

Supreme Court of Kentucky

2019-13

ORDER

IN RE: Authorization for the Rules of Practice for the Jefferson County Business Court Docket Pilot Project

By Order dated April 9, 2019, the Kentucky Supreme Court authorized a pilot project for the implementation of a Business Court Docket in Jefferson Circuit Court. The Business Court Docket is dedicated to the expedited and cost-effective resolution of assigned disputes involving business entities and affiliated persons.

The following Rules of Practice supplement the Kentucky Rules of Civil Procedure and the Rules of Practice and Procedure for the 30th Judicial Circuit, Jefferson Circuit Court, and should be construed consistent with this purpose. The Rules (to be cited as the Business Court Docket Rules of Practice, “BCR _”) shall apply to matters with proper venue in Jefferson Circuit Court and assigned to the Business Court Docket beginning January 1, 2020.

Nothing shall preclude the other divisions of Jefferson Circuit Court from using these Rules of Practice to resolve matters that are not otherwise eligible for the Business Court Docket.

BCR 1. Definitions

- a. **Affiliated Person.** “Affiliated Person” means an owner, shareholder, officer, director, manager, trustee, partner or member of a Business Entity.
- b. **Business Class Action.** “Business Class Action” means a putative class action which involves a Business Entity or a Business Interest, except for (1) Consumer class actions that are not Complex Consumer Class Actions, and (2) class actions where the Gravamen of the action relates to

or arises out of Personal Injury Disputes, claims for wrongful death, or claims of property damage to non-business property owned or possessed by a natural person.

- c. **Business Court.** “Business Court” means a court with a specialized Business Court docket as described, organized, and administered under these Rules and any applicable Kentucky Supreme Court Order.
- d. **Business Entity.** “Business Entity” means a for-profit or nonprofit corporation, partnership, limited partnership, limited liability company, limited liability partnership, professional association, professional corporation, business or statutory trust, joint venture, unincorporated association (whether or not for profit), or sole proprietorship, or any other legal entity recognized by any state and doing business in Kentucky.
- e. **Business Interest.** “Business Interest” means any ownership or possessory interest in a Business Entity, whether held directly or indirectly.
- f. **Civil Case.** “Civil Case” means all jury and nonjury civil actions within the jurisdiction of Circuit Court, including but not limited to an action or class action seeking damages or injunctive or declaratory relief.
- g. **Complex Consumer Class Action.** “Complex Consumer Class Action” means a Business Class Action brought by a class of Consumers which (1) presents complex issues regarding contracts or business operations, with the exception of retail sales and marketing to Consumers; and (2) requires active case management in the interest of justice.
- h. **Consumer.** “Consumer” means a natural person who owns, possesses, purchases, leases, licenses, uses or sustains loss or damage related to goods, services, contracts, insurance, loans, debts, or financial products primarily for personal, family or household purposes.
- i. **Gravamen.** “Gravamen” means the claim or group of claims that forms the foundation or essence of the Civil Case.

- j. **Personal Injury Dispute.** “Personal Injury Dispute” means a dispute relating to recovery for special or general damages sustained by a natural person arising from or caused by bodily injury.

BCR 2. Eligibility for the Business Court Docket

BCR 2.1 Eligible Disputes

Any Civil Case with proper venue in Jefferson Circuit Court shall be assigned to the Business Court Docket if the Gravamen of the dispute relates to any of the following:

- a. Breach of contract claims involving a Business Entity, other than (1) contract disputes involving claims by a Consumer against a Business Entity which are not asserted as part of a Complex Consumer Class Action; and (2) contract disputes involving claims by a Business Entity to collect an account from a Consumer;
- b. Business tort claims against a Business Entity, Affiliated Person or employee or agent including but not limited to, interference with contract or prospective business relationships, fraud, misrepresentation, false advertising, antitrust, unfair competition, unfair trade practices, trade libel or disparagement;
- c. Business Class Actions not brought by Consumers, with the exception that Complex Consumer Class Actions are eligible;
- d. The formation, governance, internal affairs, operations, control, dissolution or liquidation of a Business Entity;
- e. The rights, obligations, liability or indemnity by, between or among one or more Affiliated Persons of a Business Entity;
- f. Claims of breach of fiduciary duty or statutory violations relating to a Business Entity or an Affiliated Person arising out of business transactions or relationships;
- g. The valuation, offering, solicitation, sale, purchase, transfer, hypothecation or possession of a Business Interest;

- h. The provisions of KRS Chapters 14A, 271B, 272, 272A, 273, 273A, 274, 275, 279, 292, 362, 362.1, 362.2, 365 and those pertaining to any statutory or business trusts under KRS Chapters 386 or 386A;¹
- i. Intellectual property, trade secret (including under the Uniform Trade Secret Act), nondisclosure, confidentiality, non-competition and non-solicitation disputes;
- j. Transactions governed by the Uniform Commercial Code, except Consumer transactions;
- k. Franchise, distribution, agency or dealer disputes;
- l. The purchase or sale of all or part of a Business Entity, whether by merger, acquisition of assets or ownership interests therein, or otherwise;
- m. Insurance, indemnity, surety and guaranty contracts and bonds, insuring Business Entities and their Affiliated Persons and employees against liability, loss and damage, including coverage disputes, but not including suits in which the Gravamen of the suit is a Personal Injury Dispute, a claim for wrongful death, or property damage for non-business property owned or possessed by a natural person;
- n. Commercial real estate, except where the Gravamen is a Personal Injury Dispute, wrongful death or property damage for non-business property owned or possessed by a natural person;
- o. Environmental disputes arising from a breach of a contractual or legal obligation or indemnity between Business Entities;

¹ Acts included are the Business Entity Filing Act (KRS ch. 14A), Kentucky Business Corporation Act (KRS ch. 271B), Cooperative Corporations and Associations Act (KRS ch. 272), Uniform Limited Cooperative Associations Act (KRS ch. 272A), Nonprofit Corporations Acts (KRS ch. 273), Unincorporated Nonprofit Associations Act (KRS ch. 273A), Professional Service Corporations Act (KRS ch. 274), Limited Liability Company Act (KRS ch. 275), Rural Cooperative Corporations Act (KRS ch. 279), Blue Sky Law (KRS ch. 292), Uniform Partnership and Uniform Limited Partnership Acts (KRS ch. 362), Revised Uniform Partnership Act (KRS ch. 362.1), Revised Uniform Limited Partnership Act (KRS ch. 362.2), Assumed Names and Trademarks Act (KRS ch. 365), and acts regarding Business Trusts and Statutory Trusts (KRS chs. 386 and 386A).

- p. The provision of professional services to a Business Entity or the provision of professional services regarding the valuation, offering, solicitation, sale, purchase, transfer or possession of a Business Interest; or
- q. Claims involving a Business Entity or Business Interest not included above, or excluded under BCR 2.2 below, that otherwise should be considered eligible for assignment to the Business Court, in the discretion of the Business Court.

BCR 2.2 Excluded Disputes

A Civil Case shall not be assigned to the Business Court Docket if the Gravamen of the case relates to any of the following:

- a. Sales or construction of a residence;
- b. Professional services other than those described above in BCR 2.1;
- c. Insurance coverage relating to a Personal Injury Dispute or a claim for wrongful death or property damage for non-business property owned or possessed by a natural person;
- d. Individual Consumer disputes, including claims for breach of warranty and breach of contract, product liability claims and claims arising under the consumer protection laws;
- e. Consumer class actions that do not qualify as Complex Consumer Class Actions;
- f. An action brought by the Attorney General under the consumer protection laws alleging unfair, false, misleading, or deceptive acts or practices;
- g. Personal Injury Disputes and wrongful death claims filed individually or as class actions;
- h. Disputes involving wages or hours, occupational health or safety, workers' compensation or unemployment compensation;
- i. Environmental disputes, except as described in BCR 2.1 above;
- j. Eminent domain disputes;

- k. Employee/employer disputes, except where pendent or incidental to the matters described in BCR 2.1 above;
- l. Administrative agency, tax, zoning and other appeals;
- m. Individual residential real estate and non-commercial landlord/tenant disputes, including foreclosure actions;
- n. Actions to collect professional fees not otherwise identified as eligible for assignment under BCR 2.1;
- o. Except as to the enforcement of a judgment of the Business Court Docket, proceedings to enforce a judgment regardless of the nature of the underlying case;
- p. Actions by insurers to collect premiums or rescind policies;
- q. Actions to collect Consumer contracts, accounts, debts, and loans; and
- r. Any matter required by statute or other law to be heard in some other court.

BCR 3. Assignment

BCR 3.1 Assignment to the Business Court Docket

a. A Civil Case having a subject matter falling within the scope of BCR 2.1, subject to the exceptions in BCR 2.2, shall be identified by any plaintiff as appropriate for assignment to the Business Court Docket.

b. A case identified by any plaintiff as appropriate for assignment to the Business Court Docket shall be filed electronically in the Kentucky Court of Justice eCourts system. The complaint shall clearly identify in the style of the case that the matter is filed in the Jefferson Circuit Court Business Court Docket.

c. A defendant objecting to the assignment of the case to the Business Court Docket shall, within the timeframe required by CR 12.01, file an objection setting forth the basis therefore. The objection shall be limited to five pages. No response to the objection shall be allowed.

d. The filing of an objection shall not constitute a stay of any other filing obligation, including the obligation to file a responsive pleading or motion within the timeframe required by CR 12.01.

e. Within fifteen days after an objection is filed, the Business Court Docket judge shall determine if the case should remain on the Business Court Docket or be reassigned. If a Civil Case is removed from the Business Court Docket, it shall be returned to the office of the circuit court clerk for general civil assignment among the thirteen divisions of the Jefferson Circuit Court.

f. The Business Court Docket judge shall retain jurisdiction over the case until it is reassigned.

g. Nothing in this Rule shall preclude the Business Court Docket judge from determining within his or her discretion that a case on the Business Court Docket should be returned to general assignment.

BCR 3.2 Reassignment to the Business Court Docket

a. If a plaintiff fails to identify a case as appropriate for assignment to the Business Court Docket under BCR 3.1(a), but any defendant believes such assignment is appropriate, that defendant shall first attempt to reach an agreement with the plaintiff regarding reassignment of the case to the Business Court Docket. If agreement to reassignment is reached, counsel shall submit an agreed order on Form AOC-BCD-1 identifying the subject matter of the Complaint that falls within the scope of BCR 2.1. Upon entry of the agreed order, the clerk of the court shall reassign the case to the Business Court Docket in the same manner as if it had been originally identified by the plaintiff as appropriate for the Business Court Docket.

b. If an agreement regarding reassignment is not reached, the defendant shall file a motion for reassignment on Form AOC-BCD-2. The motion for reassignment shall be limited to five pages in length and shall be filed within the same timeframe required for serving an answer or response to the complaint. No response to the motion for reassignment shall be allowed.

c. A motion for reassignment shall be submitted to the Chief Circuit Judge of the Jefferson Circuit Court. In the event the Chief Circuit Judge is also a Business Court Docket Judge, the motion for reassignment shall be submitted to the Supreme Court Justice for the 4th Appellate District.

d. The filing of a motion for reassignment shall not constitute a stay of any other filing obligation, including the obligation to file a responsive pleading or motion within the timeframe required by CR 12.01.

e. Within fifteen days after the motion for reassignment is filed, the Chief Circuit Judge or, if appropriate under BCR 3.2(c), the Supreme Court Justice for the 4th Appellate District, shall determine whether the case is appropriate for assignment to the Business Court Docket. Upon entry of the AOC-BCD-4 reassigning the case to the Business Court Docket, it shall be returned to the Office of the Circuit Court Clerk for assignment in the same manner as if it had been originally identified as appropriate for the Business Court Docket.

f. The Circuit Court judge to whom the case was originally assigned shall retain jurisdiction over the case unless it is reassigned to the Business Court Docket.

BCR 3.3 Reassignment to the Business Court Docket Following the Filing of a Counterclaim

a. If, at the time the answer is filed, a counterclaim brings a case within the jurisdiction of the Business Court Docket, the counterclaimant shall first attempt to reach an agreement with the other parties regarding reassignment of the case to the Business Court Docket. If an agreement to reassignment is reached, counsel shall submit an agreed order on Form AOC-BCD-1 identifying the subject matter of the counterclaim that falls within the scope of BCR 2.1. Upon entry of the agreed order, the clerk of the court shall reassign the case to the Business Court Docket in the same manner as if it had been originally identified as appropriate for the Business Court Docket.

b. If an agreement regarding reassignment is not reached, the defendant shall submit a motion for reassignment on Form AOC-BCD-2 identifying the subject matter of the counterclaim that qualifies the case as appropriate for assignment to the Business Court Docket under BCR 2.1. The motion for reassignment shall be limited to five pages in length.

c. A plaintiff objecting to the reassignment of the case to the Business Court Docket may, within the timeframe required by CR 12.01, file an objection setting forth the basis therefore. The objection shall be limited to five pages. No response to the objection shall be filed.

d. A motion for reassignment filed under this Subsection shall be processed in the same manner as prescribed under BCR 3.2 (c) – (f).

BCR 3.4 Referral of Case to the Business Court Docket

a. A judge of the Jefferson Circuit Court may, *sua sponte*, refer a Civil Case to the Business Court Docket if he or she finds that the Gravamen of the case falls within the scope of BCR 2.1, subject to the exceptions in BCR 2.2.

b. The referral shall be reviewed by the Chief Circuit Judge. In the event the Chief Circuit Judge is also a Business Court Docket Judge, the referral shall be reviewed by the Supreme Court Justice for the 4th Appellate District.

c. Within fifteen days after the referral is entered, the Chief Circuit Judge or, if appropriate under BCR 3.4(b), the Supreme Court Justice for the 4th Appellate District, shall determine whether the case is appropriate for reassignment to the Business Court Docket. If the case is ordered to be reassigned to the Business Court Docket, it shall be returned to the Office of the Circuit Court Clerk for assignment in the same manner as if it had been originally identified by the plaintiff as appropriate for the Business Court Docket. If the case is not deemed appropriate for reassignment to the Business Court Docket, it shall remain in the division of Jefferson Circuit Court to which it was originally assigned.

BCR 3.5 Assignment or Reassignment to the Business Court Docket by Other Means

BCR 3.1, 3.2, 3.3 and 3.4 are the only methods for assignment or reassignment of a case to the Business Court Docket.

BCR 3.6 Recusal or Disqualification of Business Court Docket Judge

a. Upon recusal or disqualification of a Business Court Docket judge, the case shall be assigned to the other Business Court Judge. If both Business Court Docket judges are ineligible to preside, then the case shall be returned to the Office of the Circuit Court Clerk for general civil assignment among the remaining eleven divisions of the Jefferson Circuit Court.

b. The judge to whom the case is assigned is encouraged to use the Jefferson County Business Court Docket Rules of Practice to resolve the case.

BCR 4. Early Scheduling and Case Management

BCR 4.1 Case Management Protocol

All parties shall communicate in good faith and attempt to agree to an appropriate and thorough case management plan, including review of novel and creative approaches that may assist the efficient and just resolution of the case. The Business Court Docket judge has wide discretion in implementing an appropriate case management plan and adopting reasonable processes designed to achieve an efficient and just resolution of disputes, including deviating from the Jefferson County Business Court Docket Rules of Practice where it deems appropriate.

BCR 4.2 Case Management Meeting

Unless otherwise ordered by the Business Court Docket judge, counsel for all parties shall participate in a Case Management Meeting no later than 45 days following the assignment to the Business Court Docket. Counsel for the first named plaintiff is responsible for contacting other counsel and scheduling the meeting. A party may, by motion, request that the Court alter the process or schedule for the Case Management Meeting and Case Management Report. The motion must be supported by good cause, be filed as promptly as possible, and identify the reasons for the requested change. Any response to the motion must be filed within seven days of service of the motion, and no replies are permitted. Prior to the Case Management Meeting, counsel for the parties shall prepare to discuss each of the following items and any other issues deemed appropriate by any party.

- a. *Initial Motions*, including whether certain issues might be presented to the Court for early resolution;
- b. *Scope of Discovery*, including any anticipated travel costs necessary for discovery. Counsel should discuss the factual inquiries necessary for the case, the amount in controversy, limitations on the parties' resources, the burden and expense of the expected discovery compared with its likely benefit, the importance of the issues at stake in the litigation, and the importance of the discovery for the adjudication of the merits of the case.
- c. *Discovery Topics and Timing*, including whether phased discovery is appropriate, length of the discovery period, number of depositions (both fact and expert), and length of depositions and numbers of written discovery requests.
- d. *Electronically Stored Information*, including suggested protocol for efficient and appropriate discovery of electronically stored information, and the following items:
 - i. the specific sources, location, and estimated volume of electronically stored information;

- ii. whether electronically stored information should be searched on a custodian-by-custodian basis and, if so, the identity and number of the custodians whose electronically store information will be searched and the search parameters;
 - iii. a method for designating documents as confidential;
 - iv. plans and schedules for any rolling production;
 - v. deduplication of data;
 - vi. whether any device(s) need to be forensically examined and, if so, a protocol for the examination(s), including but not limited to mobile devices;
 - vii. the production format of documents;
 - viii. the fields of metadata to be produced;
 - ix. the type of software that will be used to identify potentially responsible electronically stored information; and
 - x. how data produced will be transmitted to other parties (e.g., in read-only media; segregated by source; encrypted or password protected).
- e. *Amendments*, including a proposed deadline for amending pleadings and adding parties, including whether additional parties are essential to the complete resolution of the case;
- f. *Expert Witness Reports*, including timing for identification of expert witnesses, responses to expert discovery, exchange of expert reports and timing of motions to exclude expert testimony;
- g. *Dispositive Motions*, including proposed briefing schedules;
- h. *Trial Dates*, including anticipated length;
- i. *Confidentiality/Protective Orders*, including terms for designating and filing certain materials under seal (*see* BCR 5.7);

- j. *Choice of Law*, including whether any law other than Kentucky law might govern aspects of the case, and, if so, what law and which aspects of the case;
- k. *Mediation or Alternative Dispute Resolution*, including timing, deadlines, possibility of early resolution efforts, and possible mediator(s);
- l. *Frequency of Case Management Conferences*, including beneficial use and scheduling options;
- m. *Special Master or Referee*, including whether matter(s) might be appropriate for an appointment and who may be well suited to serve the role;
- n. *Party Participation*, including whether client attendance at Case Management Conference(s) would be beneficial; and
- o. *Available Dates for Conducting the Case Management Conference*, including when all lead counsel for the parties are available to attend the conference with the Court as required by BCR 4.4.

Counsel for the parties shall contact the Court's administrative staff by telephone to schedule the Case Management Conference before completing the Case Management Meeting. Unless otherwise ordered, discovery shall be held in abeyance until the Case Management Meeting is completed. Any discovery served prior to the Case Management Meeting shall be deemed served on the day following the Case Management Meeting.

BCR 4.3 Case Management Report

The parties shall jointly file a Case Management Report no later than the fifteenth day after the Case Management Meeting. The parties may use the Case Management Report template attached to this Order as Appendix 1. Counsel for the first named plaintiff is responsible for circulating an initial draft of the report to other counsel for the parties, for incorporating into the

report the views of all other counsel, and for finalizing and filing the report. The report shall include the following topics:

- a. *Brief Summary of the Case.* Each party (or group of parties represented by common counsel) shall summarize the dispute with a brief statement not to exceed 250 words (or 500 words if submitted jointly).
- b. *Initial motions.* The report should list whether any party plans to file any early stage motions, a motion to dismiss, or any other early-stage motion. The party that plans to file the motion may provide a short explanation of the basis for the motion. That party should also list the projected date on which it plans to file the motion. The report should also discuss whether the parties have agreed on any deadlines for amending the pleadings or adding parties and the impact of those deadlines on the case.
- c. *Discovery.* The parties should summarize their agreement and/or competing proposals for discovery. The report should cover at least the following topics:
 - i. a proposed discovery schedule;
 - ii. an electronically stored information protocol;
 - iii. limits on written discovery and depositions;
 - iv. any agreements related to privilege logs;
 - v. any agreement about the effects of the inadvertent waiver of attorney-client privilege or attorney work-product; and
 - vi. expert discovery.

One or more parties may also ask the Court in the report to postpone creating a discovery schedule until after the Court decides any initial motions, including but not limited to, motions to dismiss.

d. *Confidentiality.* The report should indicate which parties, if any, anticipate the need for a confidentiality/protective order. If the parties agree that a confidentiality/protective order should be entered but do not agree on

the terms of that proposed order, the report should explain the nature of the disagreement and any specific language in dispute. See BCR 5.7.

e. *Mediation.* The report must explain whether the parties agree to early mediation and any agreements to facilitate an early mediation. Counsel for the parties are encouraged to discuss with their client(s) the cost of litigation and the potential cost savings that may be realized by an early mediation.

Additionally, the report must include a deadline for mediation (or competing proposals) and the name of any agreed-upon mediator.

f. *Special Circumstances.*

- i. Class allegations. If the complaint or subsequent pleading includes class action allegations, then the report should summarize the parties' agreement and/or competing proposals for the timing, nature, and extent of class certification discovery, how and/or whether class and merits discovery should be bifurcated or sequenced, and a proposed deadline for the plaintiff(s) to move for class certification. If multiple related class actions are pending, the parties must report their views on special efforts that should be undertaken and the time for doing so, such as the appointment of lead counsel, consolidation, or coordination with proceedings in other jurisdictions.
- ii. Derivative claims. If the complaint or subsequent pleading includes derivative claims, then the report should summarize the parties' positions on whether proper demand was made. The report should also describe any agreement and/or competing proposals on any special committee investigation, any stay of proceedings, or other issues regarding the derivative claims.
- iii. Related proceedings. If there are multiple related proceedings, then the parties should state their views on what efforts, including but not limited to consolidation or shared discovery, should be undertaken.

g. *Special Master/Referee.* The report should identify any matter(s) that might be appropriate for reference to a special master or referee. The parties

are specifically encouraged to think creatively about how the use of a referee might expedite the resolution of the case.

i. *Other Matters*. The report should identify and discuss any other matters significant to case management.

BCR 4.4 Case Management Conference

The Business Court Docket judge shall schedule and conduct a Case Management Conference within 60 days after the Case Management Meeting, and may require representatives of each party, in addition to counsel, to attend. Unless otherwise ordered, the Court will not hear substantive motions at a Case Management Conference.

BCR 4.5 Case Management Order

The Court will enter a Case Management Order, addressing issues developed in the Case Management Report and at the Case Management Conference, as well as any other issues the Court deems appropriate. Any party may move to modify the terms of the Case Management Order on a showing of good cause but may do so only after consultation with all other parties.

BCR 5. Miscellaneous Rules

BCR 5.1 Special Master or Discovery Referee

The parties are required under BCR 4.2(m) to consider whether a special master or discovery referee may assist the efficient resolution of certain issues in the case, and if so determined, to summarize their views in the Case Management Report as required under BCR 4.3(g). Issues for consideration in the appointment of a special master or discovery referee are found in Appendix 2, Guidelines for Appointment of a Special Master or Discovery Referee.

The Business Court Docket judge shall have wide discretion to utilize independent professionals as may be appointed by the Court under CR 53, or

as may be appointed by the agreement of the parties under terms acceptable to the Court. When appointing a Special Master or Discovery Referee, the Court will enter an order that outlines the duties, powers, compensation, and any other issues relevant to the proposed work of the Special Master or Discovery Referee.

BCR 5.2 Posting of Opinions and Dispositive Orders

The Business Court Docket judges are encouraged to post all substantive opinions on the Business Court Docket website maintained by the Administrative Office of the Courts. Opinions posted to the Business Court Docket website shall not be cited or used as binding precedent in any other case in any court of this state.

BCR 5.3 Motion Hearings

Unless otherwise ordered by the Business Court Docket judge *sua sponte* or upon written request of a party included as part of a motion or response, motions that do not require testimonial evidence shall be considered and decided by the Business Court Docket judge without hearing or oral argument, based on all matters of record, including the motion papers. In the event a hearing or oral argument is required, it shall be set at a time and upon a date scheduled for that purpose, and the Court may determine that an argument shall be conducted telephonically as permitted by these Rules. For the convenience of the parties, matters assigned to the Business Court Docket may be noticed for a standing Business Court Docket motion hour.

BCR 5.4 Unopposed Motions for Enlargement of Deadlines

Unopposed motions pursuant to CR 6.02 that (a) do not expand the time for filing a jury trial demand or the completion of discovery, and (b) do not alter the dispositive motion deadline or the scheduled trial date, may be presented to the Business Court Docket judge electronically through a proposed order only. The proposed order shall state that all parties are aware of and do not oppose

entry of the order. An unopposed motion for the enlargement of deadlines may be granted or denied by the Business Court Docket judge.

BCR 5.5 Use of Telephonic Conferences

The Business Court Docket judge and the parties may address scheduling and housekeeping matters by telephonic conference as a matter of course with all parties having adequate notice and the opportunity to participate in such calls. The Business Court Docket judge shall have full discretion to consider resolution of other matters and motions not requiring an in-person court appearance by scheduling and conducting argument via telephonic conference, with adequate notice to all parties.

BCR 5.6 Use of Email for Other Communications

The Business Court Docket judge and all counsel of record are encouraged to use email to request the scheduling of teleconferences, hearings and arguments, and to advise the Business Court Docket judge of the submission or withdrawal of any pending motion. To avoid ex parte communication, counsel of record for all parties shall be included on all email exchanges.

BCR 5.7 Confidentiality/Protective Orders

a. Public Access to the Court. Parties and counsel should assume that all documents filed in the Business Court Docket are publicly available and that restricting public access is appropriate only in limited circumstances as set forth in this Rule. Parties should limit the materials that they seek to file under seal and recognize that the party seeking to file and maintain materials under seal bears the burden of establishing restricted access and the need for filing under seal.

b. Proposed Orders. A party by motion or with the agreement of all parties may submit to the Business Court Docket judge a proposed order governing the designation, production, and use of confidential documents and

information, including how such materials will be filed under seal in the pending action and recognizing that any materials to be filed under seal must be hand delivered with clear instructions to the Office of the Circuit Court Clerk. Before submitting a proposed order to the Business Court Docket judge, the parties must confer in an effort to agree to all applicable terms of the proposed order. The entry of a proposed confidentiality or protective order does not limit the Business Court Docket judge's power to make further orders concerning the disclosure of documents produced in discovery, tendered to the Business Court Docket judge, filed with the Court, or presented at hearing or trial, including whether and under what circumstances the document will retain confidential or protected designation.

This Order shall be effective January 1, 2020, and until further Order of this Court.

Entered this 20th day of November 2019

All sitting; all concur.


CHIEF JUSTICE

**Business Court Docket Rules of Practice
Appendix 1**

ABC CORPORATION,
Plaintiff

v.

CASE MANAGEMENT
REPORT TEMPLATE

XYZ CORPORATION,
Defendant

The undersigned counsel participated in a Case Management Meeting on [INSERT DATE] and submit this report on [INSERT DATE] as required by Jefferson County Business Court Docket Rules of Practice BCR 4.3.

- d. *Brief Summary of the Case.* Each party (or group of parties represented by common counsel) shall summarize the dispute with a brief statement not to exceed 250 words (or 500 words if submitted jointly).
- e. *Initial motions.* This section of the report should list whether any party plans to file a motion for emergency relief, a motion to dismiss, or any other early-stage motion. The party that plans to file the motion may provide a short explanation of the basis for the motion. That party should also list the projected date on which the motion it plans to file the motion. This section should also discuss whether the parties have agreed on any deadlines for amending the pleadings or adding parties and the impact of those deadlines on the case.
- f. *Discovery.* The parties should summarize their agreement and/or competing proposals for discovery. The section should cover at least the following topics:
 - i. a proposed discovery schedule;
 - ii. an electronically stored information protocol;
 - iii. limits on written discovery and depositions;
 - iv. any agreements related to privilege logs;
 - v. any agreement about the effects of the inadvertent waiver of attorney-client privilege or attorney work-product; and
 - vi. expert discovery.

One or more parties may also ask the Court in the report to postpone creating a discovery schedule until after the Court decides any initial motions, including but not limited to, motions to dismiss.

- g. *Confidentiality*. The report should indicate which parties, if any, anticipate the need for a confidentiality/protective order. If the parties agree that a confidentiality/protective order should be entered but do not agree on the terms of that proposed order, the report should explain the nature of the disagreement and any specific language in dispute.
- h. *Mediation*. The report must explain whether the parties agree to early mediation and any agreements to facilitate an early mediation. If the parties do not agree to early mediation, then the report must confirm that counsel have discussed with their client(s) the cost of litigation and the potential cost savings that may be realized by an early mediation. Additionally, the report must include a deadline for mediation (or competing proposals) and the name of an agreed-upon mediator. If the parties do not agree on a mediator, then the report should list each party's choice of mediator.
- i. *Special Circumstances*.
 - i. Class allegations. If the pleading includes class action allegations, then the report should summarize the parties' agreement and/or competing proposals for the timing, nature, and extent of class certification discovery, how and/or whether class and merits discovery should be bifurcated or sequenced, and a proposed deadline for the plaintiff(s) to move for class certification. If multiple related class actions are pending, the parties must report their views on special efforts that should be undertaken and the time for doing so, such as the appointment of lead counsel, consolidation, or coordination with proceedings in other jurisdictions.
 - ii. Derivative claims. If the complaint includes derivative claims, then the report should summarize the parties' positions on whether proper demand was made. The report should also describe any agreement and/or competing proposals on any special committee investigation, any stay of proceedings, or other issues regarding the derivative claims.

- iii. Related proceedings. If there are multiple related proceedings, then the parties should state their views on what efforts, including but not limited to consolidation or shared discovery, should be undertaken.

- g. *Special Masters/Referees*. The report should identify any matter(s) that might be appropriate for reference to a special master or referee. The parties are specifically encouraged to think creatively about how the use of a referee might expedite the resolution of the case.

- h. *Other Matters*. The report should identify and discuss any other matters significant to case management.

The parties have contacted the Court's administrative staff by telephone as required pursuant to BCR 4.2, and the Case Management Conference is scheduled for _____, at _____.m.

[INSERT DATE AND SIGNATURE BLOCKS]

**Business Court Docket Rules of Practice
Appendix 2**

Guidelines for Appointment of Special Master or Discovery Referee

The following guidelines apply in cases where the parties or the court determine that a special master or discovery referee would assist the efficient resolution of certain issues under BCR 5.1

Under BCR 4.2(m), the parties are required to consider at the Case Management Meeting whether a special master or discovery referee may assist the efficient resolution of certain issues in the case, and if so determined, to summarize their views in the Case Management Report as required under BCR 4.3(g) (*see* Appendix 1).

- a. Special Master. When considering a Special Master to oversee portions of the case in accordance with CR 53, the parties should consider the following:
 - i. the proposed scope of the Special Master’s authority and tasks;
 - ii. the grounds for reference under CR 53.01, including a statement describing the basis for disagreement if any party has not joined in or consented to a Special Master;
 - iii. the name and qualifications of any candidates that the Court should consider as a Special Master, including whether the parties consent to each proposed candidate; and
 - iv. any requests for special authority to be provided under Rule 53.03.

- b. Discovery Referee. In addition to, or as an alternative to a Special Master appointed in accordance with CR 53, counsel are encouraged to give special consideration to the appointment of a discovery referee upon the agreement of the parties, particularly in cases expected to involve large amounts of electronically stored information or when there may be differing views regarding the use of keyword searches, utilization of predictive coding, or the shifting or sharing of costs associated with large-scale or costly discovery. The parties are encouraged to be creative and flexible in utilizing discovery referees to avoid unnecessary cost and motion practice before the Court.

The parties should consider the following regarding the appointment of a discovery referee:

- i. the proposed scope of the discovery referee's authority, duties, and powers, including any other issues relevant to the proposed work of the referee;
- ii. the name and qualifications of any candidates that the Court should consider appointing as a discovery referee, including whether the parties consent to each proposed candidate;
- iii. the proposed compensation of the referee and the source of that compensation; and
- iv. the process to be used to submit the discovery referee's findings and/or conclusions to the Court for final decision, including whether the findings and conclusions of the referee are binding on the parties, as if issues have been submitted to binding arbitration, or whether they are subject to further review of the Court.