



# CHIEF JUSTICE'S RULES ADVISORY COMMISSION MINUTES OF MEETING

August 21, 2020

Remote Meeting via WebEx

## **Call to Order**

A remote meeting of the Chief Justice's Rules Advisory Commission was called to order at 2:00 p.m. on Friday, August 21, 2020, via WebEx by North Carolina Court of Appeals Judge Donna Stroud, Commission Chair.

### Commission Members Present for the WebEx Meeting:

Ann Anderson, *Associate Professor*, UNC School of Government

Mark Holt, *Partner*, Holt Sherlin LLP

Kellie Myers, *Trial Court Administrator*, Wake County

John Rabiej, former *Deputy Director*, Bolch Judicial Institute, Duke University School of Law

Paul Ridgeway, *Senior Resident Superior Court Judge*, Wake County

Christine Walczyk, *District Court Judge*, Wake County

### Other Attendees Present for the WebEx Meeting:

Seth Ascher, *Assistant Administrative Counsel*, Supreme Court of North Carolina

Grant Buckner, *Administrative Counsel*, Supreme Court of North Carolina

Brad Fowler, *Chief Business Officer*, North Carolina Administrative Office of the Courts

Betse Hamilton, *Office Administrator*, Supreme Court of North Carolina

Andrew Simpson, *Chief Counsel for Policy and Intergovernmental Affairs*, North Carolina  
Administrative Office of the Courts

Rebecca Stevens, *Research Assistant to Representative Sarah Stevens*, North Carolina House of  
Representatives

## **Approval of Minutes**

The minutes from the May 22, 2020 meeting were approved, as written.

The minutes from the May 27, 2020 meeting were approved, as written.



## **Discussion of Session Law 2020-46**

Mr. Simpson gave an overview of the legislation, noting changes that were made to the commission's proposal. Mr. Simpson thanked the commission for its work to get Rules of Civil Procedure 3 and 5 amended.

Professor Anderson emphasized the need to amend General Rule of Practice 5 since the legislation references that rule, a sentiment to which everyone agreed.

A copy of Session Law 2020-46 is attached to these minutes.

## **eCourts Guide & File**

Mr. Fowler showed the commission a brief promotional video for *Guide & File*, the Judicial Branch's new service to help self-represented litigants and attorneys prepare court documents online, and explained to the commission how the system works.

The public launch of *Guide & File* is scheduled for August 31, 2020.

## **General Rules of Practice Subcommittee Report**

Judge Stroud gave an overview of the subcommittee's current draft.

Judge Stroud emphasized the need to study how amendments to the General Rules of Practice might affect the Business Court Rules and the eFiling Pilot Project Rules. It was agreed that a representative from the Business Court should be invited to participate in that discussion.

Mr. Buckner noted that, according to S.L. 2020-46, the effective date of amended Rules of Civil Procedure 3 and 5 is October 1, 2020.

Judge Stroud indicated that she would like to bring the proposed amendment to General Rule of Practice 5 to a vote at the commission's next meeting.

The subcommittee's current draft of General Rule of Practice 5 is attached to these minutes.

## **Rules of Civil Procedure Subcommittee Report**

No report.

### **Upcoming Commission Meetings**

The commission scheduled meetings for:

- Friday, September 11, 2020 at 2:00 p.m.; and
- Friday, October 16, 2020 at 2:00 p.m.

Both scheduled meetings will be conducted remotely via WebEx.

### **Adjournment**

The meeting was adjourned at approximately 3:20 p.m. by Judge Stroud.

**Minutes submitted by:** /s/ Grant E. Buckner  
Administrative Counsel, Supreme Court of North Carolina

**Date:** 8/24/20

**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2019**

**SESSION LAW 2020-46  
HOUSE BILL 679**

AN ACT TO AMEND THE RULES OF CIVIL PROCEDURE TO ALLOW FOR  
ELECTRONIC FILING AND SERVICE.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S. 1A-1, Rule 3(a) reads as rewritten:

**"Rule 3. Commencement of action.**

(a) A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing.

A civil action may also be commenced by the issuance of a summons when

- (1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and
- (2) The court makes an order stating the nature and purpose of the action and granting the requested permission.

The summons and the court's order shall be served in accordance with the provisions of Rule 4. When the complaint is filed it shall be served in accordance with the provisions of Rule 4 or by registered mail if the plaintiff so elects. If the complaint is not filed within the period specified in the clerk's order, the action shall abate. If electronic filing is available in the county of filing, attorneys shall file in accordance with Rule 5 of the General Rules of Practice for the Superior and District Courts. If electronic filing is available in the county of filing, self-represented litigants who are appropriately registered in the electronic filing system may file electronically in accordance with Rule 5 of the General Rules of Practice for the Superior and District Courts."

**SECTION 2.** G.S. 1A-1, Rule 5 reads as rewritten:

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

(a) Service of orders, subsequent pleadings, discovery papers, written motions, written notices, and other similar papers – When required. – Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(a1) Service of briefs or memoranda in support or opposition of certain dispositive motions. – In actions in superior court, every brief or memorandum in support of or in opposition to a motion to dismiss, a motion for judgment on the pleadings, a motion for summary judgment, or any other motion seeking a final determination of the rights of the parties as to one or more of the claims or parties in the action shall be served upon each of the parties at least two days before the hearing on the motion. If the brief or memorandum is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable



period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served brief or memorandum, or take such other action as the ends of justice require. The parties may, by consent, alter the period of time for service. For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, electronic (e-mail) delivery, or other means such that the party actually receives the brief within the required time.

(b) Service – How made. – A pleading setting forth a counterclaim or cross claim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or on the party's attorney of record as provided by this subsection.

With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service shall be made upon the party's attorney of record and, if ordered by the court, also upon the party. If the party has no attorney of record, service shall be made upon the party. ~~With respect to such other pleadings and papers, service with due return may be made in a manner provided for service and return of process in Rule 4. Service under this subsection may also be made by one of the following methods:~~

Service is made under this subsection if performed through the court's electronic filing system. When service through the court's electronic filing system is not available, or the party is not registered to receive service through the court's electronic filing system, service may be made as follows:

- (1) Upon a party's attorney of record:
  - a. By delivering a copy to the attorney. Delivery of a copy within this sub-subdivision means handing it to the attorney, leaving it at the attorney's office with a partner or employee, or sending it to the attorney's office by a confirmed telefacsimile transmittal for receipt by 5:00 P.M. Eastern Time on a regular business day, as evidenced by a telefacsimile receipt confirmation. If receipt of delivery by telefacsimile is after 5:00 P.M., service will be deemed to have been completed on the next business day. Service may also be made on the attorney by electronic mail (e-mail) to an e-mail address of record with the court in the case. Such e-mail must be sent by 5:00 P.M. Eastern Time on a regular business day. If the e-mail is sent after 5:00 P.M., it will be deemed to have been sent on the next business day.
  - b. By mailing a copy to the attorney's office.
  - c. In the manner provided in Rule 4 for service and return of process.
- (2) Upon a party:
  - a. By delivering a copy to the party. Delivery of a copy within this sub-subdivision means handing it to the party.
  - b. By mailing a copy to the party at the party's last known address or, if no address is known, by filing it with the clerk of court.
  - c. Service may also be made on the party by electronic mail (e-mail) if the party has consented to receive e-mail service in the case at a particular e-mail address, and a copy of the consent is filed with the court by any party. Such e-mail must be sent by 5:00 P.M. Eastern Time on a regular business day. If the e-mail is sent after 5:00 P.M. Eastern Time, it will be deemed to have been sent on the next business day.
  - d. In the manner provided in Rule 4 for service and return of process.

Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(b1) Service – Certificate of Service. – A certificate of service shall accompany every pleading and every paper required to be served on any party or nonparty to the litigation, except with respect to pleadings and papers whose service is governed by Rule 4. The certificate shall show the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon whom the paper has been served. If one or more persons are served by facsimile ~~transmission, transmission or electronic mail (e-mail)~~, the certificate shall also show the telefacsimile number or e-mail address of each person so served. ~~served in that manner.~~ Each certificate of service shall be signed in accordance with and subject to Rule 11 of these rules. With respect to persons served through the court's electronic filing systems, an automated certificate of service generated by that system satisfies the requirements of this rule.

(c) Service – Numerous defendants. – In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any crossclaim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. – The following papers shall be filed with the court, either before service or within five days after service:

- (1) All pleadings, as defined by Rule 7(a) of these rules, subsequent to the complaint, whether such pleadings are original or amended.
- (2) Written motions and all notices of hearing.
- (3) Any other application to the court for an order that may affect the rights of or in any way commands any individual, business entity, governmental agency, association, or partnership to act or to forego action of any kind.
- (4) Notices of appearance.
- (5) Any other paper required by rule or statute to be filed.
- (6) Any other paper so ordered by the court.
- (7) All orders issued by the court.

All other papers, regardless of whether these rules require them to be served upon a party, should not be filed with the court unless (i) the filing is agreed to by all parties, or (ii) the papers are submitted to the court in relation to a motion or other request for relief, or (iii) the filing is permitted by another rule or statute. Briefs or memoranda provided to the court may not be filed with the clerk of court unless ordered by the court. The party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to the court if needed or so ordered.

- (e) (1) Filing with the court defined. – The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, ~~pursuant to the rules promulgated under G.S. 7A-109 or subdivision (2) of this section,~~ except that the judge may permit the papers to be filed with ~~him, the judge,~~ in which event ~~he the judge~~ shall note thereon the filing date and forthwith transmit them to the office of the clerk.
- (2) Filing by electronic means. – ~~If, pursuant to G.S. 7A-34, G.S. 7A-49.5, and G.S. 7A-343, the Supreme Court and the Administrative Officer of the Courts establish uniform rules, regulations, costs, procedures and specifications for the filing of pleadings or other court papers by electronic means, filing may be made by the electronic means when, in the manner, and to the extent provided therein.~~ If electronic filing is available in the county of filing, filing shall be made in accordance with Rule 5 of the General Rules of Practice for the Superior and District Courts.

- (3) The failure to affix a date stamp or file stamp on any order or judgment filed in a civil action, estate proceeding, or special proceeding shall not affect the sufficiency, validity, or enforceability of the order or judgment if the clerk or the court, after giving the parties adequate notice and opportunity to be heard, enters the order or judgment nunc pro tunc to the date of filing."

**SECTION 3.** This act becomes effective October 1, 2020, and applies to filings and service effected on or after that date.

In the General Assembly read three times and ratified this the 17<sup>th</sup> day of June, 2020.

s/ Philip E. Berger  
President Pro Tempore of the Senate

s/ Tim Moore  
Speaker of the House of Representatives

s/ Roy Cooper  
Governor

Approved 9:57 a.m. this 26<sup>th</sup> day of June, 2020

## **Rule 5. Form of Pleadings**

- (a) Electronic Filing.
  - a. Requirement for attorneys. In courts where electronic filing has been implemented, as identified by the Administrative Office of the Courts, attorneys shall electronically file papers through the electronic filing system.
    - i. Failure to adhere to this requirement does not automatically void or invalidate a filing but may in the court's discretion result in an appropriate sanction, including striking of the paper, pursuant to existing law.
    - ii. This requirement is not intended to limit the authority of the Chief Justice to establish exceptions to the electronic filing requirement for exceptional circumstances.
  - b. Unrepresented parties may but are not required to electronically file papers.
  - c. Email Address. The email address of an attorney or unrepresented party who electronically files a document shall be included on all papers filed through the electronic filing system.
  - c. Mechanism. Electronic filing shall be done through the electronic filing system established and maintained by the Administrative Office of the Courts.
  - d. Registration:
    - i. Attorneys filing in courts where electronic filing is available shall register with the electronic filing system established and maintained by the Administrative Office of the Courts. Registration shall require the entry of the attorney's State Bar Number.
    - ii. Unrepresented parties may register to participate in electronic filing through registration with the electronic filing system established and maintained by the Administrative Office of the Courts. Registration shall require the entry of personal identifying information and certify compliance with all mandated security procedures.



- e. Exceptions. The following documents shall not be filed electronically with the court
  - i. Discovery and other materials required to be served on other counsel or a party and not required to be filed with the court;
  - ii. Briefs or memoranda provided to the court unless ordered by the court to be filed; and
  - iii. Documents and materials to which access is otherwise restricted by law or court order.
- f. Timely filing. An electronically filed paper is deemed filed when transmitted to the electronic filing system established and maintained by the Administrative Office of the Courts and marked with an electronic stamp by the electronic filing system, except:
  - i. if a document is transmitted and stamped after 5:00 p.m. EST, the document shall be deemed filed on the following day, subject to section ii; and
  - ii. If a document is transmitted and electronically stamped on a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions, it is deemed filed on the next day that is not a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions.
- g. Technical Failure. In the event of a technical failure or system outage preventing timely filing through the electronic filing system, any party may seek appropriate relief from the Court.
- h. Electronic Signatures. A paper that is electronically served, filed, or issued by a court or clerk is considered signed if the document includes:
  - i. the symbol “/s/” and named typed in the space where the signature would otherwise appear, unless the document is notarized or sworn; or
  - ii. an electronic image or scanned image of the signature.

- i. Format. An electronically filed document must comport with the electronic filing system's mandated format and document restrictions.
- j. Electronic Notices from the Court. The Court may send notices, orders, or other communications about the case to a registered party electronically. A court seal may be electronic.
- k. Official Record. In courts where electronic filing has been implemented, as identified by the Administrative Office of the Courts, an electronically filed document or a scanned paper document contained in the electronic filing system maintained by the Administrative Office of the Courts is the Court's official court record.

1

### **Alternative Language: Protective Orders and Electronically Filing under Seal**

#### **General principles.**

- a. This rule applies to both parties and non-parties. References to "parties" in this rule therefore include non-parties.
- b. Parties should limit the materials that they seek to file under seal. The party seeking to maintain materials under seal bears the burden of establishing the need for filing under seal.
- c. This rule should not be construed to change any requirement or standard that otherwise would govern the issuance of a protective order.
- d. Parties are encouraged to agree on terms for a proposed protective order that governs the confidentiality of discovery materials when exchanged between or among the parties.

#### **Procedures for sealed filing.**

- a. Pursuant to a protective order. The Court may enter a protective order under Rule 26(c) of the Rules of Civil Procedure that contains standards and processes for the handling, filing, and service of sealed documents. Proposed protective orders submitted to the Court should include procedures similar to those described in subsections (b) through (d) of this rule.
- b. In the absence of a protective order. In the absence of an order described in [reference rule above when formatted] any party that seeks to file a document or part of a document under seal must provisionally file the document under seal together with a motion for leave to file the document under seal. The motion must be filed no later than 5:00 p.m. Eastern Time on the day that the document is provisionally filed under seal.

- c. Until the Court rules on the sealing motion, any document provisionally filed under seal may be disclosed only to counsel of record and their staff until otherwise ordered by the Court or agreed to by the parties.