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of Superior Court,
County Attorneys,
Sheriff's Attorneys

ADMINISTRATION OF JUSTICE MEMORANDA

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New Eviction Procedures: 1983 Legislation

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Two bills enacted by the 1983 Session of the General Assembly will have a major impact on summary ejectment (eviction) cases. H 448 (Ch. 332, S.L. 1983) rewrites the law on how the sheriff must serve the complaint and summons in a summary ejectment case and H 937 (Ch. 672, S.L. 1983) writes into the statutes a procedure for serving a writ of ejectment. This memorandum will discuss both new laws, beginning with H 937 since it is already in effect.

Uniform Eviction Policy Act

H 937 adds a new G.S. 42-37 requiring the sheriff to give the defendant notice before eviction and providing that the sheriff may have the defendant's property stored rather than setting it out. This law has already taken effect and applies to any writ of ejectment issued on or after July 1, 1983.

The new law specifies that the sheriff, acting under a writ of ejectment, shall remove the tenant's property no more than seven days after receipt of the writ unless the landlord or his authorized agent signs a statement saying that the tenant's property can remain on the premises.

The sheriff must give the tenant notice of the time of removal and must carry out the writ within seven days after its receipt. Although read literally the act might allow the sheriff to padlock without first giving the defendant notice of the time of padlocking, the safest course to follow is to give the defendant notice of the time for carrying out the order whether it will

be carried out by padlocking or by removing the property. Another reason for giving notice in all cases is to encourage the tenant to move out on his own. Notice must be given by:

(1) delivering a copy to the tenant or his authorized agent at least two days before the time stated for removal,

(2) leaving a copy at the tenant's dwelling or usual place of abode at least two days before the time stated in the notice with a person of suitable age and discretion who resides at the dwelling, or

(3) by mailing a copy of the notice by first class mail to the tenant at least five days before the time stated for removal.

With the requirement to carry out the writ within seven days, it seems to me that the sheriff in fact only has one choice on how to comply with the notice provisions of this statute: When the writ of ejectment reaches the sheriff's office, the deputy handling evictions or office clerk should immediately set a time for removal seven days later, and mail a notice to the tenant about the eviction. Notice of the time should also be sent to the landlord or his agent. A model notice is set out at the end of this memorandum as Attachment A. In computing the seven-day time, the day the writ is received is not counted and if the seventh day falls on a Saturday, Sunday or a legal holiday, the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. Intermediate Saturdays, Sundays, and holidays are counted. Two examples follow: If the writ is received in the sheriff's office on Friday, July 15, the sheriff has until midnight Friday, July 23 to serve it. But if Friday, July 23 were a legal holiday, he would then have until midnight Monday, July 26 to carry out the writ because that would be the next day not a Saturday, Sunday or legal holiday. If the sheriff's department tried to use one of the other methods of serving notice (personally serving the tenant or leaving it at the dwelling with a person of suitable age and discretion), it would require going out immediately upon receiving the writ to try to find tenant or someone else at his dwelling; if he could not be found within two days, notice would have to be mailed anyway since it would have been mailed five days before the writ is enforced. A department could not comply with the requirement to carry out the writ within seven days if it took a chance that a deputy would be able to find the tenant or a person of suitable age and discretion at the dwelling, did not mail notice five days before the writ was to be carried out, and then the deputy could not locate the tenant in time to serve the notice. Also for economic reasons, serving the notice by mail is preferable. It certainly is less expensive to mail a letter than send a car. Since G.S. 7A-311 allows the sheriff to require the landlord to advance all expenses of carrying out the writ of ejectment, the sheriff's department could require the landlord to furnish to the department at the time the

clerk issues the writ of ejectment a stamped envelope addressed to the tenant at his last known address. The landlord should give the department a self-addressed stamped envelope also so he will get notice of the time for removal.

If the landlord agrees to having the property remain on the premises, he must give the sheriff a signed statement of agreement. A model statement is attached to this memo as Appendix B. The sheriff then carries out the writ by removing the tenant and any other people taking under the tenant who are on the premises at the time of the eviction and by locking the premises. The sheriff may require the landlord to meet the deputy at the premises at the time designated for removal and may require the landlord to provide the lock. The sheriff's return should indicate that the writ was carried out by locking the premises and the landlord's statement agreeing to that procedure should be attached to the return. The sheriff's duties regarding the writ would be completed after padlocking, and he would have no liability for the tenant's property.

If the landlord agrees to have the premises padlocked with the tenant's property left on the premises, he cannot automatically hold the property and refuse to return it to the tenant until rent or damages owed is paid. G.S. 44A-2(e) provides that a landlord has a lien (meaning he can hold the property for payment) on the tenant's personal property which remains on the premises if the tenant has vacated the premises for 21 or more days after the paid rental period has expired and the landlord has a lawful claim for damages against the tenant. Thus, to hold the property for back rent and other damages owed, the tenant must have vacated the premises leaving his property behind for at least twenty-one days. Otherwise the landlord must turn the personal property over to the tenant upon request. The following example illustrates the problem: Tenant does not pay his rent but continues to live on the premises; landlord files a summary ejectment action and gets a judgment for possession and back rent owed. Tenant still does not leave. Landlord has writ of ejectment issued and signs a statement that he is willing to have tenant's property remain on the premises; the sheriff goes out and padlocks the premises; that evening the tenant comes home and finds the door padlocked; he asks the landlord to return his property; the landlord would not be entitled to hold the tenant's property until the rent is paid; rather he must return the personal property to the tenant.

If the tenant has moved out of the premises, G.S. 44A-2 allows the landlord three other alternatives in dealing with the property left on the premises which do not involve the sheriff's department in the process. (1) If the tenant has vacated the premises for at least 21 days, the landlord may remove the property himself and store it for the tenant rather than asserting a lien on it and selling it. (2) If the landlord has gotten a judgment for possession from a magistrate, and the tenant has left the

premises, ten days after the judgment was rendered the landlord himself may remove the property left on the premises and store it. (3) If the total value of all the property remaining on the premises is less than \$100, then five days after the tenant has vacated the premises, the landlord may remove it from the premises and donate it to a charitable organization.

If the landlord does not agree to having the tenant's property left on the premises, the new law requires the sheriff, acting under the writ of ejectment, to remove the property. The law provides that the tenant shall take possession of his property upon removal. If the tenant is not present or is unwilling to take possession of his property upon removal, the sheriff may deliver the property to a storage warehouse rather than setting it out. The new law does not prohibit a sheriff from continuing the practice of setting the property out; however, since it provides an alternative that both removes the property and protects it (storage) at no extra cost to the sheriff's department, it is possible that a court might hold a sheriff liable in a negligence suit brought by a tenant for setting out the property rather than protecting it by storage. Therefore, the safest course for the sheriff to follow if the landlord is unwilling to padlock may be to store the property rather than setting it out. The new law authorizes the sheriff to deliver the tenant's property to a storage warehouse located in the county; or if there is no warehouse in the county, the sheriff may have the property stored in a warehouse in an adjoining county. The sheriff may require the landlord to advance the cost of delivering the property to the warehouse plus one month's storage fee. If the landlord refuses to advance the expenses (or fails to advance them within the time given by the sheriff), the statute specifies that the sheriff will return the writ unexecuted and will indicate on his return that the landlord refused to advance the expenses of storing the property. Any costs of summary ejectment and storing the property advanced by the landlord are assessed by the clerk as court costs and may be taken out of any security deposit given by the tenant. The statute states that the costs of removal and storage "shall constitute a lien against the stored property or a claim against any remaining balance of the proceeds of a warehouseman's lien sale." G.S. 44A-5 requires the surplus of a warehouseman's sale to be paid to the person entitled to it. Creditors holding security interests in the property would be entitled to any surplus in order of perfection of their liens. Under this new law any excess remaining after payment of lienors would then be used to pay back expenses advanced by the landlord rather than returned to the tenant.

The new law provides that the sheriff who stores a tenant's property and any person acting under his direction, control or employment is liable for willful or wanton negligence in storing the tenant's property. Willful and wanton negligence is more than carelessness. Willfulness involves a deliberate purpose not to

discharge some duty necessary to the safety of the person or property of another which duty had been assumed by contract or which is imposed on the person by operation of law. An act is wanton when it is done of wicked purpose or when it is done with reckless indifference to the rights of others. (Blevins v. France, 244 N.C. 334, 341 (1956)). Examples of willful or wanton negligence might be if the warehouseman stored tenant's household belongings outside or left them in a storage building several months after discovering that the roof had a substantial leak in it that was resulting in rain damage to the property. If the sheriff uses a reputable warehousemen to store the property, he probably does not need to worry too much about being held liable for damages during storage. To completely protect himself, a sheriff could choose to deal only with bonded warehousemen (if there are any in the county). In that case if the sheriff were held liable, he could go against the warehouseman who would have a bond to pay the judgment. If the sheriff decides to follow a procedure whereby the landlord makes the arrangements to have the property removed and stored, and the sheriff will merely oversee the removal, the sheriff might want to give the landlord a list of acceptable warehouses.

When the sheriff serves the writ by removing the defendant's property and having it stored, the return should be more specific than the return currently found on the form. The sheriff should check the block stating that the writ was served by removing the defendant from the premises and putting the plaintiff in possession and should add after that language the following "after giving notice of removal to the defendant as required by law. The defendant's property was taken to (insert name) warehouse for storage." Attached as Appendix C are models for five possible returns under the new law.

A major problem under the old law was that landlords would accept payments and ask the sheriff to return the writ only to reissue it a month later when the tenant did not pay the rent the next month. Or the landlord would work out payment arrangements and ask the sheriff to hold the writ a month or so to see if the tenant complied. This new law will change that procedure. Since it requires the sheriff to act within seven days, the landlord must either accept payment and agree not to evict within that seven-day period or the sheriff will either padlock or remove the property. And the new law provides that if the landlord wishes to have the writ recalled, he must sign a written statement that he does not want to eject the tenant because he has paid all court costs charged to him and has satisfied his indebtedness to the landlord. The landlord must give the signed statement to the sheriff. A copy of a model statement is attached as Appendix A. If the sheriff receives a notice of recall from the landlord, he shall return the writ unsatisfied because the landlord has been paid his indebtedness, and he must attach the landlord's statement to the return. Upon receiving the return, the clerk must make an

entry of satisfaction on the judgment docket. The landlord, therefore, will not be able to reissue the writ of ejectment at a later date. If the tenant fails to pay rent at a later time, the landlord will have to bring a new summary ejectment lawsuit before a magistrate. If the landlord does not give the sheriff a proper written notice for not ejecting the tenant, the sheriff should go ahead and carry out the eviction at the appointed time.

Each sheriff's department should adopt a new policy for handling evictions under this new law and should notify those landlords who issue most of the writs of ejectment of the new law and policy. A sample letter to landlords is attached as Appendix D.

Service of Process in Summary Ejectment Cases

H 448 (Ch. 332, S.L. 1983), which applies to summons served on or after October 1, 1983, will require a new procedure for serving the summons and complaint in a summary ejectment action. H 448 rewrites G.S. 42-29 and will cut down on the number of trips a sheriff must make to the defendant's premises before posting copies of the summons and complaint.

As of October 1, 1983, the first step the sheriff must take in serving the summons and complaint is to mail a copy first class mail to the defendant at his last known address. The law requires the plaintiff to provide the sheriff with a stamped addressed envelope.

Next the officer must attempt to telephone the defendant requesting that the defendant either personally visit the office to accept service or agree to a time for the defendant to receive delivery of service from the officer. To determine the defendant's telephone number, the officer should ask the plaintiff if he knows it or, if not, if he knows where the defendant works. If the plaintiff is not able to answer those questions, then the officer should check the appropriate telephone directory. If neither of those avenues reveal a telephone number at which the defendant may be reached, the officer may then proceed to going out to the premises. If the officer discovers a telephone number for the defendant, he should call that number at least twice (at different times of the day) to try to reach the defendant. If he is unsuccessful in reaching the defendant after two (or more if the sheriff wishes to try more) attempts, the officer may proceed to go to the premises. If the officer is able to reach the defendant by telephone, he should arrange a time for the defendant to come to the office and pick up the summons and complaint or arrange a time at which he will be home for the officer to go to the premises and serve the process on him.

If the officer is unable to reach the defendant by telephone or if the defendant does not come to the sheriff's office at the agreed upon time, the officer must make one visit to the defendant's place of abode at a time reasonably calculated to find the defendant there to attempt personal delivery of service. If the defendant is there, the sheriff shall deliver a copy of the process personally to him. If the defendant is not there but a person of suitable age and discretion who also resides at the residence is there, the sheriff shall deliver a copy of the complaint and summons to the person of suitable age and discretion. If no one answers the door, the sheriff shall post copies of the summons and complaint to a conspicuous part of the premises (usually the front door). Note that the law requires the sheriff to go out at a time reasonably calculated to find the defendant at home. Unless the sheriff knows that the defendant works a night shift, a time reasonably calculated to find defendant at home probably would be between 6 p.m. and 7 a.m. during weekdays and any time on weekends. If the sheriff has agreed upon a time to meet the defendant at this premises and neither the defendant nor a person of suitable age and discretion residing with the defendant is at the premises when the sheriff goes there, he may post the process.

The sheriff must make his return indicating how he served the process. Until new forms are available he should make one of the following returns. If the defendant is served personally or the process is left with a person of suitable age and discretion, the sheriff should add the following block:

And by mailing a copy to the defendant by first class mail.

If the defendant is served by posting, the sheriff should make the following change in the current return.

For Use In Summary Ejectment Cases Only

mailing a copy first class mail and making one visit at a time reasonably calculated to find defendant,
 After due and diligent search, the defendant cannot be found. Service was made by posting a copy of the summons and complaint at the following premises.

Name of the defendant served by posting

Address of premises where posted

Service of Process in All Small Claims Cases

H. 448 has one other change in it. Effective October 1, in any small claims case the plaintiff himself may serve the defendant by certified mail addressed to the defendant return receipt requested. The return receipt need not be signed by the defendant only to have good service. The new law provides that if the plaintiff files with the clerk an affidavit showing that he mailed the letter certified mail together with the return receipt signed by the person who received the mail, service is complete, and the magistrate may try the case. The law presumes that the person who signed the receipt was a person of suitable age and discretion residing in the addressee's dwelling house or was an agent authorized to be served. Obviously, it is less expensive for the plaintiff to pay for certified mail rather than the \$4 fee for service by the sheriff, and therefore the sheriff's department might wish to notify plaintiffs of this new option for service.

APPENDIX A

Plaintiff

vs.

Defendant

LANDLORD'S AGREEMENT TO LEAVE
PROPERTY ON PREMISES OR NOTICE
THAT TENANT HAS PAID MONEY OWED

To the Sheriff of _____ County

I, the undersigned, am the [] landlord [] agent of the landlord in the above entitled case and had issued the writ of ejectment in this case currently in your hands.

[] I agree to have the tenant's personal property remain on the premises, and therefore request that you padlock the premises.

[] I request that you return the writ unexecuted. I do not want to eject the tenant because he has satisfied his indebtedness to me.

Date of Signature	Signature
Address and telephone no. of person signing	Typed Signature

APPENDIX B

NOTICE TO TENANT OF EVICTION
(to be attached to writ of ejectment)

TO: _____
Name Defendant(s)

This office has received the attached writ of ejectment ordering the department to remove you from the premises stated in the writ. You should move from the premises immediately. If you have not moved yourself and all of your property out by _____

[] a.m. [] p.m. _____, 19____, a deputy in
(day, month, date)

this department will come at approximately that time and remove you and all your property from the premises or padlock the premises.

Date notice given	Sheriff
	County
	Deputy handling writ

APPENDIX C
RETURN OF SERVICE

When property removed and stored:

This order of execution was served as follows:

- By removing the defendant from the premises and putting the plaintiff in possession after giving notice of removal to the defendant as required by law. The defendant's property was taken to L. W. James Warehouse for storage.

When property removed but not stored:

This order of execution was served as follows:

- By removing the defendant from the premises and putting the plaintiff in possession after giving notice of removal to the defendant as required by law.

When property padlocked add in blank space the following:

- This order was served by leaving the tenant's property on the premises and locking the premises in accordance with the written request of the landlord which is attached.

When landlord requests return of writ:

- I have failed to remove the defendant from the premises for the following reason: The landlord requested that the writ be returned because the defendant paid the money owed. The tenant's request is attached.

When landlord refuses or fails to advance expenses of storage:

- I have failed to remove the defendant from the premises for the following reason: The landlord failed to advance the expenses of removal and one month's storage after being asked to do so.

APPENDIX D

TO: Landlords and Property Agents
FROM: _____ County Sheriff's Department
SUBJECT: Handling Writs of Ejectment

The 1983 General Assembly has enacted a new law (Ch. 332, S.L. 1983; H 937) which requires this office to change its procedure in carrying out writs of ejectment.

Under the new law you will have the option when you take out a writ of ejectment either to agree to have the tenant's property left on the premises and have this office padlock it, or if you want his property removed, you will be required to pay the costs of removing the property to a storage warehouse and one month's storage expenses.

You will be required to furnish this office with a stamped envelope addressed to the defendant at his last known address. The envelope must be attached to the writ when it is received in this office. You also should attach a stamped self-addressed envelope so we can notify you of the time set for removal.

If you choose to have the property left on the premises, you must furnish this office with a written notice of your intent. Copies of a possible form notice are available at this office. Your request to have the property remain on the premises must be attached to the writ of ejectment when it comes to this office. As mentioned above you will receive notice of the time at which this office will padlock the premises. You will be responsible for being at the premises at that time with a proper lock to fit the door. If you decide to follow this procedure, you should understand your rights and responsibilities with regard to the tenant's property left on the premises. You may wish to discuss this matter with an attorney before you decide whether to follow this option.

If you decide to follow the option of having the property removed, you will be required to make arrangements to have someone available to remove the property and carry it to a warehouse approved by this department if the tenant is not there to take his property. You also will be responsible for paying the first month's rent to the warehouseman. If you have not taken care of these arrangements, this department will not carry out the order.

The new law also provides that if the tenant pays you back rent and you agree not to eject him, you must notify this department in writing to that effect. A copy of a model notice is available from this department. Upon receipt of such a notice, we will return the writ and the clerk of court will mark the judgment satisfied.

You should be aware that the law (G.S. 44A-2(e)) gives you several options for dealing yourself with property left by the tenant when he vacates the premises leaving some of his property behind. You might also want to discuss those options with an attorney.

This new policy will take effect on _____.

Another new law (Ch. 332, S.L. 1983; H 448) will effect any summons and complaint in a summary ejectment action served on or after October 1, 1983. Beginning September 15, when you file a complaint in summary ejectment with the clerk of court's office you must also provide a stamped envelope addressed to the defendant at his last known address. This office will then mail a copy of the summons and complaint to the defendant as well as attempt personal service or posting the copies.

This office will attempt to answer any questions you might have about these new laws, but as mentioned before you might want to consult an attorney for a full explanation of your rights and responsibilities under these provisions.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1983
RATIFIED BILL

CHAPTER 672
HOUSE BILL 937

AN ACT TO ESTABLISH A UNIFORM EVICTION POLICY.
The General Assembly of North Carolina enacts:

Section 1. Article 3 of Chapter 42 of the General Statutes is amended by adding a new section to read:

"§ 42-37. Notice to tenant of execution of writ for possession of property; storage of evicted tenant's personal property.--(a) When sheriff may remove property. Before removing a tenant's personal property from demised premises pursuant to a writ for possession of real property or an order, the sheriff shall give the tenant notice of the approximate time the writ will be executed, to be no more than seven days from the sheriff's receipt thereof. The sheriff shall remove the tenant's property, as provided in the writ, no earlier than the time specified in the notice, unless:

- (1) the landlord, or his authorized agent, signs a statement saying that the tenant's property can remain on the premises, in which case the sheriff shall simply lock the premises; or
- (2) the landlord, or his authorized agent, signs a statement saying that the landlord does not want to eject the tenant because the tenant has paid all court costs charged to him and has satisfied his indebtedness to the landlord.

Upon receipt of either statement by the landlord, the sheriff shall return the writ unexecuted to the issuing clerk of court and shall make a notation on the writ of his reasons. The sheriff shall attach a copy of the landlord's statement to the writ. If the writ is returned unexecuted because the landlord signed a statement described in subdivision (2) of this subsection, the clerk shall make an entry of satisfaction on the judgment docket. If the sheriff padlocks, the costs of the proceeding shall be charged as part of the court costs.

(b) Sheriff may store property. When the sheriff removes the personal property of an evicted tenant from demised premises pursuant to a writ or order the tenant shall take possession of his property. If the tenant fails or refuses to take possession of his property, the sheriff may deliver the property to any storage warehouse in the county, or in an adjoining county if no storage warehouse is located in that county, for storage. The sheriff may require the landlord to advance the cost of delivering the property to a storage warehouse plus the cost of one month's storage before delivering the property to a storage warehouse. If a landlord refuses to advance these costs when requested to do so by the sheriff, the sheriff shall not remove the tenant's property, but shall return the writ unexecuted to the issuing clerk of court with a notation thereon of his reason for not executing the writ. All costs of summary ejection, execution and storage proceedings shall be charged to the tenant

as court costs and shall constitute a lien against the stored property or a claim against any remaining balance of the proceeds of a warehouseman's lien sale.

(c) Liability of the sheriff. A sheriff who stores a tenant's property pursuant to this section and any person acting under the sheriff's direction, control, or employment shall be liable for any claims arising out of the willful or wanton negligence in storing the tenant's property.

(d) Notice. The notice required by subsection (a) shall be made by one of the following methods:

- (1) by delivering a copy of the notice to the tenant or his authorized agent at least two days before the time stated in the notice for serving the writ;
- (2) by leaving a copy of the notice at the tenant's dwelling or usual place of abode with a person of suitable age and discretion who resides there at least two days before the time stated in the notice for serving the writ; or
- (3) by mailing a copy of the notice by first class mail to the tenant at his last known address at least five days before the time stated in the notice for serving the writ."

Sec. 2. Chapter 838 of the 1953 Session Laws and Chapter 464 of the 1975 Session Laws are repealed.

Sec. 3. G.S. 42-51 as it appears in Volume 2A, 1981 Cumulative Supplement, is amended on the fifth line by inserting between the words "tenant" and "or" the language "costs of removal and storage of tenant's property after a summary ejectment proceeding".

Sec. 4. This act shall become effective July 1, 1983, and shall apply to writs of possession for real property and orders that are issued on or after that date.

In the General Assembly read three times and ratified, this the 1st day of July, 1983.

JAMES C. GREEN

James C. Green
President of the Senate

LISTON B. RAMSEY

Liston B. Ramsey
Speaker of the House of Representatives