

ACBD News

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The Chair's Comments



Mitch Ambruster

It has been a pleasure to serve as chair of the Anti-trust & Complex Business Disputes Section this past year. Visiting with law students at Wake Forest this past fall, and taking a tour of the new Business Court courtroom on the Wake Forest University

Law School campus with Judge Robinson, was a great way to start the year. In February, we had another excellent CLE at the Bar Center in Cary, planned by Bailey King. Among other highlights, the CLE featured the first ever panel of all five Business Court judges. Bailey has taken over the position of chair for the 2017-18 year, and will no doubt continue to excel in his service for our section.

The growth of our section to include many topics of interest to those who practice in the area of complex business disputes has been welcome. And, in this issue of the newsletter we have an informative article by Jennifer Van Zant, Stephen Feldman, and Tim Lendino on the recent amendments to the Business Court rules which went into effect this year, a very useful piece from Gavin Parsons on the ins and outs of “apex” depositions in North Carolina, and Part II of Scott Miskimon and Lauren Bradley’s excellent insights on the litigation of contract claims at the motion to dismiss stage of the case.

Importantly, however, our section also remains dedicated to the coverage of antitrust issues. I am pleased to announce that the section will be hosting a separate antitrust-centric CLE

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The Business Court Has New Rules. What Are the Key Points?

By Jennifer Van Zant, Stephen Feldman and Tim Lendino

If you practice business litigation in North Carolina, you’ve probably heard that the Business Court has amended its rules of practice. The amendments took effect on Jan. 1, 2017, under an order from the North Carolina Supreme Court.

The amendments are substantial. By way of background, the Court last amended its rules in 2006. A ten-year passage of time warranted a fresh look at the rules—including, and especially, how the rules can make Business Court practice more efficient for parties, lawyers, and the Court.

We had the privilege of leading an incredible committee of lawyers across North Carolina in developing the principles and ideas for the amended rules, and then effectuating those principles and ideas into rules. We express deep gratitude to the Business Court judges and to the members of the committee for their invaluable input, feedback, support, and leadership in generating the ideas for the proposed revisions. We can’t underscore this point enough.

This article reviews some key points from the amendments. We adapted this article from a manuscript that we presented at a CLE in 2016.

We note two disclaimers at the outset. First, this article contains our opinions; please do not construe those opinions as authoritative in connection with the Business Court Rules, current or future. Second, this article is no substitute for reading the amended rules from stem to stern. We encourage you to do so.

A. General themes

The proposed revisions reflect four general themes and guiding principles. We developed these themes and principles from the comments of the larger committee:

1. **Approachability.** We drafted and revised the rules with reader comprehension in mind. If the reader cannot understand the rules, they’ll have little utility.
2. **Accessibility.** We wanted the rules to make clear where a reader can find the specific guidance that the reader seeks.
3. **Flexibility.** We aimed to develop clear standards throughout the Rules. With that said, those standards sometimes needed to be sufficiently elastic to allow the parties and the Business Court judges enough flexibility to ensure that litigation is reasonably efficient.

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4. Practicality. Finally, we wanted the Rules to 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. Key points from the Revised Rules

1. The Rules clarify issues relating to notices of designation.

The revised Rules on notices of designation achieve several objectives.

First, the Rules clarify the designation procedures, particularly in light of amendments in 2014 to the well-known statutory framework in N.C. Gen. Stat. § 7A-45.4.

Second, the Rules remove outdated and extraneous references to the prior version of the statute.

Third, the Rules offer 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 revised Rules instruct 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 Rules provide more structure (e.g., a briefing schedule) for oppositions to notices of designation. The Rules also make clear that reply briefs are not allowed unless ordered by the Court. Moreover, the Rules create a safe-harbor extension of time for any deadlines that are running in a case before a party files a notice of designation. The safe-harbor extension of time is intended to aid a party who may oppose a notice of designation.

Finally, the revised Rules describe the circumstances in which amended pleadings can give rise to a mandatory complex business case designation. The Rules reflect 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. The Rules make changes to motion practice.

The revised Rules 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 has been added to the Rules.

Second, the list of motions that do not require briefs has been

expanded. By way of example, the Rules clarify 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 Rules now require 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 Rules encourage 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 Rules encourage the parties to cite to the document via hyperlink in lieu of attaching the document as an exhibit. With that said, the Rules still require the filing party to preserve or to archive the hyperlink or URL address material in the event the material is later inaccessible online.

Finally, the revised Rules make 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, that type of motion may not exceed five-hundred words, and a response is not required.

3. The Rules provide a framework for emergency motions.

The revised Rules provide a framework for how the Business Court will handle emergency motions, such as motions for temporary restraining orders and preliminary injunctions.

In particular, the Rules address 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 Rules now make 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 Rules provide instructions to the parties who wish to file and to schedule a hearing on an emergency motion simultaneously with the filing of a notice of designation. The Rules also set forth an expedited briefing schedule for emergency motions.

4. The Rules have streamlined the process for electronic filing.

As an initial matter, the Rules now 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 p.m. 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 elec-

tronic 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). Because it cannot be repeated enough, we want to remind you that a notice of appeal must be filed with the clerk of court in the county of venue before or on the deadline to appeal.

5. The Rules give a procedure for resolving electronic-filing problems.

The revised Rules 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 party with a filing issue should copy all counsel on the email.

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. The Rules overhaul the case-management process.

The revised Rules eliminate the notion that a case management meeting should be a forced march through the subsections of former Rule 17.1(a).

The Rules have several features that forward this goal:

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

ment 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.

- 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 revised Rules also require that the parties meaningfully discuss discovery—including and especially electronic discovery—at the case management meeting. Significantly, the revised Rules 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 revised Rules, 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. The Rules add a new process for discovery motions.

Because of the potential for discovery motions to choke the Court's docket, the revised Rules contain new 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 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 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. The Rules contain other notable changes to discovery.

The revised Rules 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 revised 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. North Carolina litigators might consider studying 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 revised Business Court Rules. Examples include “importance of the issues at stake in the litigation,”

“amount in controversy,” “parties’ resources,” and “whether the discovery sought is unreasonably cumulative or duplicative.”

Rule 10.3 of the revised 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 revised Rules 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 the revised Rules do not contain a provision that would allow 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 revised Rules 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 revised Rules contain a presumptive seven-hour period for on-the-record testimony. The revised Rules do not contain the former 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 revised Rules, however, warn of sanctions for conduct “that impedes, delays, or frustrates the fair examination of a deponent.”

For Rule 30(b)(6) depositions, the revised Rules establish 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 revised Rules provide that depositions in an individual capacity should be taken separately from a 30(b)(6) deposition unless agreed otherwise.

9. The Rules offer guidance for protective orders and sealed filings.

The revised Rules 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—usually a redacted version. The revised Rules 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 do 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. The Rules provide new guidelines for pretrial and trial.

The revised Rules provide more guidance to the parties on the pretrial preparation process. Similar to the revised rule on case management, 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 former pretrial rule was largely silent on pretrial activities or expectations. Accordingly, the revised Rules provide 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 revised Rules also provide 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 revised Rules 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 revised Rules, providing a helpful guide to counsel. The 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 revised Rules 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 can be typical.

The revised Rules create a framework for the preparation and submission of proposed jury instructions. The changes are 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 revised Rules make the filing of a trial brief optional. For parties that opt to file trial briefs, the Rules do not set a word limit. This rule extends the parties 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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