

# The North Carolina Business Court Evolves

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## Three Things You Need to Know to Be Up to Date

Business courts are not so-named because they favor businesses, but because they are specifically designed to improve a state's business environment by providing a forum to resolve complex disputes in an efficient manner. Businesses do not fear winning or losing as much as they fear not having the knowledge to help

assess the inherent risks of litigation. Business court judges have experience in matters involving significant issues of corporate and commercial law and business courts frequently publish a high volume of opinions on issues of interest in business disputes. This access to experienced judges and the volume of opinions tends to provide litigants with a greater ability to assess the likely outcome of disputes.

### History of the North Carolina Business Court

North Carolina formed its business court in response to the 1995 Annual Report of the North Carolina Business Commission, which sought to improve the business climate of the state. Interestingly, Governor Roy Cooper sat on that Commission as a 38-year-old lawyer and state senator.

The North Carolina Business Court was created to increase the efficiency and predictability of litigation by providing judges with developed expertise on complex issues and specialized procedures designed to move cases along. The court began in 1996 with one judge working out of his home near Greensboro, and hearing cases across North Carolina. That judge, the now-retired Judge Ben F. Tennille, was pivotal to the growth and expansion of not only the North Carolina Business Court, but also to business courts in many other states that were modeled after the North Carolina Business Court.

Since its inception, the North Carolina Business Court has grown and evolved quite a bit. Most recently, it changed its footprint, increased the total number of judges, and amended its rules of practice. A quick overview of these recent changes will bring you up to date.

### The Court's Footprint

It took almost a decade for the court to grow beyond Judge Tennille, which it did first in 2005 with the addition of the now-retired Judge John R. Jolly, Jr., who opened chambers in Raleigh and Judge Albert Diaz, who opened chambers in Charlotte (but who now serves on the Fourth Circuit Court of Appeals).

Almost a decade later, in mid-2016, the Court expanded its footprint again, to Winston Salem, adding Judge Michael Robinson who maintains chambers housed at the Wake Forest School of Law.

While the Court now has chambers in four cities (Charlotte, Greensboro, Raleigh and Winston Salem), it continues to hear cases from across North Carolina.

## The Depth of the Bench

Following retirements and career transitions, and the addition of Judge Robinson in Winston Salem in 2016, the Court entered 2017 with four judges: Judge Robinson, Judge Greg McGuire in Raleigh, Judge Louis Bledsoe in Charlotte, and Judge James L. Gale (the Senior Business Court Judge) in Greensboro.

In late January of 2017, Judge Adam Conrad was added in Charlotte, now making the bench five deep. Judge Conrad comes to the court from private practice. He is relatively young for a judge (about the age the Governor was when he participated in the initial deliberations about forming a business court), but he carries an impressive resume, including serving as a law clerk for Justice Clarence Thomas of the United States Supreme Court.

With five highly-regarded judges sitting in chambers across four cities, the North Carolina Business Court is more robust than ever. The court staff has also increased over the years. The chambers are now staffed by multiple law clerks (up from what was originally one per judge), a judicial assistant, and a trial court administrator.

## The North Carolina Business Court Rules

The North Carolina Business Court has always had its own set of rules of practice, which supplement the North Carolina Rules of Civil Procedure. However, the court appointed a Rules Advisory Committee, and after months of deliberation, the court published the first overhaul of the North Carolina Business Court Rules ("Rules") since 2006. These new Rules were effective January 1, 2017.

The new Rules reflect the well-known tendencies of the Business Court bench to encourage cooperation among opposing counsel and to expedite litigation. Obviously, any practitioner must study the new Rules quite closely, but below is a quick snapshot of how the new Rules may change the litigation game:

- **Cooperative combatants.** Many people do not think of lawyers as cooperative. Courts, however, recognize that lawyers can both advocate and cooperate, and that everyone wins when lawyers can narrow the breadth of the dispute that will actually be tried before the court. In this regard, the new Rules lean heavily on counsel to work together in order to resolve issues before they are put before the court. The new Rules not only provide that counsel must cooperate in discovery, they also provide that lawyers must consult with opposing counsel before filing most motions with the court. The motivation behind these requirements is the reduction of time spent preparing for, or appearing in, court, which saves all parties and the court valuable resources.
- **Managed chaos.** Litigation is inherently unruly, as parties vie for what are often opposite outcomes. To keep all parties focused and moving ahead, courts rely on case management orders and procedures that, among other things, set sequences and deadlines for the duration of a case. The North Carolina Business Court was early to adopt a developed case management procedure, and the new Rules carry forward case management as a major theme, while also encouraging "novel and creative" approaches to case management. The bottom line is that if you are appearing in the North Carolina Business Court, you and your legal team must think through your case early and plan accordingly. You must also expect that the opposing party will do the same.
- **Less can be more.** Given the amount of communication that occurs electronically, data management has become a major litigation issue and expense, even in relatively small lawsuits. The new Rules address this by introducing the concept of "proportionality." This concept imposes a responsibility on litigants to tailor their discovery requests to account for the significance and cost of gathering the requested information. Proportionality was incorporated into the Federal Rules of Civil Procedure in 2015, but it has not been specifically referenced in the North Carolina Rules of Civil Procedure. The North Carolina Business Court Rules do not lay out a specific proportionality standard, but advise that

counsel must weigh the cost of discovery against its potential benefit. Like case management concerns, having to think through the costs and benefits of discovery at the outset of a case may drive some litigants closer to resolution.

## **Conclusion**

The North Carolina Business Court continues to grow and evolve. It continues to provide a forum that can be more efficient and predictable than many others. Whether the Business Court is the best fit for any given dispute depends on facts and law relevant to the case, but the court's recent evolution demonstrates that the original mission of the court, to handle complex disputes efficiently, remains constant. Ward and Smith, P.A. has many experienced attorneys who regularly represent parties in litigation matters before the North Carolina Business Court.

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