Key Features of Proposed Changes to the North Carolina Business Court Rules
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Before we summarize the key features of the current proposed changes to the Business Court Rules, we want to express our sincere and significant appreciation to the Business Court judges, and to the many members of the larger rules committee, for their invaluable input, feedback, support, and leadership in generating the ideas for the proposed revisions. We can't underscore this point enough, and we're grateful for the chance to have engaged with all contributors on a project of this meaning and magnitude.

Two disclaimers at the outset: (1) The views in this manuscript, as well as our presentation contain our opinions, and nothing in the manuscript or presentation should be construed as authoritative in connection with the Business Court Rules, current or future; (2) These proposed revisions are still *proposed*, and are still *drafts*, so please exercise caution when consulting this manuscript or the CLE presentation at later dates.

A. General themes

The proposed revisions reflect four general themes and guiding principles:

1. Approachability. The rules should be easy to read and to understand, and should contain the information that litigants need to access the Business Court.

2. Accessibility. The rules should make clear where to find the specific guidance that the reader seeks.

3. Flexibility. The rules should have clear standards, but those standards should allow the parties and the Business Court judges significant flexibility to ensure that litigation is reasonably efficient.

4. Practicality. The rules should cover topics of actual benefit to the Business Court judges, attorneys, and parties.

Rule 1(a) of the current draft summarizes these concepts: "These Business Court Rules should be construed and enforced to foster professionalism and civility; to permit the orderly, just, and prompt consideration and determination of all matters; and to promote the efficient administration of justice."

B. Areas of interest

1. Clarifications to process of filing notice of designation.

The proposed revised rule on notices of designation has several objectives.

First, the rule clarifies the designation procedures, particularly in light of recent amendments to the well-known statutory framework in N.C. Gen. Stat. § 7A-45.4.

Second, the rule removes outdated and extraneous references to the prior version of the statute.

Third, the rule offers directions for designations of certain types of cases. For example, section 7A-45.4(a)(9) provides that contractual disputes between businesses over $1 million may be designated as mandatory complex business cases if both parties consent to the designation. Because the plaintiff might not be able to obtain the defendant's consent when the plaintiff files the complaint and designation notice, the draft rule instructs the filing party to submit a "conditional" notice of designation in these types of cases. Doing so gives the filing party a grace period to obtain the consent of defendant(s) needed to complete the notice of designation.

Fourth, the rule provides more structure (e.g., a briefing schedule) for oppositions to notices of designation. The rule also makes clear that reply briefs are not allowed unless ordered by the Court. Moreover, a related rule creates a safe harbor extension of time for any deadlines that are running in a case before a party files a notice of designation to the Business Court. The safe harbor extension of time is intended to aid a party who may oppose a notice of designation.

Finally, the rule describes the circumstances in which amended pleadings can give rise to a mandatory complex business case designation. The rule reflects the reasoning in Business Court decisions that conclude that an amended pleading cannot be used as a basis for designation if the case previously qualified for designation.

2. Changes to rule on motion practice

The proposed revisions retain many of the current features of motion practice in the Business Court, while adding provisions designed to foster efficiency.

First, although most judges required a party filing a motion to consult with opposing counsel before filing any motions (except dispositive motions or motions for injunctive relief), this requirement will now be added to the rules.

Second, the list of motions that do not require briefs has been expanded. By way of example, this rule now clarifies that consent motions and other perfunctory motions do not require a brief.

Third, although the briefing requirements remain largely the same (same schedule, page limits, certifications, etc.), the draft rule now requires supporting materials to motions and briefs to

be organized, numbered, and indexed. Briefs also must contain pinpoint citations to supporting materials. To avoid congesting the docket, the draft rule encourages the parties to avoid re-filing the same supporting materials twice and to avoid filing unnecessarily voluminous documents. In this regard, when a document is publically available via the Internet, the draft rule encourages the parties to cite to the document via hyperlink in lieu of attaching the document as an exhibit. That said, the rule still requires the filing party to preserve or archive the hyperlink or URL address material in the event the material is later inaccessible online.

Finally, the revised rule makes clear that all motions, including emergency motions, will be decided without live testimony unless the Court orders otherwise. While a party may file a motion to present live testimony at a motion hearing, such a motion may not exceed 500 words and a response is not required.

3. Emergency motions

The current draft rule provides a framework for how the Business Court will handle emergency motions, such as motions for temporary restraining orders and preliminary injunctions.

In particular, the draft rule addresses the procedure for hearing emergency motions filed *before* a notice of designation is filed.

In the past, the issue of which judge would hear the motion (the judge in the county of venue or a Business Court judge) was decided on a case-by-case basis. The draft rule now makes clear that the Business Court judge will hear all emergency motions after the case has been designated to the Business Court, even if the motion was filed before designation. Similarly, the draft rule provides instruction to the parties who wish to file and schedule a hearing on an emergency motion simultaneously with the filing of a notice of designation. The draft rule also sets forth an expedited briefing schedule for emergency motions.

4. Streamlined rules of filing

Importantly, the rules make electronic filing mandatory. A party can seek relief from this mandate, but only on a showing of exceptional circumstances. Pro se parties can obtain relief on a good-faith showing.

The proposed revisions also give guidance about the format for filed documents. Anticipating that the range of acceptable file formats could change with evolving technology, the revised rules say that the Business Court's website will maintain a list of acceptable formats. The Court, then, will create and maintain that list.

Third, the revised rules keep the current 5:00 p.m. deadline for electronic filing, but the revised rules expressly acknowledge that the Court can modify the deadline. This revision reflects a balance between the regular state-court practice that filings must be finished by 5:00 pm and the preference of many lawyers to file electronically at any time before midnight. Lawyers who want that ability should ask the Court for it in the case-management report.

Fourth, the revised rules clarify the moment when an electronic filing is deemed to be complete. Under the revised rules, an electronic filing is complete when an electronic notice of filing is issued. The time of the filing is the date and time stated on the notice of filing.

Finally, the revised rules clarify which filings must also be filed with the clerk of court in the county of venue. The only filings that must be filed with the clerk of court in the county of venue are the materials listed in Civil Rule 5(d).

5. How to handle electronic-filing problems

The proposed revisions contain a more simple process for filing materials when the Court's electronic-filing system appears not to accept a filing.

Under the revised rules, if a person cannot file a document successfully, then the person must make a second attempt. If the second attempt also fails, then the person may continue to try to file electronically, or may (a) call the judicial assistant of the presiding Business Court judge to notify the Court of the technical failure, and (b) email the document to a designated email address: filinghelp@ncbusinesscourt.net. The email should give the date and times of the attempted filings and a brief explanation of the relevant technical failure(s). The email should give filing instructions and copy all counsel.

Although an e-mail sent to filinghelp@ncbusinesscourt.net does not constitute e-filing, it will serve as proof of an attempt to e-file in order to protect the filing party in the event of an imminent deadline and satisfies the deadline. In other words, even though the normal rule is that the filing is complete on the date and time of the notice of filing, the date and time of an e-mail sent to the "filinghelp" address will constitute timely filing if the Court does not issue a notice of filing until after the deadline passes.

For purposes of calculating briefing or response deadlines, a document filed electronically is deemed filed at the time and on the date stated in the notice of filing. Thus, even if a party relies on an email to the "filinghelp" address to meet a filing deadline, any briefing or response period does not begin to run until the notice of filing is issued.

6. Case management

The proposed revisions seek to eliminate the notion that a case management meeting should be a forced march through the subsections of current Rule 17.1(a).

The rule has several features that forward this goal:

- Proposed Rule 9.1(a) has a statement of general principles: The case-management process should be applied in a flexible, case-specific fashion.

- Proposed Rule 9.1(b) builds in more time for case management meetings. The meeting must occur no later than sixty days after the designation of an action as a

mandatory complex business case or assignment to a Business Court judge under Rule 2.1. This additional time allows lawyers to get to know their cases before the meeting. It also allows more time for service of parties in multi-party cases and for pre-meeting coordination of aligned parties.

- Proposed Rule 9.1(b) allows the parties to ask the Court for a different schedule for the case management report and case management meeting.

- The list of required topics for the meeting is shorter and more focused.

The proposed revisions also require a meaningful discussion of discovery—including and especially electronic discovery—at the case management meeting. Significantly, the proposed revisions recognize that engaging on discovery issues in some depth might require more than a single meeting. The rules thus allow the parties to take an additional thirty days after the case management meeting to participate in a second meeting about discovery issues.

The parties should not, however, simply punt all discovery issues to that second meeting. The initial case management report, which is due fifteen days after the case management meeting, must explain the discovery issues upon which the parties have agreed and, if applicable, describe the discovery issues still left to discuss.

These revisions raise another question: When, if at all, should the Court conduct a case management conference? Under the proposed revisions, the Court can convene a case management conference at a time of the Court's choosing. In some cases, the Court might decide to wait until the parties complete their discovery discussions before holding a case management conference. In other cases, the Court might convene the case management conference at an early stage. In still other cases, the Court can issue a case management order without a conference.

Finally, the revised rules contain a template case management report. The template lists topics that need to be covered in the report, but it does not force a rigid structure on the parties. The parties will therefore get significant control over what goes in the report.

7. Discovery motions

Because of the potential for discovery motions to choke the Court's docket, the proposed revisions add procedures that require greater engagement between the parties, and with the Court, before anyone engages in full-blown discovery motion practice.

The new procedures, found in proposed Rule 10.9, require the following steps before a party can file a discovery motion:

1. One party may submit a summary, not to exceed seven-hundred words, about the dispute. The party must attach a certification that the parties conferred about the dispute, plus the results of the conference.

2. Any opposing party has seven calendar days to file a responding summary, which also cannot exceed seven-hundred words.

3. The Court, having studied the summaries, may (a) schedule a telephone conference, (b) request briefs, or (c) issue any other order with additional instructions.

4. If the dispute remains unresolved, then a discovery motion may be filed. The Court may alter the normal briefing rules, and, unless otherwise provided, the briefs will be 3,750 words or less (as compared to 7,500 for other briefs). Reply briefs usually will not be allowed. Any requests for cost-shifting would need to address the estimated costs and the proportionality of the discovery being discussed. The use of condensed word limits will hopefully help parties to focus on the specific disputes at hand rather than reciting blanket propositions for the purpose of discovery and the breadth of discovery permitted under the North Carolina Rules of Civil Procedure. Further, it is likely that the judge presiding over the telephonic conference will provide direction on a focus for the briefing to make the briefs more helpful for the Court's analysis.

8. Discovery process

The proposed revisions encourage a flexible approach to discovery, with emphasis on attorney cooperation and proportionality in the methods of discovery employed. The revised rule on discovery sets this tone at the outset, stating that "counsel should cooperate to ensure that discovery is conducted efficiently. Courtesy and cooperation among counsel aids, rather than hinders, the notion of zealous representation."

The rules require early identification of and discussion of issues likely to cause discovery disputes. At least seven days before the Case Management Meeting, counsel must talk with their clients about the location, identification, and preservation of potentially discoverable ESI including assessing the burden and expense associated with collecting those materials.

The proposed rules also require the parties to engage in a discussion of discovery management. The parties may discuss discovery management at the case management meeting or within thirty days after that meeting. At that meeting, the parties should discuss every aspect of discovery including specifically, proportionality, whether discovery should be phased, and ESI.

Proportionality is a significant topic in the discussions surrounding the recent revisions to the Federal Rules of Civil Procedure. With the express inclusion of this concept into the proposed rules, parties will be able to draw on the likely growing body of case law in the federal courts applying the concept to specific disputes. The authors commend to you the proportionality matrix found in Hon. Elizabeth D. Laborte and Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality under New Federal Rule of Civil Procedure 26*, 9 The Fed. Cts. L. Rev. 20, 49-50 (2015) which offers a chart for analyzing proportionality with three columns: factor, factor assessment, and detailed explanation. The factors there are drawn from the federal rules but appear relevant and

helpful to the analysis under the proposed Business Court rules. Examples include "importance of the issues at stake in the litigation," "amount in controversy" "parties' resources" "whether the discovery sought in unreasonably cumulative or duplicative."

Rule 10.3 of the proposed rules directs the parties to prepare a written discovery protocol to use to govern discovery going forward. That document would not ordinarily be filed with the Court.

The proposed revisions contain a default seven-month discovery period. They also encourage parties to begin discovery early, though whether discovery should begin early, or perhaps be stayed pending a ruling on a dispositive motion, is a case-specific determination. These options allow parties to work together with the Court to fit the case schedule to the particular needs of the case. It is important to note that there is no provision in the draft rules allowing for interruption of the case management timetable for an opposition to designation.

The parties will need to plan to complete discovery during the discovery period, and any motions to extend the period must be made before the deadline.

On another discovery front, the proposed revisions encourage parties to confer in advance about privilege logs and suggest using broad categories in the privilege log. These revisions are designed to streamline the process of preparing a privilege log, while also ensuring that the party that receives the log can fairly ascertain the basis for the privilege's assertion.

Finally, on depositions, the proposed revisions contain a presumptive seven-hour period for on-the-record testimony. The proposed revisions do not contain the current rule that parties may not confer while a deposition is pending; rather, parties may not confer while a question is pending, other than to address a question of privilege. The proposed revisions, however, warn of sanctions for conduct "that impedes, delays, or frustrates the fair examination of a deponent."

For Rule 30(b)(6) depositions, the proposed revisions establishes a framework for negotiating disputes over topics. After a party serves a 30(b)(6) notice, the target organization should make objections within a reasonable time, and the parties should then confer about the topics in good faith. Any remaining disputes would be handled like other discovery disputes. In addition, the proposed rules provide that depositions in an individual capacity should be taken separarely from a 30(b)(6) deposition unless agreed otherwise.

9. Protective orders

The proposed revisions clarify the procedures for seeking a protective order and for filing materials under seal. The revisions recognize that both parties and third parties may need the Court's assistance to protect certain materials against public disclosure. The revisions also encourage parties to avoid filing voluminous materials under seal.

In addition, the proposed revisions permit parties to agree among themselves about how materials will be handled during discovery, but they caution parties that any protective order that sets parameters for under-seal filing must contain certain requirements.

There are two potential paths to filing under seal: (1) following provisions for filing under seal stated in a Court-approved protective order, or (2) filing a motion to file under seal. Under either path, within five days after a document is filed under seal, the party filing the document must submit a public version of the document—probably usually a redacted version. The proposed revisions require a party that seeks to file under seal to provide enough information so that the Court can assess whether the material should be filed under seal including a non-confidential description of the material, the circumstances warranting filing under seal, and the explanation for why no reasonable alternative to filing under seal exists. In addition, the motion must indicate if another party designated the material as confidential and thus would have an interest in the outcome of the motion to seal. This requirement will aid those practitioners who want to comply with a protective order but also may not have an interest in whether the material remains confidential.

Motions to seal will not need to be filed in advance of the filing of the sealed material. The motion to seal is due on the same day that the materials are submitted, and the material will be provisionally filed under seal until the Court rules on the motion. The rule applies equally to pleadings, briefs, and exhibits.

Because materials filed under seal are often produced or designated confidential by a different party than the filing party, the filing party must provide a copy of the motion for leave to the party that designated the material as confidential. That party may then file a supplemental brief supporting the motion. The party seeking to keep the material under seal will have the burden of establishing that the material should be filed under seal. That party could be a third party who produced the materials, and if no brief is filed, the Court may deny the motion summarily.

10. Pretrial and trial

The proposed revisions seek to provide more guidance to the parties on the pretrial preparation process. Similar to the revised case management rule, the pretrial rule recognizes that each case is different, so any presumptive deadlines or requirements should be applied in a flexible, case-specific fashion. The current pretrial rule is largely silent on pretrial activities or expectations. Accordingly, the revised rule provides clarity on various pretrial requirements, including the preparation of a proposed pretrial order, motions in limine, trial briefs, proposed jury instructions, and proposed stipulations.

The proposed rule also provides a chart that outlines the standard pretrial activity with presumptive time deadlines. This chart staggers various pretrial requirements over time in advance of trial. For example, the chart sets the presumptive deadlines for exchanging exhibit and witness lists, filing motions in limine, and submitting proposed jury instructions. This will aid counsel by setting pretrial deadlines in a staggered fashion so that the trial preparation process is manageable and counsel are not caught chasing multiple deadlines in a short timeframe.

Moreover, the rule revisions establish a framework for the content the parties should include in a proposed pretrial order. In this regard, a form proposed pretrial order is attached as an appendix to the rules, providing a helpful guide to counsel. The proposed pretrial order covers items such as stipulations, proposed issues for trial, technology presentation, witness lists, exhibit lists, deposition designations, and any other case-specific issues needed to be addressed for trial.

The rule revisions also provide for the timing and briefing requirements of motions in limine. In particular, the presumptive timing sets the deadline for motions in limine well in advance of the final pretrial conference, allowing for a truncated briefing schedule so that such motions are ripe and can be ruled upon potentially at the final pretrial conference. The word limitation for briefing motions in limine is condensed as well. This new process will aid the parties in obtaining rulings on evidentiary issues more in advance of trial, rather than the day of trial, which is typical in many cases. As a result, this will hopefully create efficiencies in trial preparation efforts and it may also benefit the parties in pre-trial settlement negotiations to have certain evidentiary issues resolved in advance of trial.

The proposed rule creates a framework for the preparation and submission of proposed jury instructions. This rule is designed to aid the Court and the parties by requiring the submission of jury instructions in a format that will allow the Court to efficiently craft a final set of instructions.

Lastly, the rule revisions make the filing of a trial brief optional. That said, the revisions do not set a word limitation for trial briefs. This leaves the parties with the discretion to decide if they want to submit trial briefs, and if so, how comprehensive or concise they want them to be.

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