

THE JUDGE'S COMMISSION

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I. Introduction. Although superior court judges have statewide jurisdiction, generally they must be assigned to a particular term and session of court to have jurisdiction over a particular case. As discussed in the [“Out-of-Term, Out-of-Session, Out-of-County”](#) section of this Benchbook, there are instances when a judge may act on a matter that has arisen in the judge’s home district, even if the judge is not currently assigned there, but for the most part a judge’s substantive involvement in a case depends on the judge’s current assignment. The master calendar, issued by authority of the chief justice, is the usual method of establishing a judge’s assignment, but commissions must be issued when judges are moved around after the master calendar has been set.

II. Assignment through the Master Calendar. Unlike other jurisdictions, North Carolina superior court judges do not stay put, holding court only in their home districts. If they did, there would never be an issue whether a judge was properly assigned to a district and session. But they travel, often holding court away from home.

Article IV, section 11 of the state constitution says, “The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed.” The same provision requires the chief justice to assign judges, based on rules adopted by the supreme court.

The state currently has eight divisions and superior court judges rotate through the districts within their division. Assignments are made by a master calendar for six-month terms. Within a six-month term, judges are assigned for one-week sessions in each county in a district, with the sessions designated as criminal or civil session or mixed. All these assignment are made through the master calendar prepared by the assistant director of the Administrative Office of the Courts.

For regularly scheduled sessions of superior court the master calendar itself serves as the assignment, meaning that no individual commissions are needed or issued. Appellate courts take judicial notice of the assignments made through the master calendar. *Vance Construction Company, Inc., v. Duane White Land Corporation*, 127 N.C. App. 493, 495 (1997).

III. The Use of Commissions. The master calendar never meets all the needs for assignment of judges. Judges get sick; they have to recuse themselves from cases; trials run past the scheduled end of the session; backlogs require additional sessions; and so on. The assistant director of the AOC spends considerable time moving judges from the assignments on the master calendar.

When a change in assignment from the master calendar is made, or a new session of court scheduled, the assistant director prepares a commission for the new assignment, signed by the chief justice. The commission is sent to the judge, the clerk of court, other designated officials such as the judge's judicial assistant, and also to the district attorney for criminal sessions.

Sometimes a judge will need to extend a session because a trial lasts beyond the end of the week. Although the standard commission says the judge is assigned "until the business is disposed of," probably eliminating the need for a new commission — see *Lockert v. Lockert*, 116 N.C. App. 73, 77 (1994) — the assistant director of the AOC routinely issues a new commission in that situation. Similarly, a new commission is issued when a judge who has just left a county or district for another assignment needs to sign an order in the previous district or return for a short hearing.

- IV. Meaning of the Commission.** Occasionally a question will arise on appeal about a judge's authority to have heard a case. If the judge was not properly assigned to that session of court, the judge's acts may be invalid. *Vance Construction Company, Inc., v. Duane White Land Corporation*, 127 N.C. App. 493, 495 (1997).

If the judge was sitting pursuant to assignment by the master calendar, the master calendar serves as proof of the judge's assignment to sit in that court at that time and resolves any issues about the judge's authority. As stated above, the appellate courts will take judicial notice of the master calendar.

When a judge is assigned separately from the master calendar, the commission is proof of the assignment and of the superior court judge's authority. The critical issue, though, is not whether there is a commission on file, it is whether the judge was properly assigned by the chief justice. A commission is the most convenient proof of the assignment, but it is not essential if there is sufficient other evidence of the assignment. As stated in *State v. Eley*, 326 N.C. 759, 764 (1990): "The issuance of a commission by the Chief Justice . . . does not endow the judge with jurisdiction, power, or authority to act as a superior court judge. The commission so issued merely manifests that such judge has been duly assigned pursuant to our Constitution to preside over such session of court."

Eley involved a challenge to the authority of the trial judge to conduct a murder trial. Although no commission could be found, evidence established that the judge had been assigned by the chief justice and that the commission had been issued in the normal course of business but never received. The supreme court upheld the trial judge's authority based on that evidence and also seemed to say that the issue was properly resolved by the chief justice issuing a commission *nunc pro tunc* dated back to the session in question. (Note, however, that a *nunc pro tunc* order is not used to fix something that was done wrong in the first instance, it is only to be used to have the record reflect correctly what was done earlier. See *Rockingham County DSS ex rel. Walker v. Tate*, 202 N.C. App. 747, 751-52 (2010).)

- V. Emergency and Retired Judges.** "Commission" has more than one meaning for an emergency or retired superior court judge. If a superior court judge retires before the mandatory retirement age, that judge may be recalled to service as an emergency judge under G.S. 7A-53. For that to happen the governor has to issue a "commission" to the

judge. In this instance, the commission is documentary proof that the person holds the office, it serves the same purpose as the commissions issued to various elected officials upon certification of the election results. For the emergency judge to hold court the judge needs not only the commission issued by the governor, the judge also needs the commission issued by the chief justice assigning the judge to a particular session of court.

A superior court judge who has retired because of the mandatory retirement age may be recalled by the chief justice under G.S. 7A-57 without the need for a commission from the governor. Instead the chief justice issues an "order of recall" which is to be included in the court file along with the commission assigning the retired judge to that session of court.

- VI. Summary and Advice.** Issues about a superior court judge's authority to hold court at a particular session are unlikely to arise and usually can be resolved by simply referring to the assignment on the master calendar. When assignments are changed from the master calendar, the assistant director of the AOC consistently and conscientiously prepares and distributes commissions, probably more than legally required. Still, when a judge is being moved at the last minute from one district and one assignment to another the judge should remember to check on the commission and confirm that a copy is on file. While the *Eley* decision includes lots of language to support the validity of an assignment even when a commission cannot be found, it will be considerable trouble for everyone to collect the evidence to establish the validity of the assignment in the absence of the commission.