MEMORANDUM

TO: Administrative Board of Courts

FROM: Commercial Division Advisory Council

DATE: February 19, 2026

RE: Proposal to add a new Commercial Division Rule regarding cost shifting for discovery motions

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The Commercial Division Advisory Council ("CDAC") recommends the addition of a new rule related to cost shifting in connection with discovery motions in the form proposed herein, for the reasons set forth in this memorandum.

Introduction

Effective March 1, 2025, the Texas Business Court implemented Local Rule 4(e), which states that certain information must be provided in connection with cost-shifting requests for discovery motions. Specifically, the rule provides, "If a party requests cost shifting, the party's motion or response must state the amount of costs that should be shifted, how that amount was determined, and the basis for the requested cost shifting."[1]

Commentary on the Texas Business Court's local rules emphasizes that the court is attempting to streamline "the most costly, time-consuming and contentious" disputes—discovery fights—through tighter pre-motion procedures, including requiring parties to certify whether they discussed cost-shifting and proportionality during their conferrals.[2] This structure reflects a broader trend in specialized business courts: channeling discovery disputes into early, disciplined

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[1] Texas Business Court Local R. 4(e), https://www.txcourts.gov/media/1459346/local-rules-of-the-business-court-of-texas.pdf.

[2] Andrew Price et al., *Navigating the Texas Business Court: Local Rule highlights*, Norton Rose Fulbright (July 2025), https://www.nortonrosefulbright.com/en/knowledge/publications/f0caa38b/navigating-the-texas-business-court-local-rule-highlights.

discussions about scope, burden, and costs, with cost-shifting addressed explicitly rather than as an afterthought.

State and federal courts throughout the country have acknowledged their ability to allocate production costs to the requesting party under the appropriate circumstances,[3] but thus far, few courts have implemented local rules governing the request of such cost allocation. Two state business courts, Georgia Business Court and North Carolina Business Court, provide alternative models for rules governing cost shifting requests. Unlike the Texas rule, each of these rules requires only an "estimate" of the costs sought to be shifted, although they make clear that the party seeking cost-shifting must have a "reasoned factual basis" for its estimated costs. Georgia's rule also expressly cautions that "cost-shifting should not be a common practice," reinforcing that the default remains that the responding party ordinarily bears the cost of responding to discovery.[4]

The full text of these rules is as follows:

Georgia Business Court Rule 7-5(d)

> Cost-Shifting Requests. If a party contends that cost-shifting is warranted as to any discovery sought, then the party's letter or brief should address estimated costs of responding to the requests in relation to the breadth, complexity, or other considerations bearing upon the specific discovery at issue. Counsel's estimate must have a reasoned factual basis, and the Court may require that any such basis be demonstrated by affidavit. Cost-shifting should not be a common practice in the Court, and parties should continue to assume that a responding party ordinarily bears the cost of responding to discovery.[5]

North Carolina Business Court Rule 10.9(d)

> Cost-shifting requests. If a party contends that cost shifting is warranted as to any discovery sought, then the party's brief should address estimated costs of

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[3] In 2015, Federal Rule of Civil Procedure 26(c)(1)(B) was amended to include an "express recognition of protective orders that allocated expenses for disclosure or discovery." Transmittal of Proposed Amendments to the Federal Rules of Civil Procedure at 69–70, Jud. Conf. of the United States (Apr. 29, 2015), https://www.uscourts.gov/sites/default/files/2015-04-29-transmittal_to_congress_final_1.pdf.

[4] Georgia Business Court R. 7-5(d), https://www.georgiabusinesscourt.com/wp-content/uploads/2021/06/2021.08.01-Georgia-State-wide-Business-Court-Rules_as-issued.pdf.

[5] *Id.*

> responding to the requests and the proportionality of the discovery sought. Counsel's estimate must have a reasoned factual basis, and the Court may require that any such basis be demonstrated by affidavit.[6]

In addition, North Carolina's Business Court's procedures around discovery disputes reflect a consistent theme: requiring parties to engage in structured pre-filing interaction with the court and each other, with an explicit expectation that counsel address proportionality and (where applicable) cost-shifting as part of the process. As commentary on North Carolina's rule explains, "[d]iscovery motions often overwhelm the Business Court's docket, so Rule 10.9 was implemented to require increased engagement between the parties and the Court before filing discovery motions."[7]

The Proposed Rule

The CDAC proposes inserting the Rule as a new Rule 14-b. The Rule would have the following text:

> Proposed Rule 14-b
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> If a party requests cost shifting in connection with a discovery dispute, the party's motion or response should state the basis for the request and include a good-faith estimate of the amount of costs to be shifted, including an explanation of how that estimate was determined.

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[6] North Carolina Business Court R. 10.9(d), https://www.elliswinters.com/wp-content/uploads/2019/07/Business-Court-Rules-Codified-1-July-2019.pdf.

[7] *Playing by the (New) Rules in the North Carolina Business Court: Part 3*, Lord & Lindley (Apr. 5, 2017), https://lordlindley.com/2017/04/05/playing-by-the-new-rules-in-the-north-carolina-business-court-part-3/.

Rationale

The costs shifted to the requesting party pursuant to an order on a discovery motion can be significant.[8] Accordingly, there is merit to a rule that requires a party to provide advance notice of the magnitude of the expenses that it could be held responsible for if a court were to impose cost-shifting. Additionally, the requirement that a party requesting cost-shifting provide the basis for such a request and a statement of how the amount was determined provides transparency and allows the court and the parties to assess the reasonableness of the request from the outset.

Specialized business courts have increasingly attempted to reduce discovery-motion churn by forcing parties to surface proportionality and cost considerations early. For example, commentary on Texas Business Court practice highlights that its discovery-motion prerequisites require conferral certifications identifying not only dates and results, but also whether the parties discussed cost-shifting and proportionality as mechanisms to narrow or resolve the dispute.[9] A Commercial Division rule that requires an up-front estimate and methodology similarly encourages early, concrete discussion of the cost consequences of disputed discovery—before the parties (and the Court) incur avoidable motion practice and compliance costs.

At the same time, business-court rules caution against normalizing cost-shifting. Georgia's Business Court rule expressly states that cost-shifting "should not be a common practice," reaffirming the default assumption that the responding party ordinarily bears its discovery costs.[10] A Commercial Division rule focused on notice and transparency (rather than mandating outcomes) would reinforce that cost-shifting remains discretionary and exceptional, while ensuring that, when requested, it is presented with sufficient specificity to permit meaningful evaluation.

In practice, the party seeking cost shifting may only have a rough estimate of its discovery costs associated with a disputed request as of the time of the parties' briefing on the dispute.[11] For this reason, any rule requiring a party to set forth the amount of costs to be shifted should not be

binding on the requesting party, but rather should require the requesting party to provide a good-faith estimate of its anticipated costs, with the understanding that the total amount may change. This "good-faith estimate" approach tracks the business-court models, which require that estimates be supported by a reasoned factual basis while recognizing that discovery-cost quantification often involves projections that can be refined as collection and review proceeds.

Conclusion

The proposed new Rule would limit unfair surprise in discovery disputes and potentially encourage the parties to reach reasonable resolutions without forcing either party to incur significant discovery costs for information that is of minimal additive value by giving the requesting party a sense of the financial implications of compliance at the outset of the dispute.

Further, by prompting parties to articulate cost and proportionality positions concretely—and early—the proposed new Rule aligns with the approach of specialized business courts that seek to manage discovery disputes through structured pre-filing processes and explicit consideration of cost-shifting as a narrowing tool. In addition, the proposed Rule will demonstrate to the business community the Commercial Division's strong commitment to cost-effectiveness, signaling that it is an efficient venue for resolving disputes that may involve significant volumes of discoverable material.

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[8] *See, e.g., Lawson v. Spirit Aerosystems, Inc.*, No. 18-1100-EFM, 2021 WL 4844058 (D. Kan. Oct. 18, 2021) (requiring requesting party to pay over $1 million in discovery expenses and associated legal fees).

[9] Price, *supra* note 2.

[10] Georgia Business Court R. 7-5(d), https://www.georgiabusinesscourt.com/wp-content/uploads/2021/06/2021.08.01-Georgia-State-wide-Business-Court-Rules_as-issued.pdf.

[11] *See, e.g., Lawson v. Spirit Aerosystems, Inc.*, No. 18-1100-EFM-ADM, 2020 WL 3288058, at *22 (D. Kan. June 18, 2020) (explaining that the court could not "at this time determine a specific dollar amount to allocate to Lawson because Spirit only had projected expenses available when the parties briefed the instant motion [regarding cost-shifting]").