

April 6, 2022

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Chief Justice Ziegler and Justices of the Wisconsin Supreme Court  
c/o Clerk of Supreme Court  
Attention: Deputy Clerk-Rules  
P.O. Box 1688  
Madison, WI 53701-1688  
(Sent electronically to [clerk@wicourts.gov](mailto:clerk@wicourts.gov), and hand delivered, 4/6/22)

Re: Rule Petition 16-05D – Business Court Pilot Project

Dear Honorable Chief Justice Ziegler and Honorable Justices of the Wisconsin Supreme Court:

Thank you for the opportunity to comment on the petition to extend the business court pilot project. I respectfully suggest that this project was ill-conceived and should not continue.

By way of background, I have been a member of the Wisconsin Bar since 1978. After a clerkship with this court (Justice William Callow), I practiced as a civil trial lawyer in Madison for 28 years, and then served as a circuit court judge for Dane County for ten years before retiring in 2017. Since then I have mediated and arbitrated civil disputes, including commercial cases. My work as a trial lawyer was mostly insurance defense, and over time, I concentrated on medical malpractice defense. I did handle some commercial cases. On the bench, I spent about half my time in the civil rotation, including commercial cases.

I was honored to be invited to fellowship in the American College of Trial Lawyers and to membership in the Wisconsin Chapter of the American Board of Trial Advocates (ABOTA). I was named ABOTA's Wisconsin trial judge of the year in 2016.

I respectfully offer three points:

First, this business court is entirely unnecessary. Sound, conservative principles of judicial administration counsel that we should continue established traditions that work, supplanting them only if they no longer serve their purpose. Since statehood we have had elected judges, chosen by the people in the court's jurisdiction to hear and decide their disputes. While procedures for assignment of cases may vary depending on the number of judges in a county, the general idea of random assignment of cases to judges within a division preserves the perception of fairness. Any change that does away with this and instead allows certain persons to assign certain judges to certain types of cases, should only be made for compelling reason. Here there is none.

Business cases are no different than other cases. Of course, the judge must learn the substantive law that applies to any case. It is the responsibility of the trial judge to do the homework, and it is the responsibility of the trial lawyer to help the judge understand the governing legal principles. The principles of law in business cases are no more difficult than those in products liability cases, medical malpractice cases, administrative law cases, or most any other area of the law. Likewise, while the nature of the facts will vary, of course, from case to case, there is nothing inherently more complicated about business disputes compared with other cases, which may involve engineering, medicine, and other specialized knowledge. We have always counted on judges and lawyers to do their jobs and learn the material, and that is true regardless of the type of case.

When I was trying medical malpractice cases, we often had cases before judges who had not handled a malpractice case before. Some of those judges were among the finest judges I appeared before. They were prepared. They read the law. When they didn't know something they asked the lawyers, and if we knew, we helped. These judges understood the facts. They knew how to hold the lawyers and parties to a schedule and how to run a trial. I am confident these judges would do just as fine a job with a commercial case.

Likewise, the procedures for handling business cases are no more demanding than those for other cases. Proponents of the business court project have suggested that a business court might handle a business case more efficiently. Not so. I'm sure the business court judges do a fine job, but that's not because they are business court judges, it's because they are good judges, period.

For example, as a trial judge, I had several cases where one party appeared, usually late in the day, and often it seems on a Friday, seeking a TRO in a commercial dispute. We took care of those requests promptly, usually reaching an interim solution with input from the other party whenever possible, and then scheduling a hearing the following week. If I had to move other things on the calendar, so be it. That's just the kind of commonsense calendar management that judges and their staff do all the time.

Why create a new set of rules and procedures, and handpick certain judges to handle business cases, when we don't do that for other cases? Why deprive litigants of their right to have their cases decided by those judges who are elected by them and by their fellow citizens and assigned more or less randomly to hear their cases?

I began by invoking the bedrock principle of sound, conservative judicial administration; put a little differently it comes down to the old maxim, "Don't fix what ain't broke." Our system ain't broke, and we should leave well enough alone.

My second point addresses an attitude some may have that there's no harm in continuing to give this project a try. Why not extend it another two years? I suggest there are at least three reasons to stop it now:

- There was never a good reason to undertake this in the first place, and the fact that it now exists, doesn't change that. This project has reached the end of its original pilot period, and therefore is on schedule to expire now, unless approved to continue. It should be allowed to expire. The petition does not supply a compelling reason to continue an unnecessary project.
- When the judiciary expends time and resources, there are opportunity costs. Why not spend the time and resources – including the considerable expertise of those serving on this committee -- on something more promising? For example, if business lawyers think judges are not well enough trained in the substantive law or principles of case management, why not work within our exemplary judicial education framework to create programs to be offered at the annual judicial conference, the civil law seminar, or even perhaps the judicial college?
- Most important, with this project the Wisconsin judiciary has squandered its most precious asset – its credibility as a beacon for equal justice for all. How does the public not look at this without believing that the court is putting its thumb on the scales of justice in favor of business? Why don't injured parties and those that have been denied their civil rights get the same treatment? The way in which this project came about -- without transparency, without diversity of input, without public hearing, without public comment, without public notice that it was scheduled for a vote -- surely contributes to the stain it leaves on the judiciary. Other unfortunate aspects, such as the judicial training provided at the Antonin Scalia School of Law, do little to dispel the perception that this is an ideologically-driven device to give business interests more favorable treatment by the judiciary than the rest of the people get. These were deeply unfortunate, unforced errors, to be sure, but the entire project seems an unforced error, and it's time to correct that.

Rather than ask, why not let this project continue, I respectfully suggest a better question would be, why not let it expire?

My final point is that the court should not be misled by the facile and disingenuous comparison to treatment courts, which, unlike the business court, serve a real need and are rigorously evidence-based. I worked in treatment courts for a combined total of ten years, and was honored to receive the 2017 Aulik Award for leadership in treatment courts in Wisconsin. Treatment courts are not for adjudicating disputes. Rather, once a drug or alcohol addicted criminal offender has acknowledged responsibility, treatment courts provide a closely supervised program of treatment and accountability in lieu of jail or prison. The model works in significant part because of the relationship established between the offender and the judge. Treatment courts were developed to solve the problem (in fact, they are sometimes called problem-solving courts) that locking people up does not address the addiction that is associated with their criminal behavior. In contrast, the business court project remains a solution in search of a problem.

Thank you for the opportunity of presenting my views on the petition to extend this pilot program. I do hope the court will conclude that this misbegotten project has run its course and should be allowed to expire.

Respectfully submitted,

John Markson

cc: Attorney Laura A. Brenner, Chair, Business Court Advisory Committee  
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