



CHIEF JUSTICE'S RULES ADVISORY COMMISSION MINUTES OF MEETING

October 16, 2020

Remote Meeting via WebEx

Call to Order

A remote meeting of the Chief Justice's Rules Advisory Commission was called to order at 2:05 p.m. on Friday, October 16, 2020, via WebEx by North Carolina Court of Appeals Judge Donna Stroud, Commission Chair.

Commission Members Present for the WebEx Meeting:

Ann Anderson, *Town Attorney*, Town of Chapel Hill

Mark Anderson, *Partner*, McGuireWoods LLP

Mark Holt, *Partner*, Holt Sherlin LLP

Mike Mitchell, *Attorney*, Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, 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

Michael Robinson, *Judge*, North Carolina Business Court

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



Welcome and Introductions

Judge Stroud welcomed Judge Michael Robinson of the North Carolina Business Court and indicated that Judge Robinson would be assisting the commission moving forward.

Approval of Minutes

The minutes from the August 21, 2020 meeting were approved, as written.

General Rules of Practice Subcommittee Report

Mark Anderson and John Rabiej gave an overview of the subcommittee's current draft of Rule 5 of the General Rules of Practice, which included a few style and writing edits proposed by Mr. Rabiej in track changes format. With limited exception (discussed below), consensus was reached to move forward with the substance of the proposal.

Mark Holt raised a concern about the provision related to unrepresented parties, specifically that it allowed a judge to order an unrepresented party to file documents electronically under certain circumstances. Discussion ensued about this topic that resulted in an additional edit being made to that provision.

Judge Stroud shared feedback that she had received about the new e-mail service provision in Rule 5 of the Rules of Civil Procedure. Judge Stroud queried whether Rule 5 of the General Rules of Practice needed to specify what an e-mail "of record" means. Discussion ensued about this topic, but no edit was made to the draft.

Judge Robinson shared a concern about the provision allowing discovery materials to be served through the system electronically and noted the implications that provision could have under the public records law. Brad Fowler indicated that he would find out how service of discovery materials works through the system and report back to the General Rules of Practice subcommittee. Discussion ensued about this topic and although no edit was made to the draft during the meeting, consensus was reached that the provision needed to be edited by the subcommittee before the next meeting.

The commission discussed the filing of briefs and memoranda. Consensus was reached that these items should be filed electronically but that in order to do so another amendment might be needed to Rule 5 of the Rules of Civil Procedure. The Rules of Civil Procedure subcommittee noted this issue for further study.

The draft of Rule 5 of the General Rules of Practice, as edited during the meeting, is attached to these minutes.

Judge Stroud asked the General Rules of Practice subcommittee to make additional edits to Rule 5 and circulate the draft by e-mail to the Commission before the next meeting. Judge Stroud indicated that she would like to call a vote on the draft at the next meeting.

Rules of Civil Procedure Subcommittee Report

No report.

General Rules of Practice – For Information Only

Judge Stroud noted that on September 23, 2020, the Supreme Court adopted an amendment to Rule 5 of the General Rules of Practice. Judge Stroud also noted that the Judicial Branch's Coronavirus Task Force has recommended an amendment to Rule 6 of the General Rules of Practice, which would allow for motions to be argued remotely. Both the Supreme Court's order and the Task Force's recommendation were distributed with the agenda as information items.

Upcoming Commission Meetings

The commission scheduled a meeting for Friday, November 6, 2020, at 2:00 p.m. The meeting will be conducted remotely via WebEx.

Adjournment

The meeting was adjourned at approximately 4:40 p.m. by Judge Stroud.

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

Date: 10/19/20

Rule 5. Form of Pleadings

(a) Electronic Filing.

a. Requirement for attorneys. ~~An attorney shall file papers electronically through the electronic filing system in a 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. A court may sanction a party for failing to file a paper electronically, including striking the paper.~~

~~ii.i. This requirement is not intended to limit the authority of the~~The Chief Justice ~~to~~ may establish exceptions to the electronic filing requirement for exceptional circumstances.

b. ~~A Court may require an Unrepresented parties party may but are not required to electronically file papers. An unrepresented party may, but is not required to, electronically file papers except when required by the court in its discretion. OR An unrepresented party may file papers electronically through the electronic filing system, but is only required to do so if ordered by the court in its discretion.~~

c. Email Address. ~~The email address of an~~An attorney or unrepresented party ~~shall include his or her email address who electronically files a document shall be included on every all papers filed through the electronic filing system electronically.~~

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. An attorneys filing in a courts where electronic filing is available electronically shall register with the electronic filing system established and maintained by the Administrative Office of the Courts [Rule 5 (c) makes this unnecessary verbiage]. The attorney shall provide the attorney's~~

~~Registration shall require the entry of the attorney's~~ State Bar Number.

ii. ~~U~~An unrepresented party~~ies~~ may register to participate in electronic filing ~~through by registration registering~~ with the electronic filing system ~~established and maintained by the Administrative Office of the Courts~~. ~~Registration shall~~The unrepresented party shall ~~provide~~ require the entry of personal identifying information and certify compliance with all mandated security procedures.

e. Exceptions. The following documents ~~may, but are not required to~~ not be filed electronically ~~unless with~~ the court ~~so orders~~:

i. Discovery and other materials ~~[what are the other materials? Shouldn't they be listed as exceptions?]~~ required to be served on other counsel or a party~~, and not required to be filed with the court~~. ~~Though parties are not required to~~ But a party may use the e-filing system to serve discovery requests and responses on other parties, using the court's electronic filing system without the papers becoming a part of the official court record ~~it can be used for that purpose, with discovery not becoming part of the court's record; and~~

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 receipt 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~~ [is this clause necessary?].

- g. Technical Failure. In the event of a technical failure or system outage preventing timely filing through the electronic filing system, any a 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~~ [reader's miscue referring either to judge's signature or filer's signature] is considered signed if the document includes:
 - i. the symbol “/s/” and named-name 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 ceourt 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 [scanned papers typically are transmitted electronically] A paper filed electronically is the Court's official court record. [Rule 5(f) defines electronic filing when receipt stamp marked. Unnecessary verbiage.]]~~

Addition to GRP Rule 5

Protective Orders and Electronically Filing under Seal

(a) General.

1. This rule applies to both parties and non-parties. References to “parties” in this rule ~~therefore~~ include non-parties.
2. Parties ~~should limit~~ [too vague] shall have a [“compelling reason,” or whatever the NC sealing standard] the materials that they seek to file

under seal. The party seeking to ~~maintain seal~~ materials ~~under seal~~ bears the burden of establishing the need for filing under seal.

(b) Procedures for sealed filing. [Does NC have a provision for sealing entire cases or only papers filed in a case? If the former, we should consider addressing it here.]

1. 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.
2. Pursuant to a Motion for Leave to File Under Seal. [This implies a two-step procedure: first step is to request leave; second step is to file motion to seal. If a two-step procedure is desired, a separate provision and header should be added for a Motion to Seal. But (c) implies a one-step procedure; if so, better to style this as a Motion to Seal, include the documents, and file as a confidential document under the appropriate security level, until the court rules. In the absence of a protective order described in [cite rule above when formatted] any A party that seeks to file a document [earlier references to “papers” – are we drawing a distinction?] or part of a document under seal must [past references to “shall” – are we drawing a distinction?] file a Motion for Leave to File Under Seal [unclear whether this motion is filed under seal and whether the other party is notified and served with the motion – (c) clarifies that the motion is sealed and unavailable to the public and it also clarifies that opposing counsel can respond; if so, we need to make that clear] and obtain leave of court to file a Sealed Document or a Sealed Motion. The proposed sealed document or sealed motion must be filed as a separate PDF in the same filing as the Motion for Leave to File Under Seal.
3. ~~Where parties~~ If a party seeks to seal only a portions of a document or motion, ~~the parties~~ must include as a separate PDF file an unredacted copy of the document with the proposed redactions highlighted or otherwise identified in a manner that enables the Court to easily review the proposed redactions.
4. In a courts where electronic filing has been implemented, ~~as identified by the Administrative Office of the Courts [unnecessary to constantly repeat; Rule 5(a) makes this clear.]~~, an attorneys shall electronically file the Motion for Leave to File Under Seal and all proposed documents through the electronic filing system.

(c) Court order. ~~After reviewing the motion and response(s), the Court will enter an Order on the Motion for Leave to File Under Seal. If the Court grants the Mmotion for Leave to File Under Seal, the party shall file is granted, the~~

~~Court will direct the filer to file the proposed sealed Motion to Seal, along with any proposed sealed documents, or redacted documents under the appropriate security level., [or will order the clerk of superior court to change the security level on the appropriate version of the document so that it is publicly viewable– if the court orders that the paper be available to the public, it is not granting the motion].~~ If the motion is denied, the proposed sealed document or sealed motion will remain unavailable to the public, unless the Court orders otherwise.