motion, and other paper shall be *signed* by the attorney or *pro se* party, whose address shall be stated. An unsigned pleading, motion, or other paper shall be stricken unless signed promptly after the omission is called to the attention of the pleader or movant. Rule 11(a).
2. Pleadings must be *verified* only if there is a specific statute requiring same. Rule 11(a). Domestic relations pleadings that require verification include absolute divorce; divorce from bed and board; post-separation support; juvenile petitions alleging neglect, abuse, or dependency; and civil contempt (the latter requiring verification or affidavit). See N.C. Gen. Stat. §§ 50-8; 50-8; 50-16.2A; 7B-403(a); 5A-23, respectively. See *Boyd v. Boyd*, 61 N.C. App. 334 (1983) (holding a

complaint is not sufficient to “commence” an action and invoke jurisdiction unless verified at the time it is filed).

3. For absolute divorces, be sure the verification is signed *at least* one year and one day after the date of separation.
4. Violation of Rule 11 shall result in an appropriate sanction which may include an order to pay reasonable expenses incurred, including a reasonable attorney’s fee. Rule 11(a). Courts engage in a three-prong analysis for Rule 11 sanctions, including factual sufficiency, legal sufficiency, or improper purpose. Violation of any prong requires imposition of sanctions. *See In re Thompson*, 232 N.C. App. 224, 230 (2014).

Rule 12. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleading.

Meaning: The rule prescribes certain time frames for answers, replies, and responsive pleadings; jurisdiction, venue, process, joinder, and cause of action issues; and remedies for problematic pleadings.

1. Service of a Rule 12 motion suspends the 30 day time limit for filing responsive pleadings until the court acts on the motion, unless otherwise ordered by the court. Rule 12(a). A defendant has 30 days to serve an answer to a complaint or cross-claim, or a reply to a counterclaim. A responsive pleading shall be served within 20 days after notice of the court’s ruling on a Rule 12(b) or (e) (motion or for a more definite statement) motion. Rule 12(a)(1).
2. Be mindful of filing any document which may be construed as a general appearance before you challenge jurisdiction to proceed. Rule 12(b) (“Obtaining an extension of time within which to answer or otherwise plead shall not constitute a waiver of any defense herein”); N.C. Gen. Stat. § 1-75.7 (“[O]btaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance”). *But see Philpott v. Kerns*, 285 N.C. 225, 229 (1974) (holding the filing of an extension of time is a general appearance). A word to the wise: *Philpott* has a cautionary Shepard’s signal.
3. Certain defenses or objections should be raised by pre-answer motion or in the initial responsive pleading (if no such motion was made). Do not separate Rule 12(b)(2)–(5) motions; failure to assert a defense to lack of personal jurisdiction, improper venue or division, insufficiency of process, or insufficiency of service of process as prescribed constitutes a waiver. Rule 12(h)(1).

4. A motion for judgment on the pleadings should be made when the pleadings are closed and before trial. I commonly use this motion when a Chapter 50C case is called for trial, and the pleading is clearly deficient. Rule 12(c).
5. A motion to strike is permitted for any insufficient defense or redundant, irrelevant, immaterial, impertinent, or scandalous matter. I frequently use this motion when inadmissible evidence is alleged are made in pleadings. Rule 12(f).
6. A judge cannot *sua sponte* order a change in venue if never requested by the parties. *Zetino-Cruz v. Benitez-Zetino*, ___ N.C. App. ___, 791 S.E.2d 100 (2016).

Rule 13. Counterclaim and crossclaim.

Meaning: Compulsory counterclaims are required if they arise out of the transaction or occurrence that is the subject matter of the opposing party’s claim. Permissive counterclaims do not arise out of the same transaction or occurrence, and may permit unrelated actions to be joined.

1. Appreciate the affirmative defense of “prior pending action” doctrine. The first action filed trumps the second action if the subject matter is substantially the same. *Shoaf v. Shoaf*, 219 N.C. App. 471 (2012).
2. If actions for absolute divorce, divorce from bed and board, alimony, or annulment are pending, then subsequently instituted actions for custody or child support *must* be joined with same. N.C. Gen. Stat. § 50-13.5(f).
3. If actions for custody or child support are pending, then subsequently instituted actions for absolute divorce, divorce from bed and board, alimony, or annulment *may* be consolidated with the custody or child support action(s). *Id.*
4. Notwithstanding Rule 13(a) (compulsory counterclaims), an action for absolute divorce *may* be filed independently of any action for alimony, post-separation support, custody and support, or another absolute divorce. N.C. Gen. Stat. § 50-19(a); *see* N.C. Gen. Stat. § 50-19(b) (vice versa); *see also* *Murrelle v. Murrelle*, 233 N.C. App. 786 (2014) (unpublished).
5. *Beware* a motion to dismiss for failure to join compulsory counterclaims in a family law context. The statutes are difficult to construe in *pari materia*. Compare N.C. Gen. Stat. § 50-13.5(f) (*venue* for custody and support actions) with N.C. Gen. Stat. §§ 50-19(a) and (b) (maintenance of certain actions as *independent actions permissible*). Although the first statute states joinder is required, the latter permits independent actions. If *Gardner v. Gardner*, 294 N.C. 172 (1978), is argued in support of compulsory joinder, that decision was abrogated by enactment of N.C. Gen. Stat. §§ 50-19 on July 1, 1979. *A fortiori*, *Gardner* is specifically limited to the “law of the case,” meaning when a court decides a legal issue, that decision

governs throughout that case but carries no precedential value. *See Gardner v. Gardner*, 48 N.C. App. 38 (1980).

Rule 15. Amended and supplemental pleadings.

Meaning: A party may amend his pleading any time before a responsive pleading is served or, if no responsive pleading is permitted and the action is not placed upon the trial calendar, he may amend within 30 days after service. Rule 15(a).

1. After a responsive pleading is filed, a party must either obtain written consent of the adverse party or request leave of court to amend. Absent material prejudice, leave to amend should be “freely given.” Rule 15(a); *Coffey v. Coffey*, 94 N.C. App. 717, 722 (1995).
2. Amended claims relate back to the date of the original filing, absent notice issues. Rule 15(c).
3. When issues not raised by the pleadings are tried at trial without objection, they shall be treated as if raised in the pleadings, and the pleadings shall be amended to conform to the evidence. Rule 15(b); *see Guilford Cnty. ex rel. St. Peter v. Lyon*, 247 N.C. App. 74 (2016).

Rule 17. Parties plaintiff and defendant; capacity.

Meaning: In a family law context, GAL’s are routinely appointed when a party is incompetent or an unemancipated minor parent. Appointment of a GAL for the child in a custody case may be by consent or by appointment. Rule 17(b)(3) (a GAL may be appointed when deemed expedient by the court); Rule 17(c) (appointment procedure). However, appointment of a custody evaluator must be by consent.

Rule 19. Necessary joinder of parties.

Meaning: Persons who are united in interest must be joined as parties. This involves putative fathers in legitimation, paternity, adoption, custody, and child support context, as well as third parties alleging standing to intervene in a custody case.

1. You *must* join as a necessary party a third person/entity having title or ownership interest when alleging a constructive, resulting, or express trust. You must join an LLC or other business entity if the court orders action by those entities. If a necessary party is not joined with the action, any subsequent order is null and void. *Tanner v. Tanner*, ___ N.C. App. ___, 789 S.E.2d 888 (2016) (holding an order

void that imposed a constructive trust on a plaintiff's mother as she was an unjoined, necessary party due to her receipt of more than \$335,000.00 from a plaintiff's business months before the parties' separation); *see* Cheryl Howell, *Equitable Distribution: When does the marital LLC have to be joined as a party?*, ON THE CIVIL SIDE (February 12, 2016, 5:00 AM), <https://civil.sog.unc.edu/equitable-distribution-when-does-the-marital-llc-have-to-be-joined-as-a-party/>.

2. Concepts of property and ownership include equitable interests held by third parties. *Upchurch v. Upchurch*, 132 N.C. App. 172, 175 (1996).

Rule 24. Intervention.

Meaning: An applicant may intervene as a matter of conditional or unconditional right when claiming an interest relating to the subject of the action and disposition may impair one's ability to protect that interest.

1. The conditional right to intervene allows, in certain contexts, grandparent intervention in child custody or visitation cases. *See, e.g.*, N.C. Gen. Stat. § 50-13.2(b1).
2. The intervenor shall serve a motion stating grounds to intervene upon all parties, accompanied by a pleading setting forth the claim.
3. If contested, the motion to intervene should be heard before the parties are ordered to mediation.

Rule 25. Substitution of parties upon death, incompetency or transfer of interest; abatement.

Meaning: No action abates upon death of a party if the cause of action survives, and the court may, within the time specified pursuant to N.C. Gen. Stat. § 28A-19-3, order substitution of the personal representative and allow the action to continue. Other rules apply for insanity or incompetency.

1. A claim for equitable distribution, filed or not, survives the death of a spouse so long as the parties were living separate and apart at death. N.C. Gen. Stat. § 50-20(1)(1).
2. The surviving spouse may file an equitable distribution claim *against the estate* of the deceased spouse subject to timing rules of claims against the estate. N.C. Gen. Stat. § 28A-19-1. *Beware* the 90 day notice to creditors.

3. The estate may file an equitable distribution claim *against the surviving spouse* within one year of death. N.C. Gen. Stat. § 50-20(1)(3).
4. An action will abate unless proper parties are substituted within the time fixed by the court and within 12 months from the order. Rule 25(c).

Rule 26. General provisions governing discovery.

Meaning: Discovery is proper if the information sought appears “reasonably calculated to lead to the discovery of admissible evidence.”

1. Proper objections include discovery sought is (a) obtainable from a more convenient or less burdensome or expensive source; (b) unduly burdensome or expensive; (c) unreasonably cumulative or duplicative; (d) privileged; (e) work product; (f) unobtainable without undue hardship; and (g) improper as the party had ample opportunity to obtain the information sought. Rule 26(b).
2. Discovery is designed for early completion in the case. The court may impose an appropriate sanction when one party has willfully obstructed or unreasonably delayed discovery proceedings or a pending equitable distribution proceeding, and the delay is or would be prejudicial to the interest of the other party. Sanctions may include reasonable expenses and damages incurred, a reasonable attorney’s fee, and the expenses of an expert necessary to timely conduct the proceeding. N.C. Gen. Stat. § 50-20(e).
3. Protective orders are rare but may apply for business, privacy interests, or grossly excessive discovery requests. Rule 26(c).
4. A party is required to disclose the identity of an expert it intends to use at trial. Rule 26(b)(4)a.1. Generally, discovery for a consulting expert is not permitted. Rule 26(b)(4)b.2. A party has the option—not the obligation—to provide a written report which, if provided, must include a complete statement of all opinions the witness will express, the basis, and reasons for them. Rule 26(b)(4)a.2. Drafts of the expert are not discoverable. Rule 26(b)(4)d. You may depose the expert without a court order. Rule 26(b)(4)b.
5. *Beware* of limits applicable to a preservation letter to unrepresented parties.

Rule 30. Depositions upon oral examination.

Meaning: This tool has become more common in custody and equitable distribution cases, particularly out-of-county.

1. Understand the rule has strict notice, timing, location, and production of documents requirements.
2. Be careful of the “usual stipulations.” Stipulate the rules of civil procedure apply.
3. Obtain documents for a party deponent via a request for production of documents. Rule 34(a). Obtain documents for a non-party deponent via a subpoena *duces tecum*. Rules 30(b)(1).
4. Any party or potential witness may be deposed. Special rules apply for persons in prison, in-patient care, or the mentally ill or handicapped. Rule 30(a).
5. A deposition is an open proceeding to witnesses. *See* Rule 26(c) (permitting a protective order excluding witnesses except those designated by the court).
6. Object to the form of the question if improper. Otherwise, the objection is waived. Rule 32(d)(3)b.
7. The rule does not limit the number of depositions one may take—even of the same person—although the same may result in motions for a protective order or to quash (or an objection to) a subpoena, among other action.
8. If your client is deposed, do not waive the signing of the transcript. Insure your client reviews the same, correcting any mistakes. Rule 30(e).
9. Notice and leave of court may be required for depositions other than stenographic means. Rule 30(b)(4).
10. Videotape a deposition if your witness may be unavailable at trial; for an expert witness; to memorialize the conduct of a party, witness, or an attorney; or if you believe a video deposition will be effective at trial. Rule 30(b)(4).
11. Deposition by telephone may occur by stipulation or by motion and court order. Rule 30(b)(7).

Rule 33. Interrogatories to parties.

Meaning: Interrogatories are used to gain factual information about the other opposing party, material witnesses, experts, and the case.

1. A party may direct no more than 50 interrogatories to the other party. Subparts count as separate questions under the rule. Rule 33(a); *see* G. GRAY WILSON,

NORTH CAROLINA CIVIL PROCEDURE § 33-5 (3d ed. 2007) (noting a party likely waives an objection based on the number of interrogatories should he choose to answer any of same).

2. Interrogatories *must* be verified and can be used to discredit at trial. Rule 33(b).
3. Upon being served interrogatories, a respondent has 30 days to answer after service of same or 45 days to answer following service of the summons and complaint, whichever is longer. Rule 33(a).
4. See Rule 6 for extensions of time.
5. The best interrogatories are crafted fact-specific to the case.

Rule 34. Production of documents, electronically stored information, and things; entry upon land for inspection and other purposes.

Meaning: The rule (1) allows a party to request and view designated documents in possession, custody, or control of the party and (2) permits entry upon designated land to inspect, measure, survey, photograph, or test the property.

1. Request for documents are limited in scope only by relevancy and Rule 26 considerations. *See* Rule 26(b)(1a) (limiting discovery that is unreasonably cumulative, obtainable from a more convenient or less expensive source, or unduly burdensome or expensive for the needs of a case).
2. Use request for documents for parties and a subpoena *duces tecum* for non-parties. *See Kilgo v. Wal-Mart Stores, Inc.*, 138 N.C. App. 644 (2000). Certain exceptions exist for public records and hospital medical records by statute. Rule 45(c)(2). Refer to the local rules of your jurisdiction, particularly for medical or DSS records.
3. Upon being served a request for documents, a respondent has 30 days to respond after service of same or 45 days to respond following service of the summons and complaint, whichever is longer. Rule 34(b).
4. Design your request with trial in mind. In a family law context, seek, *inter alia*, financial, employment, medical, and other relevant documents.
5. You may wish to request entry upon land to allow an appraiser upon the property to value the real estate or personal property, to observe the layout of the home to prove opportunity for a marital tort, or to determine the living conditions for the children.

Rule 36. Requests for admission; effect of admission.

Meaning: The primary purpose of this rule is to establish the truth of factual or legal matters, narrow trial issues, and identify issues in genuine dispute.

1. Relevance is circumscribed by Rule 26(b).
2. Upon being served a request for admission, a respondent has 30 days to respond after service of same or 60 days to respond following service of the summons and complaint, whichever is longer. Rule 36(a).
3. Any matter admitted is conclusively established absent the court's discretionary amendment or withdrawal. Rule 36(b).
4. Proof of a matter not admitted or insufficiently answered may result in an award of expenses. Rule 36(a); Rule 37(a)(4).

Rule 37. Failure to make discovery; sanctions

Meaning: The primary purpose of this rule is to compel discovery responses and provide appropriate sanctions.

1. Beware of motions for protective order; incomplete answers to discovery requests; and failures to admit, attend depositions, obey orders, produce documents, or participate in the discovery process.
2. Any motion to compel under this rule must include a certification that the movant has in good faith conferred, or attempted to confer, with the party failing to comply. Rule 37(a)(2).
3. Courts loathe gamesmanship. Sanctions, monetary and otherwise, may be awarded for partial performance or evasiveness, failure to admit, stubborn resistance to court orders, or other misconduct. Motions to compel allow expenses, including attorney's fees, for the motion and, if denied, for defense of same. Rule 37(a)(4).

Rule 41. Dismissal of actions.

Meaning: The rule allows for a voluntary dismissal *without prejudice* and a dismissal *with prejudice*.

1. A plaintiff may dismiss his action *once* without prejudice at any time before resting his case, thus invoking the one-year savings clause. Rule 41(a)(1).
2. However, the common law exception lives. Though Rule 41 is silent on the issue, a plaintiff may not dismiss his action—without the consent of a defendant, when a

defendant has filed a counterclaim arising out of the same transaction or occurrence. *See Gardner v. Gardner*, 48 N.C. App. 38 (1980); *Swygert v. Swygert*, 46 N.C. App. 173 (1980).

3. Unless a dismissal states otherwise, it shall be considered without prejudice. Rule 41(a)(1).
4. Once a plaintiff has completed his evidence presentation, a defendant may move for a dismissal with prejudice. If a defendant presents evidence after making a Rule 41(b) motion to dismiss, “Defendant waives the right to appeal the denial of the motion to dismiss made at the close of Plaintiff’s evidence.” *Karger v. Wood*, 174 N.C. App. 703 (2005) (alterations omitted). A defendant may renew his motion at the close of all the evidence. If the court renders a dismissal on the merits—other than for lack of jurisdiction, improper venue, or for failure to join a necessary party—it operates as an adjudication upon the merits. Rule 41(b).
6. *Hatton v. Garrett*, ___ N.C. App. ___, 795 S.E.2d 157 (2017) (unpublished) (holding the standard for dismissal is whether there is competent evidence to support the findings of fact, sufficient findings of fact to support the conclusions of law, and sufficient conclusions of law to support the decree).

Rule 43. Evidence

Meaning: The rule covers select evidence subjects of possible witnesses, offers of proof, affirmation or oath, and the hearing of evidence on motions.

Rule 45. Subpoena.

Meaning: The rule mandates the form, manner of service, and various methods of protection of persons subject to subpoena.

1. A subpoena is a court order. *See* Rule 45(e)(1) (failure to obey a subpoena may be deemed contempt of court).
2. The rule requires service upon opposing counsel or parties. Rule 45(b)(2); Rule 5(b). Non-compliance may result in a procedural due process issue.
3. Use request for documents for parties and a subpoena *duces tecum* for non-parties. *See Kilgo v. Wal-Mart Stores, Inc.*, 138 N.C. App. 644 (2000). Certain exceptions exist for public records and hospital medical records by statute. Rule 45(c)(2). Refer to the local rules of your jurisdiction, particularly for medical or DSS records.
4. Objections must be filed by notice of objection or motion to quash within 10 days. However, if the subpoena is served with less than 10 days before compliance, any

objection must be filed before the time specified. Rule 45(c)(3). Failure to object is a waiver.

5. Remedies for non-compliance include the issuance of a show cause order or a motion for contempt.
6. Remember to issue a subpoena for an expert witness if you are seeking reimbursement for an expert witness fee. N.C. Gen. Stat. § 7A-305(d)(11).
7. The rule is onerous for issuance of an out-of-state subpoena for records. *See* 2014 FEO 7 (ruling a lawyer may provide a foreign entity or individual with a North Carolina subpoena accompanied by a statement/letter explaining that the subpoena is not enforceable in the foreign jurisdiction, the recipient is not required to comply with the subpoena, and the subpoena is being provided solely for the recipient's records).
8. Once you receive documents pursuant to a subpoena, you must provide notice and an opportunity to copy and inspect the same to other parties within five business days. Rule 45(d1).
9. A local rule provides that subpoenas for medical or DSS records necessitate issuance of a court order for same. Post-service, said records are sent to the district court judge's office and are maintained by the trial court coordinator. Attorneys may review, but not copy, these records upon notice and approval of the trial court coordinator.

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

Meaning: The rule allows a motion for a directed verdict at the close of the opposing party's evidence and all the evidence, and for a judgment notwithstanding the verdict at the close of all the evidence not later than 10 days after entry of judgment.

1. A motion for a directed verdict shall state the specific grounds therefore and is effective without assent of the jury. Rule 50(a).
2. A motion for a judgment notwithstanding the verdict is permitted once a party has moved for a directed verdict. The movant may ask to set aside any verdict and judgment entered thereon within 10 days after entry of judgment or, if a verdict was not returned, within 10 days after the jury has been discharged. Rule 50(b)(1).
3. A motion for a new trial may be joined with these motions or prayed in the alternative. Rule 50(b)(1).

Rule 52. Findings by the court.

Meaning: Upon motion of a party not later than 10 days after entry of judgment, the court may amend its findings or make additional findings and amend the judgment accordingly.

1. This rule is important when the court elects *not* to make certain findings and for the making of an appellate record.
2. This motion may be made with a motion for a new trial. Rule 52(b).

Rule 54. Judgments.

Meaning: A judgment is a determination of the rights of the parties and is either interlocutory or final. A final judgment leaves nothing to be judicially determined between the parties.

1. An interlocutory judgment may be immediately appealable if (1) “a substantial right of the party is affected,” and (2) the substantial right will be lost, prejudiced, or inadequately preserved without an immediate appeal. *See, e.g., Kelley v. Kelley*, ___ N.C. App. ___, 798 S.E.2d 771 (2017) (holding if denial of summary judgment affects a substantial right by precluding the ability to present affirmative defenses, the judgment is immediately appealable); *see Clements v. Clements ex rel. Craige*, 219 N.C. App. 581, 584, 725 S.E.2d 373, 376 (2012). Examples of a substantial right in a domestic context include subject matter jurisdiction, standing, etc.
2. A trial court may not by Rule 54(b) certification render a decree immediately appealable if it is not a final judgment. *Geoghagan v. Geoghagan*, ___ N.C. App. ___, 803 S.E.2d 172 (2017).
3. A final judgment shall grant relief to the party in whose favor it is rendered even if the party has not demanded such relief in his pleadings. *Lasecki v. Lasecki*, 246 N.C. App. 518 (2016); *see also* Rule 8.
4. An *order* requires performance. An order is *temporary* if it is entered without prejudice, states a clear and specific reconvening time and the interval is reasonably brief, or it does not determine all the issues. *Woodring v. Woodring*, 227 N.C. App. 638 (2013).

Rule 55. Default.

Meaning: Entry of default is permissible when a party against whom affirmative relief is sought fails to plead pursuant to the rules.

1. An entry of default serves two purposes: it “deems the allegations in the complaint admitted,” and it “denies the responding party the opportunity to answer the complaint.” *West v. Marko*, 141 N.C. App. 688 (2001).
2. With regard to actions for absolute divorce, annulment, and alimony, allegations are deemed denied. N.C. Gen. Stat. § 50-10(a); *Phillips v. Phillips*, 185 N.C. App. 238 (2007).
3. Default may be set aside “for good cause shown” per Rule 60(b). Rule 55(d). The court considers whether the moving party was diligent in pursuit of the matter, if the non-moving party would suffer any harm by virtue of the delay, and whether the moving party would suffer a grave injustice by being unable to defend the action. *Swan Beach Corolla, LLC v. Cty. of Currituck*, ___ N.C. App. ___, 805 S.E.2d. 743 (2017).

Rule 56. Summary judgment.

Meaning: A party is entitled to summary judgment when there is no genuine issue as to any material fact, and a party is entitled to judgment as a matter of law.

1. The motion shall be served at least 10 days before the hearing date. Rule 56(c).
2. The adverse party may serve opposing affidavits at least two days before the hearing. *Id.* The rule defines service as actual receipt of the affidavit. *Id.*
3. Sharp limits apply to use of oral testimony and supplemental discovery as proof for summary judgment. However, the motion may be opposed with depositions, answers to interrogatories, and opposing affidavits. *McLeod v. McLeod*, ___ N.C. App. ___, 801 S.E.2d 181 (2017) (unpublished).
4. This rule is used routinely in judgments for absolute divorce.

Rule 58. Entry of judgment.

Meaning: The rule explains entry of judgment, service requirements, tolling periods, and deadlines.

1. A judgment/order is entered when reduced to writing, signed by the judge, and filed with the clerk of court. Rule 58.

2. The rule requires a party to serve the order to all other parties within three days after the judgment is entered. *Id.*
3. Service should be via Rule 5 and *always* have a certificate of service. *Id.*
4. If you do not serve all parties within three days of entry, the time periods applicable to Rule 50(b), Rule 52(b), and Rule 59 are tolled for the duration of non-compliance not to exceed 90 days. *Id.*
5. Consent for signing and entry of a judgment out-of-term, session, county, and district shall be deemed to have been given unless an express objection was made on the record prior to the end of term or session. *Id.*
6. Parties have 30 days to file notice of appeal from entry of a final order or interlocutory order affecting a substantial right unless the period is tolled up to 90 days as referenced in Paragraph No. 4; by Rule 50(b), Rule 52(b), or Rule 59; or a writ is allowed under N.C. R. App. Pro. 21. *Id.*; *see* N.C. R. App. Pro. 21.
7. *Actual notice* of the entry of a judgment/order triggers the time for appeal or Rule 59 relief. *Manone v. Coffee*, 217 N.C. App. 619 (2011); *Magazian v. Creagh*, 234 N.C. App. 511 (2014) (holding, although email is not a valid method of service, a plaintiff's admission of actual notice of the judgment triggered her time for—and negated—her appeal).
8. *Nunc pro tunc* only applies to a previously filed court order or judgment, granting retroactive effect. *See* Rule 5(e)(3).

Rule 59. New trials; amendment of judgments.

Meaning: The rule lists the grounds and time requirements for a motion for a new trial as well as a motion to amend judgment.

1. The rule *requires* this motion be served not later than 10 days after entry of judgment. Rule 59(b). This time cannot be enlarged. Rule 6(b); *but see* G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE (3d ed. 2007) § 59-14 (noting Rule 6(b) could be used for the *affidavits* of the motion).
2. Beware the court may reopen the evidence and issue a new judgment. In other words, the court may—based on your motion for a new trial—correct a defective judgment. Rule 59(a).
3. When the motion is based upon affidavits, they shall be served with the motion. Failure to do so will result in a motion to dismiss based on statutory noncompliance. The opposing party has 10 days to serve opposing affidavits which may be extended up to 30 days by the court or by stipulation. Reply affidavits are discretionary with the court. Rule 59(c).

4. If Rule 59 is denied, a party has 30 days to file notice of appeal *unless* the Rule 59 motion was frivolous. *Quevedo-Woolf v. Overholser*, ___ N.C. App. ___, 2018 N.C. App. LEXIS 946 (September 18, 2018). File a factually or legally supported Rule 59 motion, or file none at all.
5. *Actual notice* of the entry of a judgment/order triggers the time for appeal or Rule 59 relief. *Manone v. Coffee*, 217 N.C. App. 619 (2011); *Magazian v. Creagh*, 234 N.C. App. 511 (2014) (holding, although email is not a valid method of service, a plaintiff's admission of actual notice of the judgment triggered her time for—and negated—her appeal).
6. The court can, *sua sponte*, order a new trial so long as it provides notice, proper grounds, and hearing. Rule 59(d).
7. The primary grounds for a new trial in a domestic context include newly discovered evidence which could not with reasonable diligence have been discovered and produced at trial, misconduct of the prevailing party, insufficiency of the evidence, error in law occurring at the trial, or the verdict is contrary to law. Rule 59(a).

Rule 60. Relief from judgment or order.

Meaning: The rule provides for relief from a judgment/order for mistake, newly discovered evidence, fraud, changes in the law, and for reasons justifying relief from the judgment/order.

1. Rule 60(a) rectifies clerical mistakes, not substantive changes beyond the clerical error.
2. Rule 60(b)(1)–(3) requires the motion within a reasonable time and not more than one year after the judgment was entered. However, this rule does not limit the power of a court to set aside a judgment/order for *fraud* upon the court. Rule 60(b).
3. Rule 60(b)(4)–(6) allows a motion within a reasonable time. *Id.*
4. A party may *not* use Rule 60 to amend a judgment. The proper rules to amend are Rule 52(b)(allowing amended findings and/or judgment) and Rule 59 (allowing amended judgment). *See, e.g., Hagwood v. Odom*, 88 N.C. App. 513 (1988) (holding an appropriate remedy for errors of law is an appeal or a motion under Rule 59 in lieu of Rule 60(b)).
5. A party may *not* use Rule 60(b) to modify an interlocutory order, including temporary custody and child support, post-separation support, or an interim distribution ED order. *See, e.g., Sink v. Easter*, 288 N.C. 183 (1975) (holding Rule 60(b) applies by its express terms to final judgments and does not apply to interlocutory judgments, orders, or proceedings).

6. A party *should* specify whether it is a Rule 60(a) or Rule 60(b) motion. *See Ellis v. Ellis*, 38 N.C. App. 81 (noting the better practice for a movant is to specify the rule section); *see also* Rule 7()(b)(1); Rule 6 of the General Rules of Practice for Superior and District Courts.
7. The court cannot invoke a Rule 60 motion, *sua sponte*, if seen as a judgment by ambush. *See Guilford Cnty. ex rel. St. Peter v. Lyon*, 247 N.C. App. 74 (2016).

Rule 65. Injunctions.

Meaning: The rule defines types of injunctions; legal, timing, and security requirements; and damages on dissolution.

1. Pretrial, protective remedies include *lis pendens* and injunctive relief. N.C. Gen. Stat. §§ 50-20(h) and (i).
2. A Temporary Restraining Order (“TRO”) is an emergency measure issued without notice and before a hearing on a preliminary injunction. TROs are granted *only* if specific facts shown by affidavit or verified complaint clearly demonstrate immediate need and irreparable harm before the adverse party can be heard in opposition. Rule 65(b); *Lambe v. Smith*, 11 N.C. App. 580 (1971).
3. TROs require subsequent notice and hearing to determine whether a preliminary injunction should issue. A TRO shall expire by its terms and may not exceed 10 days unless extended for a like period for good cause or longer by consent. Rule 65(b). The adverse party may move for dissolution or modification on two days’ notice. *Id.* Damages may be awarded in an order for dissolution. Rule 65(e). Personal jurisdiction, Rule 5 service, and actual notice are required. Rule 65; *Helbein v. Southern Metals Co., Inc.*, 119 N.C. App. 431 (1995). Posting of security for any restraining order is contemplated by the rule with limited exceptions. Rule 65(c). A restraining order is binding upon the parties, their agents and attorneys, and those acting in concert with actual notice. Rule 65(d).
4. Preliminary injunctions require (a) a likelihood of success on the merits *and* (b) the likelihood of irreparable loss unless injunctive relief is issued *or* the court deems issuance is necessary to protect the applicant’s rights during litigation. *N.C. Baptist Hosp. v. Novant Health Inc.*, 195 N.C. App. 721 (2009). Generally, preliminary injunctions are left in place until a final determination of the issues. *Lambe v. Smith*, 11 N.C. App. 580 (1971).

Rule 68. Offer of judgment and disclaimer.

Meaning: The rule allows a defendant to offer a judgment against him for money or property which, if not accepted in writing within 10 days after service of the offer, is deemed withdrawn. If judgment finally obtained is not more favorable than the offer, the opposing must pay cost incurred after the making of the offer.

1. The intent of this rule is to “encourage compromise and to avoid protracted litigation.” *Aikens v. Ludlum*, 113 N.C. App. 823 (1994).
2. The offer must create a binding final judgment that forces both parties “to evaluate the risks and costs of litigation and to balance them against the likelihood of success.” *Marek v. Chesny*, 473 U.S. 1 (1985).
3. This rule *may* be used in cases involving alimony, child support, equitable distribution, and enforcement of separation agreements. To be binding in equitable distribution, the offer for judgment must extend to all assets in the marital estate and must not be limited to one marital asset. *Lauterbach v. Weiner*, 174 N.C. App. 201 (2005) (holding even if Rule 68 applies to equitable distribution, plaintiff limited her offer to only the marital residence rather than the entire marital estate, failing to follow the rule).
4. The use of this rule has been specifically *rejected* in the context of child custody matters. *Mohr v. Mohr*, 155 N.C. App. 421 (2002).

Rule 70. Judgment for specific acts; vesting title.

Meaning: If a party fails to execute a conveyance of land, to deliver deeds or documents, or to perform any other specific act required by judgment, this rule allows a judge to direct that the act be done by some other appointed person.

1. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience. Rule 70.
2. A judge may, in proper cases, adjudge the disobedient party in contempt. *Id.*
3. If real or personal property is within North Carolina, the judge may enter a judgment divesting title of the property of any party and vesting it in others. This judgment has the same effect as a conveyance. If judgment is for delivery of possession of property, the party in whose favor the order is entered is entitled to execution upon application to the clerk. *Id.*
4. When a judge directs a party to execute a deed on behalf of a disobedient party, such direction is an “order” divesting ownership of the property from the disobedient party. *Dabbondanza v. Hansley*, ___ N.C. App. ___, 791 S.E.2d 116

(2016) (holding an oral directive from the judge to the clerk to convey a deed to a party was unenforceable as Rule 58 orders are enforceable only when reduced to writing, signed by the judge, and filed by the clerk).

A gentle reminder as we part.

We often deal with unrepresented parties, subjecting ourselves to those who are not officers of the court. Remember, the Rules of Professional Conduct permit an attorney to interview an adverse *pro se* party and make a demand or propose a settlement. N.C. R. of Prof'l Conduct 15. The rules further allow a lawyer to prepare an affidavit and confession of judgment for an adverse *pro se* party provided the lawyer explains who he represents and does not give legal advice. N.C. R. of Prof'l Conduct 165; *see* 2009 FEO 12.

However, the rules do not allow lawyers to give legal advice to an adverse *pro se* party, to state or imply the lawyer is a disinterested party, or render any advice other than to secure counsel. N.C. R. of Prof'l Conduct 4.3(a). In domestic cases, an attorney may not make a form available to an adverse *pro se* party, directly or through his client, that if signed would waive the opposing party's right to answer or other rights. CPR 296; *see also* 2002 FEO 6 (ruling that an attorney may not prepare the answer to a complaint for an adverse *pro se* party). An attorney may not prepare a waiver of exemptions for an adverse *pro se* party. N.C. R. of Prof'l Conduct 165; *see* 2009 FEO 12.

Be collegial. Know the rules to parry sharp practice. Check the local rules. And—most importantly—remember the epilogue.

Epilogue

“You don't learn to walk by following rules. You learn by doing, and by falling over.”

- Richard Branson

“The young man knows the rules, but the old man knows the exceptions.”

- Oliver Wendell Holmes, Sr.