

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on October 23, 2023, the following order was made and entered:

RE: Request for Public Comment on Proposed Amendments to Rules 29.07, 29.08, 29.09, and 29.10 of the West Virginia Trial Court Rules, No. 22-701

On August 23, 2022, the Honorable Michael D. Lorensen, Judge of the Twenty-Third judicial Circuit and then-Chair of the Business Court Division, filed proposed amendments to Rules 29.07, 29.08, 29.09, and 29.10 of the West Virginia Trial Court Rules. The proposed amendments would clarify that business court judges may hold hearings and trials in any county in the state if agreed to by all parties and the presiding judge. The proposed amendments would further allow for arbitration to be used as an alternate dispute resolution in business court cases.

The Court has jurisdiction under West Virginia Constitution Article VIII, §§ 1 and 3. Upon consideration and review on October 19, 2023, the Court is of the opinion to and does publish the proposed amendment for public comment for a period of sixty days. Comments must be filed in writing with the Clerk of Court through File & ServeXpress in Docket No. 22-701 on or before December 22, 2023.

The proposed amendments are indicated by strike-through and underscoring as follows:

West Virginia Trial Court Rules

Rule 29.07. Assignment of Presiding and Resolution Judge in Business Litigation.

(a) An order from the Chief Justice granting a Motion to Refer is a transfer of Business Litigation to the Division. Upon receipt of the order, the Division Chair shall, with the advice and consent of the Division, enter an order assigning Presiding and Resolution Judges. The Division Chair may serve as a Presiding or Resolution Judge.

(b) Upon referral by the Chief Justice and assignment by the Division Chair, the Presiding Judge is authorized, pursuant to Article VIII § 3 of the West Virginia Constitution, to preside over the action in any county that is within the same Business Litigation Assignment Region in which the case is filed, or in any other county within the State upon agreement of the parties and approval of the Presiding Judge.

Rule 29.08. Powers and Duties of Presiding and Resolution Judges.

- (a) The Presiding Judge is authorized to preside in any circuit in which Business Litigation or proceedings therein are pending, or in which Business Litigation or proceedings therein are transferred for purposes consistent with the Division's case management and trial methodologies.
- (b) With the advice and consent of the Division, the Presiding Judge is authorized to consolidate and/or transfer Business Litigation or proceedings therein from one circuit to one or more other circuits to facilitate the Division's case management and trial methodologies and to order the transfer of court files to the appropriate circuit.
- (c) Within thirty (30) days of being assigned, the Presiding Judge shall conduct a case management and scheduling conference.
- (d) Within fifteen (15) days of the case management conference, the Presiding Judge shall issue a case management order that includes any deadlines or procedures deemed appropriate to fairly and efficiently manage and resolve the Business Litigation.
- (e) The Presiding Judge may schedule conferences, motions, mediation, pretrial hearings, and trials in ~~any circuit court courtroom~~ the filing county or in any county within the Business Litigation Assignment Region, with due consideration for the convenience of the parties; and the Presiding Judge may schedule all of said matters in any other county within the State upon agreement of the parties and consent of the Presiding Judge. Jury trials shall be conducted in the following order of preference: (1) within the filing county; (2) in any county within the Business Litigation Assignment Region; or (3) only upon agreement of all of the parties and the Presiding Judge in any county within the State.
- (f) The Presiding Judge shall have the sole authority to supervise the jury selection process, to disqualify a prospective juror from jury service, and to excuse jurors from juror service in Business Litigation to which the Presiding Judge has been assigned, all pursuant to W.Va. Code § 52-1-1 et seq.
- (g) The Business Litigation should proceed to final judgment in an expedited manner. The time standards for general civil cases set forth in Trial Court Rule 16.05 shall apply; provided, however, that the Presiding Judge shall make all reasonable efforts to conclude Business Litigation within ten (10) months from the date the case management order was entered. All other time standards for service of notices and entry of order set forth in the West Virginia Rules of Civil Procedure shall apply unless modified by order entered by the Presiding Judge.
- (h) The Resolution Judge is authorized to schedule and conduct mediation of the case or any Alternative Dispute Resolution as agreed to by the parties and the Resolution Judge in an attempt to resolve the case in an expedient and efficient manner.

Rule 29.09. Alternative Dispute Resolution.

(a) Upon agreement of the parties any case referred to the Business Court Division is available for binding or non-binding arbitration. If the parties agree to non-binding arbitration and agree to accept the arbitration decision, a settlement agreement shall be prepared, and a dismissal order shall be entered in the case. The decision may be reflected in the dismissal order if the parties agree or if the Chief Arbitrating Judge finds that it is required. IF either party chooses to not accept the non-binding decision the case shall remain on the trial docket and proceed as scheduled. If all the parties agree to binding arbitration, it shall be non-appealable except as allowed under West Virginia Code § 55-10-23(a)(1),(2)(B),(C).

(b) The parties may agree to have their case arbitrated before one Business Court Division Judge on a panel of three Business Court Division Judges.

(c) If the parties desire the arbitration to be conducted by one judge, then the Resolution Judge previously appointed by the Chair shall conduct the arbitration. If the Resolution Judge has already conducted mediation in the case, any of the parties may request that the Chair appoint another judge to conduct the arbitration, but nothing prohibits the Resolution Judge, after conducting mediation, from also serving as an arbitrator if the parties agree.

(d) If the parties desire the arbitration to be conducted by a three-judge panel, the plaintiff(s) shall choose one judge and the defendant(s) shall choose one judge from among the sitting Business Court Division Judges, and the Chair shall appoint the third judge, who shall then act as the Chief Arbitrating Judge. The parties may, upon agreement, request that the Chair choose all three judges. Nothing prohibits the Chair from serving on a panel or individually. If the parties agree, the Presiding Judge or any Resolution Judge may serve on the arbitration panel.

(e) All administrative matters concerning the arbitration shall be determined solely at the discretion of the Chief Arbitrating Judge.

(f) Generally, the arbitration shall take place in the courtroom in the county in which the action is pending, but at the direction of the Chair of the Division or the presiding judge, the arbitration may be conducted in any courtroom in the Business Litigation Assignment Region or such other place as the parties, with the concurrence of the Chief Arbitrating Judge, agree.

(g) The time, method of presentation of evidence, and argument shall be agreed upon by the parties and approved by the Chief Arbitrating Judge prior to the arbitration being scheduled. The Chief Arbitrating Judge shall make himself or herself available to counsel as requested for assistance regarding these administrative matters.

(h) Once the Chief Arbitrating Judge has been appointed, a scheduling conference shall be set. After the scheduling conference, a Scheduling Order setting out the time and place of the arbitration, the method of presenting evidence, argument and time allotted thereto, and the

deadline for submission of pre-arbitration statements (which shall contain a final list of witnesses each party intends to call and a list of exhibits and documentary evidence anticipated to be introduced) shall be entered. Included in this statement shall be a brief description of the matters upon which each witness will be called to testify. If the parties agree, in lieu of live testimony or affidavit. Each party should also be prepared to provide the arbitrating judges copies of any pleadings or other documents contained in the court file the party deems relevant.

(i) The Chief Arbitrating Judge shall have complete discretion on how the hearing is conducted. The hearing shall be transcribed with the cost of the court reporter to be born in a pro rata shared by the parties unless the parties agree otherwise.

(j) The decision of the arbitrator or panel shall be in writing and signed by the arbitrator(s). The arbitrator shall make a record of the decision. If the parties request, the record may set forth findings of fact and conclusions of law that support the decision. The arbitrator shall give notice or the decision, including a copy of the decision, to each party to the arbitration proceeding.

(k) Within thirty (30) days after the conclusion of the arbitration hearing, or thirty (30) days after the receipt of the final authorized memorandum of the parties, the arbitration decision shall be submitted to the Presiding Judge for the entry of the judgment. If the Presiding Judge participated as an arbitrator, the Chair of the Division shall appoint a different member of the Division as Presiding Judge to receive the decision and preside over entry of the Order approving the decision and any issues regarding enforcement. With the consent of the Chief Arbitration Judge, the parties ay agree to extend these timeframes. The Chief Arbitration Judge, in his or her discretion, has the authority to extend the timeframes if deemed necessary.

(l) In the case of binding arbitration if the arbitration is carried out by a three-judge panel, the decision must be unanimous to be binding and final. If no final decision is entered the case will remain upon the trial docket as scheduled. If the presiding judge sat on the arbitration panel or was the sole arbitrating judge, the Chair of the Division shall enter an order naming a new presiding judge who shall have the discretion in regard to any further action required in the case.

(m) On motion to the Chief or sole Arbitration Judge by a party to an arbitration proceeding, the arbitrator may modify or correct an award if:

1. There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property referred to in the award;

2. The award is imperfect in a matter of form not affecting the merits of the decision on the claims;

3. The arbitrator(s) did not make a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

4. To clarify the award.

(n) A motion to modify must be made, and notice given to all parties, within ten days after the moving party receives notice of the decision. A party to the arbitration proceeding must give notice of any objection to the motion within five days after receipt of the notice.

(o) Nothing in this section shall preclude the parties from agreeing to more individualized terms and conditions of the arbitration proceedings with the approval of the Arbitrating Judge.

Rule 29.10. Scope; Conflicts.

If these Rules conflict with other rules or statutes, these rules shall apply; otherwise all applicable Rules apply.

A True Copy

Attest: /s/ Edythe Nash Gaiser
Clerk of Court

