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9.23.24

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SEP 23 2024

SENT BY MAIL

CLERK OF SUPREME COURT  
OF WISCONSIN

Chief Justice Ziegler and  
Justices of the Wisconsin Supreme Court Clerk of Supreme Court  
c/o Clerk of Supreme Court  
Attention: Deputy Clerk-Rules  
P.O. Box 1688  
Madison, WI 53701-1688

Re: Rule Petition 16-05E, In re Creation of a Pilot Project for Dedicated Trial Court  
Judicial Dockets for Large Claim Business and Commercial Cases

Dear Justices:

Pursuant to the letter dated June 20, 2024 from the Supreme Court of Wisconsin Office of Court Commissioners, the Petitioner Business Court Advisory Committee (the "Committee") provides the following Response to the comments received in connection with Petition 16-05E to extend the Pilot Program for Dedicated Trial Court Judicial Dockets for Large Claim Business and Commercial Cases.

Overview of Business Court Pilot Program History

After publishing the petition, soliciting written comments, and a public hearing, this Court approved the Business Court Advisory Committee's rule petition asking the court to create the business court pilot project and the Business Court pilot project commenced effective July 1, 2017, and was initially authorized for a period of three years with a review scheduled in July 2020. S. Ct. Order 16-05, 2017 WI 33 (issued Apr. 11, 2017, eff. July 1, 2017) (approving pilot project following receipt of public comment and public hearing). The pilot project and its review expanded to additional circuit courts and extended for an additional two years. S. Ct. Order 16-05A (issued February 12, 2020).

The pilot project was thereafter expanded to additional circuit courts and extended for an additional two years, until July 2022, and the interim rules were amended. *See* S. Ct. Order 16-05A (Feb. 12, 2020) (extending and expanding pilot

project to the Second and Tenth Judicial Administrative Districts following the Committee's filing of Rule Petition 16-05A); S. Ct. Order 16-05B (Feb. 20, 2020) (extending pilot project to Third Judicial Administrative District); and S. Ct. Order 16-05C (Mar. 13, 2020) (adding Dane County and Iron County to the pilot project).<sup>1</sup>

On February 11, 2022, the Petitioner Business Court Advisory Committee filed its written petition asking the court to extend the pilot project and the Supreme Court's review for an additional two years – from 2022 to 2024. In addition to requesting an extension, the Committee also asked the Court to revise the Interim Rule to reflect that the Chief Justice seeks local input from chief judges of the Judicial Administrative District before making an appointment under this rule.

On June 29, 2022, after soliciting and receiving additional public comments, this court further extended the duration of the pilot project until July 30, 2024, further amended the interim rules and directed that “on or before July 1, 2023, the Committee shall either file a formal rule petition asking the court to amend the rules to adopt a permanent business court or shall advise the court in writing that it recommends the court permit the pilot project to expire.” The Committee did not file a rule petition asking the court to amend the rules to adopt a permanent business court or to extend the pilot project by the July 1, 2023 deadline set by S. Ct. Order 16-05D. On May 30, 2024, the Committee filed Rule Petition 16-05E, seeking an amendment to the interim rules governing the pilot project to extend the pilot project until July 1, 2026.

On June 19, 2024, the Court temporarily extended the pilot project pending this the Court's disposition of Rule Petition 16-05E.

By letter dated June 20, 2024, Supreme Court Commissioner Tim Barber notified a list of potential “interested persons,” including all Wisconsin circuit court and court of appeals judges, various individual judges and judicial associations, legal practitioners, court administrators, legal regulatory agencies, State Bar Associations, Marquette and University of Wisconsin law schools, Public Defender offices, legal aid organizations, and commercial business organizations.<sup>2</sup> (See Ex. 1, Commissioner Rich's 6/20/24 Ltr.

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<sup>1</sup> See generally Petition Archive for copies of all filings, comments and orders.  
<https://www.wicourts.gov/scrules/pending/1605.htm>

<sup>2</sup> Prior to approving the initial Pilot Project, Commissioner Rich sent a similar letter dated December 19, 2016 notifying essentially the same list of “interested persons” of the initial rule petition and seeking comment. (See Ex. 2, Commissioner Rich's 12/19/2016 Ltr. for complete list of interested persons.) The Court received only three comments in response to the 2016 letter - from the Wisconsin Banker's Association, Chair of the Business Law Section of the State Bar of Wisconsin (both in support of the pilot program), and Wisconsin Court of Appeals Judge Lisa K. Stark (raising several concerns about the lack of evidence supporting the need for the program and suggestions about how to better implement the program.) Commissioner Rich sent another interested persons letter on 3/11/2022 when the Pilot Project was again up for



for complete list of interested persons.)

[https://www.wicourts.gov/supreme/docs/1605e\\_intpers.pdf](https://www.wicourts.gov/supreme/docs/1605e_intpers.pdf)

In response to Supreme Court Commissioner Tim Barber's June 20, 2024 "interested persons" letter, the Court received 8 letter comments from the following interested parties: (1) Wisconsin Court of Appeals District 4 Judge, JoAnne F. Kloppenburg; (2) Wisconsin Court of Appeals District 4 Judge Brian W. Blanchard; (3) (ret.) Dane County Circuit Court Judge John Markson and (ret.) Dane County Circuit Court Judge Richard G. Niess; (4) Dane County Circuit Court Judge Rhonda Lanford and Dane County Circuit Court Judge Stephen Ehlke; (5) Wisconsin Court of Appeals District 3 Judge Lisa K. Stark (all opposed to the petition); and (6) Attorney Paul G. Swanson (along with 60 other attorney signatories from 24 law firms throughout the state); (7) Wisconsin Manufacturer's & Commerce ("representing 3,800 member companies of all sizes from every sector of the economy"); and (8) Wisconsin Institute for Law & Liberty, Inc. (all in favor of granting the petition and in support of the Business Courts).

The Business Court Advisory Committee members thank the Court for the opportunity to work towards implementing and continuing to improve this Business Court Pilot Project, have reviewed the comments and provide the following response to those comments.

#### Response to Comments

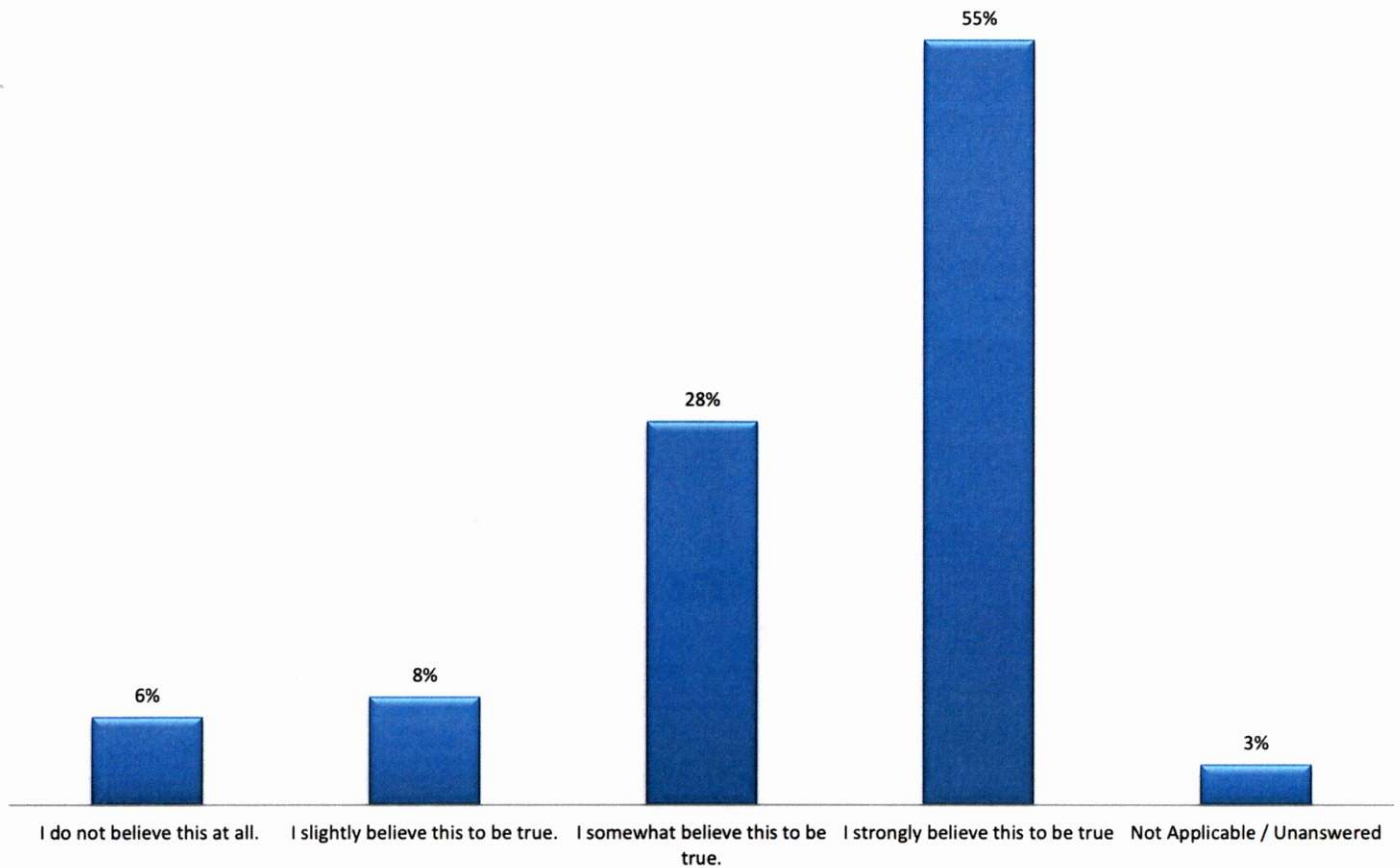
The Committee notes and joins in the comments from Attorney Paul G. Swanson (and all of the attorneys who joined in that letter), Wisconsin Manufacturer's & Commerce and Wisconsin Institute for Law & Liberty, Inc. in their support for continuing the Business Court Pilot Project.

Notably, none of the comments opposing the petition to continue the pilot project are from attorneys or litigants who have actually practiced in one of the business court cases; and the attorneys surveyed who have participated in business court cases have expressed varying degrees of support for the business court with over 90% expressing degrees of support for making the commercial docket a permanent component of the Wisconsin Court System.

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extension. (See Ex. 3, Commissioner Rich's 3/11/2022 Ltr.) In response to the 3/11/2022 letter, the Court received eight (8) comments from: (ret.) Dane County Circuit Court Judge John Markson, (ret.) Dane County Circuit Court Judge Richard G. Niess, Wisconsin Court of Appeals Judge Lisa K. Stark, Attorney and Stoughton Municipal Judge Matthew Roethe, and Will Stites (all opposed to the petition), and Attorneys Lon E. Roberts, Matthew D. Rowe, Paul G. Swanson (along with 47 other attorney signatories) (all in favor of granting the petition and in support of the Business Courts).

**Q9. I believe the commercial court docket should become a permanent component of the Wisconsin Court System.**



(See generally Exs. 5 and 7 summarizing survey data collected by the Commercial Court Pilot Project.)

We will address the comments opposing the pilot project by topic, as those commenting in opposition echoed one another and raised duplicative points in several respects.

Comment that there is a Lack of Data or Evidence to Support the Necessity of the Business Court Pilot Project

Five commenters, Judges Stark, Niess, Markson, Lanford and Ehlke raised in some form or another concerns and criticisms that there is generally no proven need for a Business Court. See e.g. ret. J. Neiss (“the ‘pilot project’ has continued with no evidentiary basis supporting its existence, and zero evaluative criteria to assess its work, all culminating in no demonstrable improvement to the handling of commercial cases in



our courts.”); J. Langford and J. Ehlke (“We write simply to express our view that the commercial court seems to be a ‘solution in search of a problem’.”) In sum, , they specifically assert that there was insufficient data/evidence to support the need to create the Business Court Pilot Project and/or argue that there now is insufficient data/evidence to show that the Pilot Project has operated successfully.

First, saying that the commercial court pilot project is a solution in search of a problem wrongly implies that innovation must be premised on proof that the current system is “broken.” There is nothing inherently wrong with wanting to seek improvement. In fact, that is the case here. The Business Court Pilot Project is not premised on proving the existing system was difunctionally “broken,” but on the idea (guided by looking at the many other states who had successfully implemented similar business courts) that there could be a way to make our court system function better.

This program is certainly not unique to Wisconsin. “As of January 1, 2020, twenty-five states around the country have some type of specialized business court or commercial docket as a feature of their judicial systems. Some are limited to specific locales within a state, others operate state- wide.” (See Ex. 9, “Through the Decades: The Development of Business Courts in the United States of America,” Lee Applebaum, Mitchell Bach, Eric Milby, and Richard L. Renck, *The Business Lawyer*; Vol. 75, Summer 2020; (See also Ex. 8, National Center for State Courts and the State Justice Institute in their “Business and Commercial Litigation Courts: Course Curriculum (2020),” <https://nsc.contentdm.oclc.org/digital/collection/traffic/id/91> (noting that as of 2019 business courts operating in 25 states and discussing generally the benefits of business courts) Why should it be seen as nefarious for Wisconsin to want to innovate and implement a commercial court similar to those that appear to be successfully working in so many other states?

As one law review author notes in support of Indiana’s business court, one of the key benefits of a commercial court docket is efficiency:

Most participating states agree that the leading benefit a business court provides is the potential efficiency with which it resolves complex disputes. A 2012 study that evaluated total case time measured in days and case complexity measured in docket entries, highlighted the efficiency for which business courts are known. The study found that business courts handled complex contract claims an average of 1138 days faster than regular civil courts. The same study showed business courts handled complex tort-based claims an average of 718 days faster than civil courts.

(See Ex. 10 “Business Courts: Their Advantages, Implementation Strategies, And Indiana's Pursuit Of Its Own,” T. Moorhead, 50 *Ind. L. Rev.* 397 at pp. 2-3) (internal citations omitted).

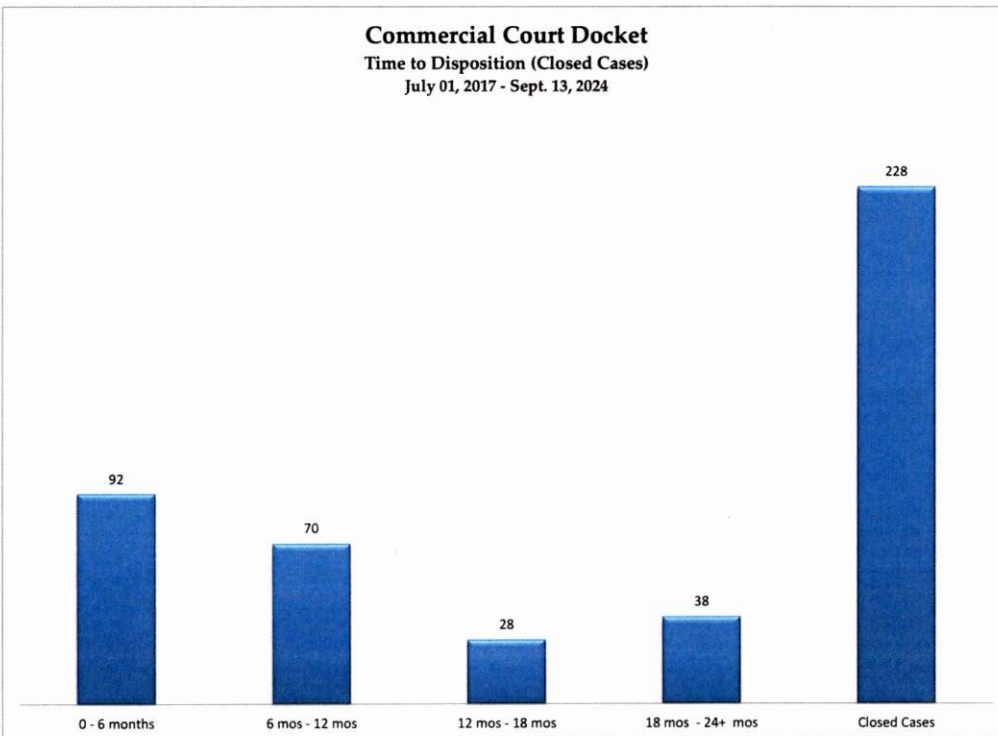
The available data also reflects that the majority of Wisconsin’s commercial docket cases have reached disposition in 12 month or less.<sup>3</sup>

With respect to the general contention that there is no data to support the need for the business court here in Wisconsin, not only are the commenters ignoring the data from other states, but they are also discounting the survey results from the pilot project case participants. For example, Judge Stark mistakenly states that “[a]pparently, no additional data has been kept regarding the efficacy and efficiency of the CCDs [Commercial Court Dockets] since 2022.”

In fact, there is data supplementing the data previously referenced as Exhibits A and B to the February 11, 2022 Rule Petition. As summarized below (*see also* Exs. 4-7), the responses by participants in the Pilot Program to survey questions reflect that the vast majority of participants— ranging from 80-90% and above —believe that the Business Court docket outperformed the general civil court docket on nine different metrics per the following results:

For each question, commercial court/survey participants were asked whether “I believe the commercial court docket demonstrated this feature more effectively than the traditional circuit court docket.”

<sup>3</sup> See Ex. 6, time to disposition.





Q1. Providing a judge with experience in managing complex business litigation cases.

Responses:

I slightly believe this to be true: 7%

I somewhat believe this to be true: 28%

I strongly believe this to be true: 55%

Subtotal: 90%

Q2. Developing a detailed case management timeline with the court.

Responses:

I slightly believe this to be true: 7%

I somewhat believe this to be true: 28%

I strongly believe this to be true: 51%

Subtotal: 86%

Q3. Effectively managing discovery-related issues.

Responses:

I slightly believe this to be true: 9%

I somewhat believe this to be true: 27%

I strongly believe this to be true: 51%

Subtotal: 87%

Q4. Limiting the number of continuances.

Responses:

I slightly believe this to be true: 8%

I somewhat believe this to be true: 29%

I strongly believe this to be true: 51%

Subtotal: 88%

Q5. Judge employing an effective strategy for settling the case.

Responses:

I slightly believe this to be true: 7%

I somewhat believe this to be true: 30%

I strongly believe this to be true: 52%

Subtotal: 89%

Q6. Judge effectively managing trial.

Responses:

I slightly believe this to be true: 4%  
I somewhat believe this to be true: 15%  
I strongly believe this to be true: 17%  
Not applicable: 56%  
Subtotal: 56% not applicable\* (majority of cases did not go to trial); of remaining 44% responses 36% agreed true

Q7. Reducing delays in bringing the case to trial or settlement.

Responses:  
I slightly believe this to be true: 7%  
I somewhat believe this to be true: 29%  
I strongly believe this to be true: 51%  
Subtotal: 87%

Q8. Achieving a resolution of the case at a lower overall cost (work time and expenses).

Responses:  
I slightly believe this to be true: 9%  
I somewhat believe this to be true: 30%  
I strongly believe this to be true: 42%  
Subtotal: 81%

Q9. I believe the commercial court docket should become a permanent component of the Wisconsin Court System.

Responses:  
I slightly believe this to be true: 8%  
I somewhat believe this to be true: 28%  
I strongly believe this to be true: 55%  
Subtotal: 91%

(See Exs. 5, 7 question survey results.)

It is not clear that any amount of data would be sufficient for those who appear philosophically predisposed against the pilot program. That said, the available data gathered to date strongly refutes the critiques and demonstrates that the vast majority of those who have participated in the pilot program believe it has achieved its objectives of handling cases more effectively than the traditional circuit court docket and believe the commercial court docket should become a permanent component of the Wisconsin Court System.



Comment that the Business Court Pilot Program Creates a Negative Public Impression of the Courts and the Judicial System and Compromises the Public's Confidence in Both

A critique among some of the commentators is that the Business Court Pilot Project improperly elevates business disputes to the exclusion of other litigants.

For example, Judge Kloppenburg states: “Among the most prominent comments that resonate with me are the following. First, our judiciary is premised on, strengthened by, and gains its respect in the eyes of the bar and the public from the demonstrated ability of our judges, from the circuit courts to the supreme court, to handle with understanding, common sense, and skill the many different kinds of disputes that parties bring to be resolved. The preferential treatment of business and commercial disputes compromises that respect.

Ret. Judge Neiss offers the inflammatory claim that the pilot project “a Trojan Horse offering from special business interests and their allies that should alarm anyone concerned about judicial independence and access to justice in Wisconsin courts . . . a court so at odds with our judicial system’s fundamental integrity is unworthy of the public’s trust.”

However, despite repeat calls for data, the commentators offer none to support this point. There is not a single comment or anecdotal example of how the existence of the business courts in various jurisdictions impaired fair access to other litigants. Nor is there even one example of any litigant in Wisconsin who claims to have been denied access to justice because of the existence of the commercial court.

Again, the commentators say they are concerned about the public’s perception of the judicial system being compromised – but they appear to be taking the lead in feeding the public with misperceptions and alarmist claims about the program.

Comment that the Commercial Court Docket Pilot Program was Created in “Secret” or Without Public Comment

On that note, Ret. Judge Neiss repeats the debunked claim that this commercial court was created in secret or as part of some shadow court. This claim was the subject of an op-ed piece authored by Judge Niess and circulated to various publications throughout the state. (Richard Niess, *Shadowy Business Courts Corrupt Justice*

*System, Urban Milwaukee*, March 31, 2022).<sup>4</sup> Specifically and contrary to what Judge Niess (and others) have claimed the Advisory Committee offers the following responses to those misperceptions.

As discussed above in the introductory remarks of this letter, the Business Court Pilot Project was created pursuant to a public process. A hearing was held to discuss the Petition at an open rules conference on November 7, 2016, after which the Court voted to approve the Pilot Program by a vote of 5 to 2. The Court also voted to solicit written comments and to conduct a public hearing to obtain additional input regarding the Pilot Project. The Court solicited comments from organizations around the state. *See* Letter from Julie Anne Rich, Supreme Court Commissioner, to Interested Persons (Dec. 19, 2016), <https://www.wicourts.gov/supreme/docs/1605intrpersoc.pdf>.

The Supreme Court conducted a hearing on February 16, 2017 and heard testimony from members of the Committee and others. The Court then discussed the Petition at a following open rules conference (open to the public via WisconsinEye). A majority of the Court voted to approve the interim commercial court rule, subject to certain amendments, and to authorize the Committee to create some guidelines for the Pilot Project, which would be made available on the Wisconsin court system website. All of this information is still available on that website today.<sup>5</sup>

There was nothing secret about the creation of the Pilot Program or of the Pilot Program's operation. The Wisconsin court system website contains information about the program, helpful forms for use with the program, and published decisions of judges

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<sup>4</sup> The editorials contained some of the same salacious, patently incorrect comments repeated in response to the petition as discussed below, like the following:

*Here is how it works: the Chief Justice, currently **Annette Ziegler**, receives recommendations from big business and selects a limited number of business court judges . . . .*

(*See* Richard Niess, *Shadowy Business Courts Corrupt Justice System*, Urban Milwaukee, March 31, 2022, previously submitted as Ex. 4 to the Committee's April 18, 2022 Response Ltr.) Judge Niess further referred to the Wisconsin Supreme Court as having a "penchant for secrecy" and that it didn't allow for any public hearing, opportunity to comment or public notice for this program. Not surprisingly, many citizens sent the Committee expressing concern about a "secret court" set up in a non-public manner to favor only "big business."

<sup>5</sup> Notably, Judge Niess devotes an extensive amount of his comment to rehashing and critiquing the information discussed as part of the public hearing in 2017. This is interesting, considering one of his main tenants of criticism is that the Business Court Pilot Project was created "in secret" and "without public comment." It appears that Judge Niess now concedes that these statements about the creation of the Court were not accurate.



with commercial court judges. The website lists a contact person to handle questions, too. See [www.wicourts.gov/services/attorney/comcourtpilot.htm](http://www.wicourts.gov/services/attorney/comcourtpilot.htm)

As part of the Pilot Program, more case codes were created to help collect data about the Program. And as part of the Program, judges are encouraged to issue written decisions which are maintained on this website with the hope that it will inform others. Many decisions from these Business Courts have already been posted for review. And as part of the program, all participating litigants are offered the opportunity at the conclusion of their cases to provide feedback about the program and whether they thought it was helpful.

Moreover, throughout the last several years, many articles have been published about the Pilot Program as well. See Lon Roberts, *The commercial court docket pilot program: Wisconsin's 'business court'*, Wis. L.J. (Mar. 2, 2021), <https://wislawjournal.com/2021/03/02/the-commercial-docket-pilot-program-wisconsins-business-court/>; Joe Forward, *Business Dispute? It Should Go to the Business Court Docket*, InsideTrack (Sept. 15, 2021), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=13&Issue=18&ArticleID=28617>; Joseph S. Goode, Mark M. Leitner, Klay A. Baynar, *Using Business Courts to Enhance Commercial Law in Wisconsin*, (Mar. 2020), <https://llgmke.com/using-business-courts-to-enhance-commercial-law-in-wisconsin/>; Joe Forward, *Commercial Litigation: Business Court Pilot Project Still Open for Business*, InsideTrack (Dec. 4, 2019), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=11&Issue=21&ArticleID=27333>; Michael J. Aprahamian, *The Need for Speed: Commercial Court now Open for Business*, Wis. Law. (Jan. 1, 2018), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=91&Issue=1&ArticleID=26094>

Comment that the Committee was Stacked with Pro Business Interests or that the Selection of the Judges to Commercial Court Docket Favor Big Business

In his September 9, 2024 letter comment, without reference or support, Ret. Judge Niess portrayed the Committee as being somehow controlled by unnamed outside “business interests”:

The “pilot project” was spawned in 2016 when special business interests on the Business Court Advisory Committee prevailed upon then-Chief Justice Roggensack to hand-select an exclusive, small, and limited number of judges to hear all cases in the “pilot project” commercial docket. The Chief Justice then collaborated with these business interests regarding which judges to choose. The same business interests, also working through the Committee, crafted the procedural protocols controlling the commercial litigation in the business court.



They subsequently facilitated out-of-state training bankrolled by big business entities such as the Koch brothers, rather than, more appropriately, by the Wisconsin Judicial College created and funded by this court.

That is simply not correct on multiple fronts. The Committee includes Wisconsin judges and attorneys with decades of experience in commercial cases. Beyond that, they have diverse backgrounds of practices and clients. They do not solely represent or favor “big business.” For example, member Attorney Paul Swanson, a litigator for decades, represents primarily small commercial businesses in receivership and other commercial cases. Attorneys Brenner and Gierke similarly represent big and small businesses and individuals in their practices, but Attorney Gierke also practices in product liability cases and represents individuals in both commercial and employment matters which would fall outside of the business court purview. The allegation that the Committee themselves worked with “business interests” to craft the procedural protocols controlling commercial litigation is perplexing. The Committee members worked among themselves and in coordination with Court system to develop procedural protocols based on their experience litigating commercial matters in those courts. The one other thing they all have in common is that they have all worked on solely volunteer basis for years on this project to help improve the Program and ultimately to provide information about whether or not the Commercial Docket should be adopted, in whole or part, as something more permanent.

Ret. Judge Niess’ suggestion that judges are selected to participate in the Pilot Program based on collaborating with big business, is also not true. Judges are selected by the Chief Justice based upon their experience with commercial issues and their willingness to take on these responsibilities as extra duty assignments. The Chief Justice has had no involvement in the assignment of any judge to any particular case.

Judges who have commercial dockets as part of the program were portrayed in the Judge Niess editorials as being trained by an institution funded by the Koch brothers. In reality, judges who agree to take on commercial court dockets simply agree to educate themselves about typical commercial court cases and issues that arise in such cases. They can get training and information about commercial court cases and best practices in a number of ways and none of them is required or mandatory. One option is a national program offered by the American College of Business Courts. That group meet at annually, and the George Mason University Antonin Scalia Law School sponsors educational programs at that meeting. The focus is best practices to efficiently handle commercial court cases and the sharing of experiences from judges around the country who handle similar dockets – it is not a political endeavor. Judges may, but do not have to, attend that annual meeting. Judges may get information about commercial court issues and practices in many other ways, including CLE programs and seminars, judicial programs, publications (such as *The Business Courts Benchbook*, an American Bar Association publication), etc. There is no particular “required” training.



Comment that there was no Rationale Reason for the Project Itself and that Commercial Court Cases are Unlike Other Specialty Courts

The Petitioner respectfully disagrees with the principle that business cases are no different than other cases. First, to acknowledge that commercial business cases present unique and complex issues is not a value judgment against any other area of law. In fact, it hardly seems controversial to recognize the law is not a one size fits all practice. Court of Appeals Judge Blanchard conceded as much stating: “[s]ome business disputes can certainly be complex. But so can divorces. And landlord tenant disputes. The list goes on.” That is really the point the Committee has been making, in pointing out that many other specialty courts have been created in various types of cases out of a recognition that specializing allows judges to hone their knowledge and expertise and create efficiencies for the litigants. It’s not unlike how lawyers regularly specialize their practices because doing so allows them to become well versed in a particular area and by doing so better, more efficient advocates. It is not to say that a lawyer who has practiced commercial litigation for 25 years would not be intellectually capable of handling a family law matter, but it certainly would seem likely that it would be more difficult for them to handle a family law case than a lawyer who had practiced family law for a similar lengthy career. Both are experienced in litigation. Yet each area involves unique questions of law, procedure and factual issues. It stands to reason that the same could be said of the Courts adjudicating these areas of law. Again, it should not be controversial to suggest this given that there is a long track record in Wisconsin for creating specialized dockets not only separating civil and criminal courts but also further specializing dockets within the civil courts –*i.e.* family law courts, probate courts, small claims courts *etc.*

Judge Niess again makes the slippery slope argument of “how many docket-specific courts should we create?” This Court does not need to answer that question to determine the question at hand which is whether continuing this single specialized court is a good idea.

Again, the business court is like many other specialty courts which have been created in Wisconsin and across the country where judges obtain specialized knowledge and training so that they can handle the unique problems of their particular dockets. Family law, drug courts, domestic violence courts, veterans courts, felony courts are all notable examples of these kind of dockets that have been implemented and successfully operated in Wisconsin for many years. This does not disparage in any way the ability of judges to hear complicated matters. All of these courts recognize that justice is served when judges can have the necessary knowledge, experience and specialized training to decide the particular cases before them.

Not unlike similar previous innovations within our Courts that improved the delivery of justice in Wisconsin by creating focused and specialized dockets, such as the Small Claims Court, Drug Courts, Family Law Courts and Veterans Courts, the

Commercial Court docket has streamlined the resolution of generally complex commercial litigation. The judges assigned to the Commercial Court Pilot Project have volunteered for this duty and have been selected based on experience and a willingness to tackle this area of law directly. They have performed well. So far, litigants of all sizes and types have indicated that they were well served by the program. That is the point of the Program – to determine whether another specialty docket is warranted.

### Conclusion

The Pilot Program began in April 2017 with only with only two commercial court dockets in District 8 and Waukesha County and has gradually been expanded to include several other districts and counties. For that reason alone, it would be helpful to have more time to gather information and feedback about the program.

But, from the feedback and comments of those who have already participated in the Business Court Pilot Project, there is a clear consensus that it has aided in the efficient and effective delivery of justice to the litigants, a benefit that does not come at the expense of other participants in our Judicial system, but rather fosters confidence that issues will be decided or resolved within a reasonable time. It should be continued.

A great deal of time and effort has been invested in the Business Court Pilot Program. Numerous judges have invested their time and effort. The members of the Advisory Committee have voluntarily provided their time and effort as well. Litigants have taken the time to provide feedback as well. So far, the results and feedback show a lot of promise for this Program and the improvements for our system. It would be a terrible waste of these investments to end the program now.

For all of these reasons, we ask that the Petition to amend the program and extend it for an additional two years be granted.

Respectfully On Behalf of Petitioner Business Advisory Committee,



Nora E. Gierke, Business Advisory Committee Member

cc Clerk of the Supreme Court (by email: [clerk@wicourts.gov](mailto:clerk@wicourts.gov).) (word copy)





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SEP 23 2024

**CLERK OF SUPREME COURT  
OF WISCONSIN**

# EXHIBIT 1





# Supreme Court of Wisconsin

OFFICE OF COURT COMMISSIONERS  
110 E. MAIN STREET, SUITE 440  
MADISON, WISCONSIN 53703

Nancy A. Kopp  
David W. Runke  
Mark A. Neuser  
Timothy Barber  
Commissioners

Telephone (608) 266-7442

June 20, 2024

***To: Interested Persons – See Attached List***

Re: Rule Petition 16-05E, In re Creation of a Pilot Project for Dedicated Trial Court Judicial Dockets for Large Claim Business and Commercial Cases

Greetings:

I am assisting the Wisconsin Supreme Court with its consideration of rule petition 16-05E, filed on May 30, 2024, by Attorney Laura A. Brenner, Chair of the Wisconsin Business Court Advisory Committee (Committee). This petition asks the court to extend the pilot project for dedicated trial court judicial dockets for large claim business and commercial cases for an additional two years, to July 31, 2026, and to modify the associated interim rules accordingly.

You have received this letter because you or your agency or organization potentially have an interest in this matter. A copy of the petition can be found on the court's website at <https://www.wicourts.gov/scrules/pending/1605.htm>.

At a closed conference on June 17, 2024, the court voted to obtain written comments and schedule a public hearing at a date to be determined for the fall of 2024. Please note, the court may take any action on a rule petition it deems appropriate, including any of the following:

- (a) Grant the petition and adopt the extension as proposed, or a modified version, without further comment;
- (b) Deny the petition and reject the request for an extension as proposed without further comment;
- (c) Refer the rule petition to another entity for its review and recommendation;
- (d) Schedule the petition for a public hearing; or
- (e) Request further information or analysis from the petitioner or interested persons or entities.

Any comment to the rule petition should be filed by September 9, 2024, with the Clerk of Supreme Court, Attention: Deputy Clerk-Rules, P.O. Box 1688, Madison, WI 53701-1688. If possible, email a Microsoft Word version of your response to [clerk@wicourts.gov](mailto:clerk@wicourts.gov). See comment guidelines

at the court's website at <https://www.wicourts.gov/scrules/process.htm>. The petitioner may file a response to the comments by September 23, 2024.

You might wish to consult the court's website at <https://www.wicourts.gov/scrules/pending/index.htm> to follow this rule petition. Court communications on the petition and any written comments filed with the clerk's office will be posted on the website.

If you have specific questions regarding this matter, please contact me by mail at P.O. Box 1688, Madison, WI 53701-1688, by telephone at 608-261-6642, or by email at [tim.barber@wicourts.gov](mailto:tim.barber@wicourts.gov).

Very truly yours,

/s/

Tim Barber

Supreme Court Commissioner

cc: Chief Justice Annette Kingsland Ziegler  
Justice Ann Walsh Bradley  
Justice Rebecca Grassl Bradley  
Justice Rebecca Frank Dallet  
Justice Brian Hagedorn  
Justice Jill J. Karofsky  
Justice Janet C. Protasiewicz  
Attorney Laura A. Brenner, Chair,  
Business Court Advisory Committee  
Krista Miller, Legal Advisor, Office of Court Operations



**List of Interested Persons for Supreme Court Rules**

Badger State Sheriffs' Association, Attention: Executive Director  
Board of Administrative Oversight, Attention: Denis Donohoe, Chair  
Board of Bar Examiners  
Chief Circuit Court Judges  
Circuit Court Judges  
Clerk of Supreme Court and Court of Appeals, Samuel A. Christensen  
Court of Appeals, Attention: Chief Staff Attorney  
Court of Appeals Judges  
Holly Szablewski, Deputy Director of State Courts, Office of Court Operations  
Court Operations: Ann Olson, Trent Koerner, Meg Sternitzky  
Department of Administration, State Prosecutors Office, Attention: Kasey Deiss, Director  
Director of State Courts, Honorable Audrey K. Skwierawski  
District Court Administrators  
Eastern District of Wisconsin Bar Association, Attention: Katy Borowski, Executive Director  
Hamilton Consulting Group, Attention: Rebecca Hogan, R.J. Pirlot, Adam Jordahl  
Legal Action of Wisconsin, Attention: Deedee Peterson, Executive Director  
Legal Aid Society of Milwaukee, Attention: Colleen Foley, Executive Director  
Marquette University Law School, Attention: Joseph D. Kearney, Dean  
Office of Lawyer Regulation, Attention: Timothy Samuelson, Director  
Office of State Public Defender, Attention: Katie York  
Office of State Public Defender, Attention: Adam Plotkin  
Office of the Attorney General, Attention: Josh L. Kaul  
Preliminary Review Committee, Attention: Barry Boline, Chair  
State Bar of Wisconsin, Attention: Larry Martin, Executive Director  
State Bar of Wisconsin, Attention: Lisa Roys, Advocacy & Access to Justice Director  
State Bar of Wisconsin, Attention: Dean Dietrich, President  
State Bar of Wisconsin, Attention: Margaret Hickey, Past-President  
State Bar of Wisconsin, Attention: Ryan M. Billings, President-Elect  
University of Wisconsin Law School, Attention: Daniel Tokaji, Dean; Myra Sun, Exec. Asst.  
Western District Bar Association of Wisconsin, Attention: Winn S. Collins  
Wisconsin Asian American Bar Association, Attention: Julius Kim, President  
Wisconsin Association for Justice, Attention: Bryan Roessler, Executive Director; Jim Rogers,  
Government Affairs Director  
Wisconsin Association of African American Lawyers  
Wisconsin Association of Criminal Defense Lawyers, Attention: Peter McKeever  
Wisconsin Association of Judicial Court Commissioners, Attention: Susan Schaubel  
Wisconsin Bankers Association, Attention: Kris Cleven, Vice President-Legal  
Wisconsin Clerks of Circuit Court Association, Attention: Regina Kolbow, Stacy Kleist  
Wisconsin Counties Association, Attention: Marcie Rainbolt  
Wisconsin Defense Counsel, Attention: Jenni Kilpatrick, Executive Director; Andrew Hebl,  
President  
Wisconsin District Attorneys Association, Attention: Greta Mattison, Executive Director  
Wisconsin Family Court Commissioners Association, Attention: David Pruhs, Deputy Family  
Court Commissioners; Lisa Krueger, Family Court Commissioner; Elizabeth Pfeuffer, Family  
Court Commissioner; Peggy Miller, Family Court Commissioner  
Wisconsin Hispanic Lawyers Association, Attention: Pamela M. Ritger  
Wisconsin Judicare, Inc., Attention: Beth Ann Richlen, Executive Director  
Wisconsin Judicial Commission, Attention: Jeremiah VanHecke  
Wisconsin Judicial Council, Attention: William C. Gleisner, III, Chair

Wisconsin Judicial Council, Appellate Procedure Committee: Hon. Thomas M. Hruz, Chair  
Wisconsin Justice Initiative, Inc., Attention: Margo Kirchner  
Wisconsin Juvenile Court Clerks Association, Attention: Lisa Milella  
Wisconsin Municipal Judges Association, Attention: Honorable Robert Kupfer  
Wisconsin Newspaper Association, Attention: Beth Bennett, Executive Director  
Wisconsin Registers in Probate Association  
Wisconsin Sheriffs & Deputy Sheriffs Association, Attention: Sandy Schueller  
Wisconsin State Attorneys Association, Attention: John Gelhard  
Wisconsin Trial Judges Association, Attention: Honorable Gregory Gill, Jr.  
Wisconsin Tribal Judges Association, Attention: Honorable Gwendolyn Topping, President

**List of Additional Interested Persons**

Metropolitan Milwaukee Association of Commerce, Attention: Timothy Sheehy  
Wisconsin Business Alliance  
Wisconsin Manufacturers & Commerce, Attention: Kurt Bauer; Scott Manley; Evan Umpir  
Attorney Richard G. Niess

# EXHIBIT 2





# Supreme Court of Wisconsin

OFFICE OF COURT COMMISSIONERS

110 E. MAIN STREET, SUITE 440

MADISON, WISCONSIN 53703

Nancy A. Kopp  
Julie A. Rich  
David W. Runke  
Mark A. Neuser  
Commissioners

Telephone (608) 266-7442

December 19, 2016

**To: Interested Persons – See Attached List**

Re: Rule Petition 16-05, In re creation of a pilot project for dedicated trial court judicial dockets for large claim business and commercial cases.

Greetings:

I am assisting the Wisconsin Supreme Court with its consideration of rule petition 16-05 filed October 26, 2016 by Attorney John Rothstein, on behalf of the Business Court Advisory Committee, appointed by Chief Justice Patience Drake Roggensack. The petition proposes a three-year pilot project to create dedicated trial court judicial dockets for large claim business and commercial cases in Waukesha County and in the Eighth Judicial District. A copy of this petition can be found on the court's website at <https://www.wicourts.gov/scrules/1605.htm>.

The court will conduct a public hearing and an open conference on Thursday, February 16, 2017, at 9:30 a.m. to discuss this matter further. Please note, the court may take any action on a rule petition it deems appropriate, including any of the following:

- (a) Adopt the rule proposed, or a modified version, without further comment.
- (b) Reject the rule proposed without further comment.
- (c) Refer the rule petition to another entity for its review and recommendation.
- (d) Request further information or analysis from the petitioner or interested persons or entities.

Any comment to the rule petition should be filed by January 23, 2017, with the Clerk of Supreme Court, Attention: Deputy Clerk-Rules, P.O. Box 1688, Madison, WI 53701-1688. If possible, email a Microsoft Word version of your response to [clerk@wicourts.gov](mailto:clerk@wicourts.gov). See comment guidelines at the court's website at <https://www.wicourts.gov/scrules/petitioncomment.htm>. The petitioner shall file any response to the comments by January 30, 2017.

If you are interested in appearing in person at the public hearing, please notify the Deputy Clerk for Rules by January 30, 2017, at [clerk@wicourts.gov](mailto:clerk@wicourts.gov) or 608-261-4302.

You might wish to consult the court's website at <https://www.wicourts.gov/scrules/supreme.htm> to follow this rule petition. Court communications on the petition and any written comments filed with the clerk's office will be posted on the website.

If you have specific questions or other comments regarding this matter, please contact me by mail at Post Office Box 1688, Madison, WI 53701-1688, by telephone at 608-261-6642, or by email at [julie.rich@wicourts.gov](mailto:julie.rich@wicourts.gov).

Very truly yours,

/s/

Julie Anne Rich

Supreme Court Commissioner

cc: Chief Justice Patience Drake Roggensack  
Justice Shirley S. Abrahamson  
Justice Ann Walsh Bradley  
Justice Annette Kingsland Ziegler  
Justice Michael J. Gableman  
Justice Rebecca Grassl Bradley  
Justice Daniel Kelly  
Attorney John Rothstein

**List of Interested Persons for Supreme Court Rules Matters**

Badger State Sheriffs Association, Attention: Executive Director  
Board of Bar Examiners  
Chief Circuit Court Judges  
Christian Gossett, Winnebago County District Attorney  
Circuit Court Judges  
Court of Appeals, Attention: Chief Staff Attorney  
Court of Appeals Judges  
Court Operations, Sara Ward-Cassady, Director  
Court Operations, Ann Olson  
Court Operations, Marcia Vandercook  
Dean Dietrich, Attorney (Wausau)  
Diane M. Fremgen, Clerk of Supreme Court  
Director of State Courts  
Eastern District of Wisconsin Bar Association, Attention: Katy Borowski, Executive Director  
League of Women Voters: Andrea Kaminski, Executive Director  
Legal Action of Wisconsin  
Legal Aid Society of Milwaukee, Attention: Kimberly Walker, Executive Director  
Marquette Law School, Attention: Joseph D. Kearney  
Office of Lawyer Regulation, Attention: Keith Sellen, Director  
Office of State Public Defender, Attention: Kelli S. Thompson  
Office of the Attorney General, Attention: Brad D. Schimmel  
Jeremy C. Perri, Attorney  
State Bar of Wisconsin, Attention: George Brown, Executive Director  
State Bar of Wisconsin, Attention: Lisa Roys, Public Affairs Director  
State Bar of Wisconsin, Attention: Francis Deisinger, President  
Steven Levine, Attorney  
U.W. Law School, Attention: Margaret Raymond  
Western District Bar Association of Wisconsin, Attention: Matthew Duchemin  
Wisconsin Asian Bar Association, Attention: Robin Dalton  
Wisconsin Association for Justice, Attention: Bryan Roessler, Executive Director  
Wisconsin Association of African American Lawyers, Attn: Steven DeVougas  
Wisconsin Association of Criminal Defense Lawyers, Attention: Peter McKeever  
Wisconsin Association of Judicial Court Commissioners, Attention: Susan Schaubel  
Wisconsin Bankers Association, Attention: Attorney John Knight  
Wisconsin Bankers Association, Attention: Rose Oswalk Poels, CEO  
Wisconsin Clerks of Circuit Court Association, Attention: Carlo Esqueda  
Wisconsin Counties Association, Attention: Marcia Rainboldt  
Wisconsin Defense Counsel, Attention: Jane Svinicki, Executive Director  
Wisconsin District Attorneys Association, Attention: Greta Mattison, Executive Director  
Wisconsin Family Court Commissioners Association, Attention: David Pruhs, Exec. Secretary  
Wisconsin Hispanic Lawyers Association, Attention: Cain W. Oulahan  
Wisconsin Judicare, Inc., Attention: Kimberly Haas, Executive Director  
Wisconsin Judicial Commission, Attention: Jeremiah VanHecke  
Wisconsin Judicial Council, Attention: April Southwick  
Wisconsin Juvenile Court Clerks Association, Attention: Jody J. Bartels  
Wisconsin Municipal Judges Association, Attention: Honorable Scott Letteney  
Wisconsin Newspaper Association, Attention: Beth Bennett, Executive Director  
Wisconsin Registers in Probate Association, Attention: Julie Kayartz  
Wisconsin Sheriff & Deputy Sheriff Association, Attention: David Graves, Exec. Director  
Wisconsin State Attorneys Association, Attention: John Gelhard



Wisconsin Trial Judges Association, Attention: Honorable Mary M. Kuhnmuench  
Wisconsin Tribal Judges Association, Attention: Eugene White-Fish, President

**List of Additional Interested Persons**

Metropolitan Milwaukee Association of Commerce, Attention: Timothy Sheehy  
Metropolitan Milwaukee Association of Commerce, Attention: Steve Baas  
Wisconsin Business Alliance  
Wisconsin Manufacturers & Commerce, Attention: Kurt Bauer  
Wisconsin Manufacturers & Commerce, Attention: Scott Manley

# EXHIBIT 3



# Supreme Court of Wisconsin

OFFICE OF COURT COMMISSIONERS

110 E. MAIN STREET, SUITE 440

MADISON, WISCONSIN 53703

Nancy A. Kopp  
Julie A. Rich  
David W. Runke  
Mark A. Neuser  
Commissioners

Telephone (608) 266-7442

March 11, 2022

**To: Interested Persons – See Attached List**

**Re: Rule Petition 16-05D, In re Creation of a Pilot Project for Dedicated Trial Court Judicial Dockets for Large Claim Business and Commercial Cases**

Greetings:

I am assisting the Wisconsin Supreme Court with its consideration of rule petition 16-05D, filed on February 11, 2022, by Attorney Laura A. Brenner, Chair, on behalf of the Business Court Advisory Committee (Committee). This petition asks the court to extend the pilot project and the Supreme Court's review for an additional two years. In addition to requesting an extension, the Committee asks the court to revise the Interim Rule to reflect that the Chief Justice seeks local input from chief judges of the Judicial Administrative District before making an appointment under this rule.<sup>1</sup>

You have received this letter because you or your agency or organization potentially have an interest in this matter. A copy of the petition can be found on the court's website at <https://www.wicourts.gov/scrules/pending/index.htm>.

The court voted to solicit written comment. Any comment to the rule petition should be filed by April 8, 2022 with the Clerk of Supreme Court, Attention: Deputy Clerk-Rules, P.O. Box 1688, Madison, WI 53701-1688. If possible, email a Microsoft Word version of your response to [clerk@wicourts.gov](mailto:clerk@wicourts.gov). See comment guidelines at the court's website at <https://www.wicourts.gov/scrules/process.htm>. The petitioner may file a response to the comments by April 15, 2022.

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<sup>1</sup> This court approved the Business Court Advisory Committee's rule petition asking the court to create the business court pilot project and the Business Court pilot project commenced effective July 1, 2017, and was initially authorized for a period of three years with a review scheduled in July 2020. S. Ct. Order 16-05, 2017 WI 33 (issued Apr. 11, 2017, eff. July 1, 2017) (approving pilot project following receipt of public comment and public hearing). The pilot project and its review was extended for an additional two years. S. Ct. Order 16-05A (issued February 12, 2020). The court added Dane County as an additional county that could hear commercial court docket cases as part of the pilot project. S. Ct. Order 16-05C (issued March 13, 2020).



Please note, the court may take any action on a rule petition it deems appropriate, including any of the following:

- (a) Grant the request and adopt the amended interim rule as proposed, or a modified version, without further comment.
- (b) Reject the request for an extension and the amended interim rule as proposed without further comment.
- (c) Refer the rule petition to another entity for its review and recommendation.
- (d) Request further information or analysis from the petitioner or interested persons or entities.

You might wish to consult the court's website at <https://www.wicourts.gov/scrules/pending/index.htm> to follow this rule petition. Court communications on the petition and any written comments filed with the clerk's office will be posted on the website.

If you have specific questions or other comments regarding this matter, please contact me by mail at P.O. Box 1688, Madison, WI 53701-1688, by telephone at 608-261-6642, or by email at [julie.rich@wicourts.gov](mailto:julie.rich@wicourts.gov).

Very truly yours,

/s/

Julie Anne Rich

Supreme Court Commissioner

cc: Chief Justice Annette Kingsland Ziegler  
Justice Ann Walsh Bradley  
Justice Patience Drake Roggensack  
Justice Rebecca Grassl Bradley  
Justice Rebecca Frank Dallet  
Justice Brian Hagedorn  
Justice Jill J. Karofsky  
Attorney Laura A. Brenner, Chair,  
Business Court Advisory Committee  
Krista Miller, Legal Advisor, Office of Court Operations

**List of Interested Persons for Supreme Court Rules**

Badger State Sheriffs' Association, Attention: Executive Director  
Board of Administrative Oversight, Attention: Lori S. Kornblum, Chair  
Board of Bar Examiners  
Chief Circuit Court Judges  
Christian Gossett, Winnebago County District Attorney  
Circuit Court Judges  
Clerk of Supreme Court and Court of Appeals, Sheila T. Reiff  
Court of Appeals, Attention: Chief Staff Attorney  
Court of Appeals Judges  
Court Operations: Diane M. Fremgen, Deputy Director for Court Operations  
Court Operations: Ann Olson, Krista Miller, Amber Peterson, Elizabeth Barroilhet  
Dean Dietrich, Attorney  
Department of Administration, State Prosecutors Office, Attention: Kasey Diess, Director  
Director of State Courts, Honorable Randy Koschnick  
District Court Administrators  
Eastern District of Wisconsin Bar Association, Attention: Katy Borowski, Executive Director  
Hamilton Consulting Group, Attention: Rebecca Hogan, R.J. Pirlot, Adam Jordahl  
Legal Action of Wisconsin, Attention: Deedee Peterson, Executive Director  
Legal Aid Society of Milwaukee, Attention: Colleen Foley, Executive Director  
Marquette University Law School, Attention: Joseph D. Kearney, Dean  
Office of Lawyer Regulation, Attention: Timothy Samuelson, Director  
Office of State Public Defender, Attention: Kelli S. Thompson  
Office of State Public Defender, Attention: Jeremy C. Perri  
Office of the Attorney General, Attention: Terri Surita  
State Bar of Wisconsin, Attention: Larry Martin, Executive Director  
State Bar of Wisconsin, Attention: Lisa Roys, Public Affairs Director  
State Bar of Wisconsin, Attention: Cheryl Furstace Daniels, President  
University of Wisconsin Law School, Attention: Daniel Tokaji, Dean  
Western District Bar Association of Wisconsin, Attention: Ann Peacock  
Wisconsin Asian American Bar Association, Attention: Bryant Park  
Wisconsin Association for Justice, Attention: Bryan Roessler, Executive Director  
Wisconsin Association of African American Lawyers  
Wisconsin Association of Criminal Defense Lawyers, Attention: Peter McKeever  
Wisconsin Association of Judicial Court Commissioners, Attention: Susan Schaubel  
Wisconsin Bankers Association, Attention: John Knight  
Wisconsin Bankers Association, Attention: Kris Cleven, Vice President-Legal  
Wisconsin Clerks of Circuit Court Association, Attention: Regina Kolbow, Carlo Esqueda  
Wisconsin Counties Association, Attention: Marcie Rainbolt  
Wisconsin Defense Counsel, Attention: Jenni Kilpatrick, Executive Director;  
Andrew Hebl, President  
Wisconsin District Attorneys Association, Attention: Greta Mattison, Executive Director  
Wisconsin Family Court Commissioners Association, Attention: David Pruhs, Exec. Secretary  
Wisconsin Hispanic Lawyers Association, Attention: Pamela M. Ritger  
Wisconsin Judicare, Inc., Attention: Beth Ann Richlen, Executive Director

Wisconsin Judicial Commission, Attention: Jeremiah VanHecke  
Wisconsin Judicial Council, Attention: William C. Gleisner, III, Chair  
Wisconsin Juvenile Court Clerks Association, Attention: Samuel Christensen  
Wisconsin Municipal Judges Association, Attention: Honorable Robert Kupfer  
Wisconsin Newspaper Association, Attention: Beth Bennett, Executive Director  
Wisconsin Registers in Probate Association  
Wisconsin Sheriffs & Deputy Sheriffs Association, Attention: Sandy Schueller  
Wisconsin State Attorneys Association, Attention: John Gelhard  
Wisconsin Trial Judges Association, Attention: Honorable Gregory Gill, Jr.  
Wisconsin Tribal Judges Association, Attention: Honorable Gwendolyn Topping, President

**List of Additional Interested Persons**

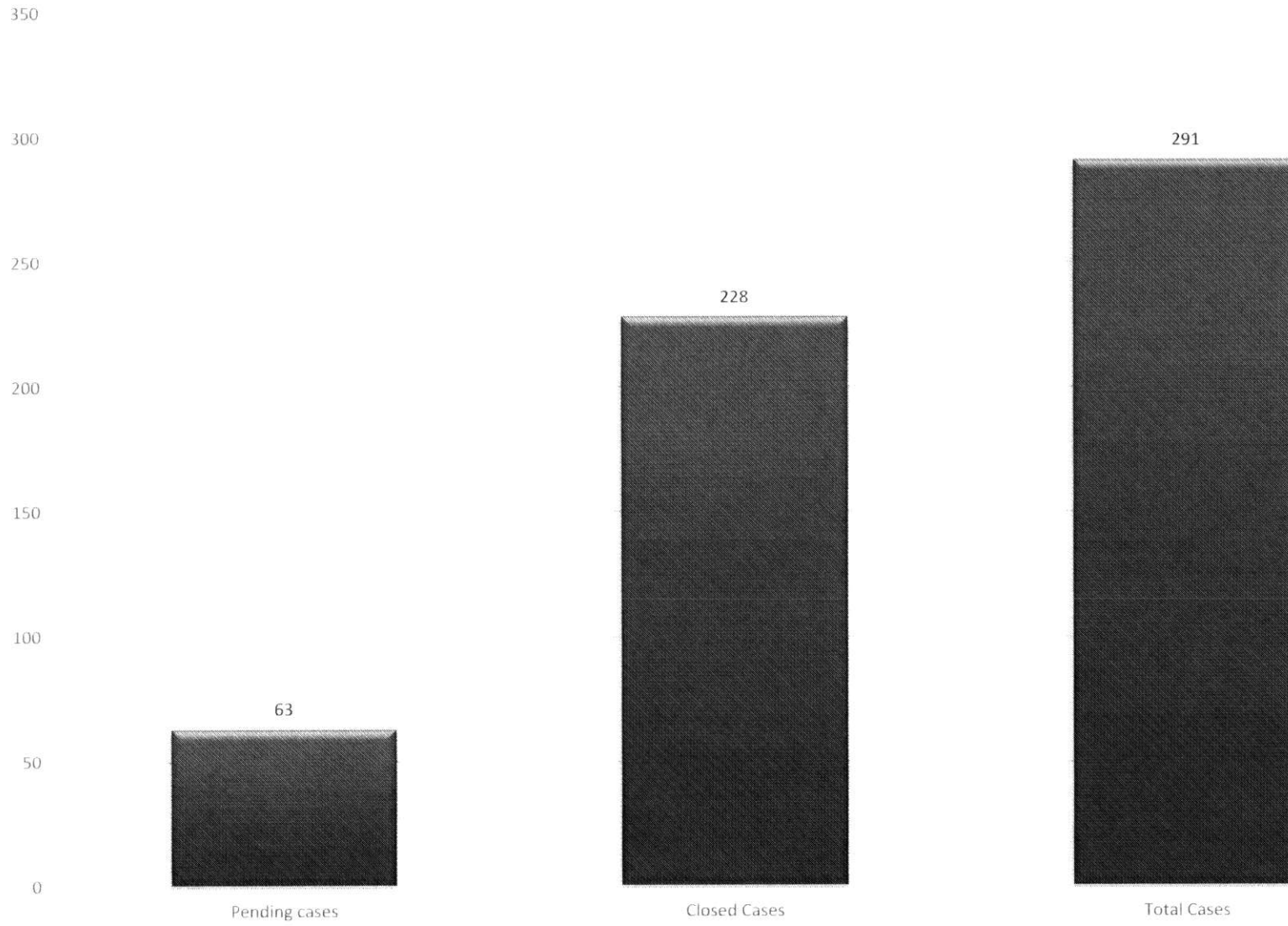
Metropolitan Milwaukee Association of Commerce, Attention: Timothy Sheehy  
Wisconsin Business Alliance  
Wisconsin Manufacturers & Commerce, Attention: Kurt Bauer  
Wisconsin Manufacturers & Commerce, Attention: Scott Manley  
Attorney Richard G. Niess



# EXHIBIT 4

# Commercial Court Cases

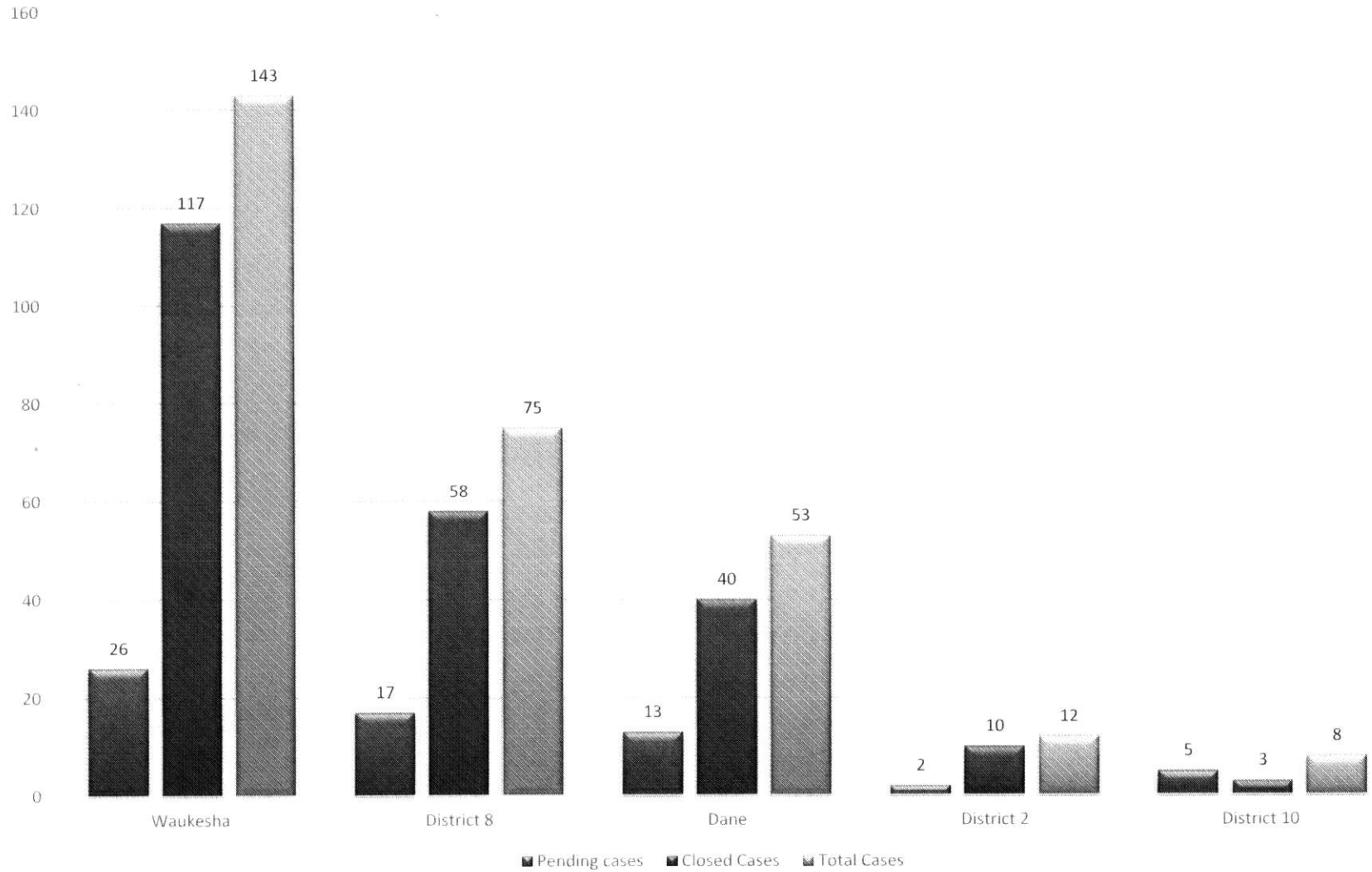
July 01, 2017 - Sept. 13, 2024



# Commercial Court Cases

By Pilot Project County or District

July 01, 2017 - Sept. 13, 2024

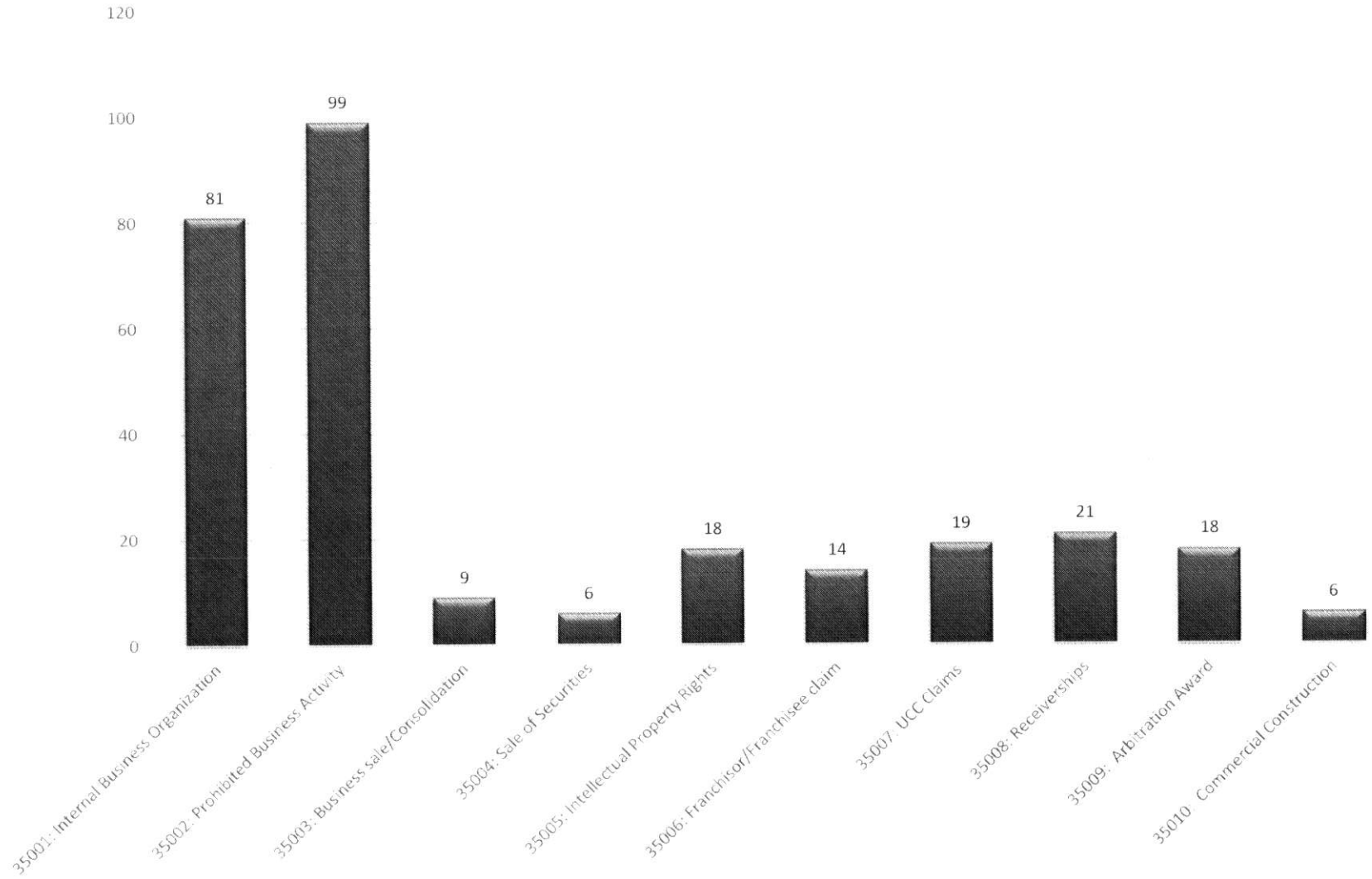




# Commercial Court Docket

Class Code Categorization

July 01, 2017 - Sept. 13, 2024



# EXHIBIT 5

## Electronic and Paper Survey Results

(7/1/2017 - 9/13/2024)

Question 1 **Providing a judge with experience in managing complex business litigation cases.**

### Responses

I do not believe this at all.	8%	16
I slightly believe this to be true.	7%	15
I somewhat believe this to be true.	28%	57
I strongly believe this to be true	55%	114
Not Applicable / Unanswered	2%	4
		206

Question 2 **Developing a detailed case management timeline with the court.**

### Responses

I do not believe this at all.	8%	17
I slightly believe this to be true.	7%	15
I somewhat believe this to be true.	28%	57
I strongly believe this to be true	51%	105
Not Applicable / Unanswered	6%	12
		206

Question 3 **Effectively managing discovery-related issues.**

### Responses

I do not believe this at all.	7%	15
I slightly believe this to be true.	9%	18
I somewhat believe this to be true.	27%	55
I strongly believe this to be true	51%	106
Not Applicable / Unanswered	6%	12
		206

Question 4 **Limiting the number of continuances.**

### Responses

I do not believe this at all.	8%	17
I slightly believe this to be true.	8%	17
I somewhat believe this to be true.	29%	59
I strongly believe this to be true	51%	105
Not Applicable / Unanswered	4%	8
		206

Question 5 **Judge employing an effective strategy for settling the case.**

Responses

I do not believe this at all.	9%	19
I slightly believe this to be true.	7%	14
I somewhat believe this to be true.	30%	61
I strongly believe this to be true	52%	107
Not Applicable / Unanswered	2%	5
		206

Question 6 **Judge effectively managing the trial.**

Responses

I do not believe this at all.	8%	16
I slightly believe this to be true.	4%	9
I somewhat believe this to be true.	15%	31
I strongly believe this to be true	17%	35
Not Applicable / Unanswered	56%	115
		206

Question 7 **Reducing delays in bringing the case to trial or settlement.**

Responses

I do not believe this at all.	9%	19
I slightly believe this to be true.	7%	15
I somewhat believe this to be true.	29%	60
I strongly believe this to be true	51%	106
Not Applicable / Unanswered	3%	6
		206

Question 8 **Achieving a resolution of the case at a lower overall cost (work time and expenses).**

Responses

I do not believe this at all.	12%	25
I slightly believe this to be true.	9%	19
I somewhat believe this to be true.	30%	61
I strongly believe this to be true	42%	87
Not Applicable / Unanswered	7%	14
		206

Question 9 **Commercial court docket should become a permanent component of the Wisconsin Court System.**

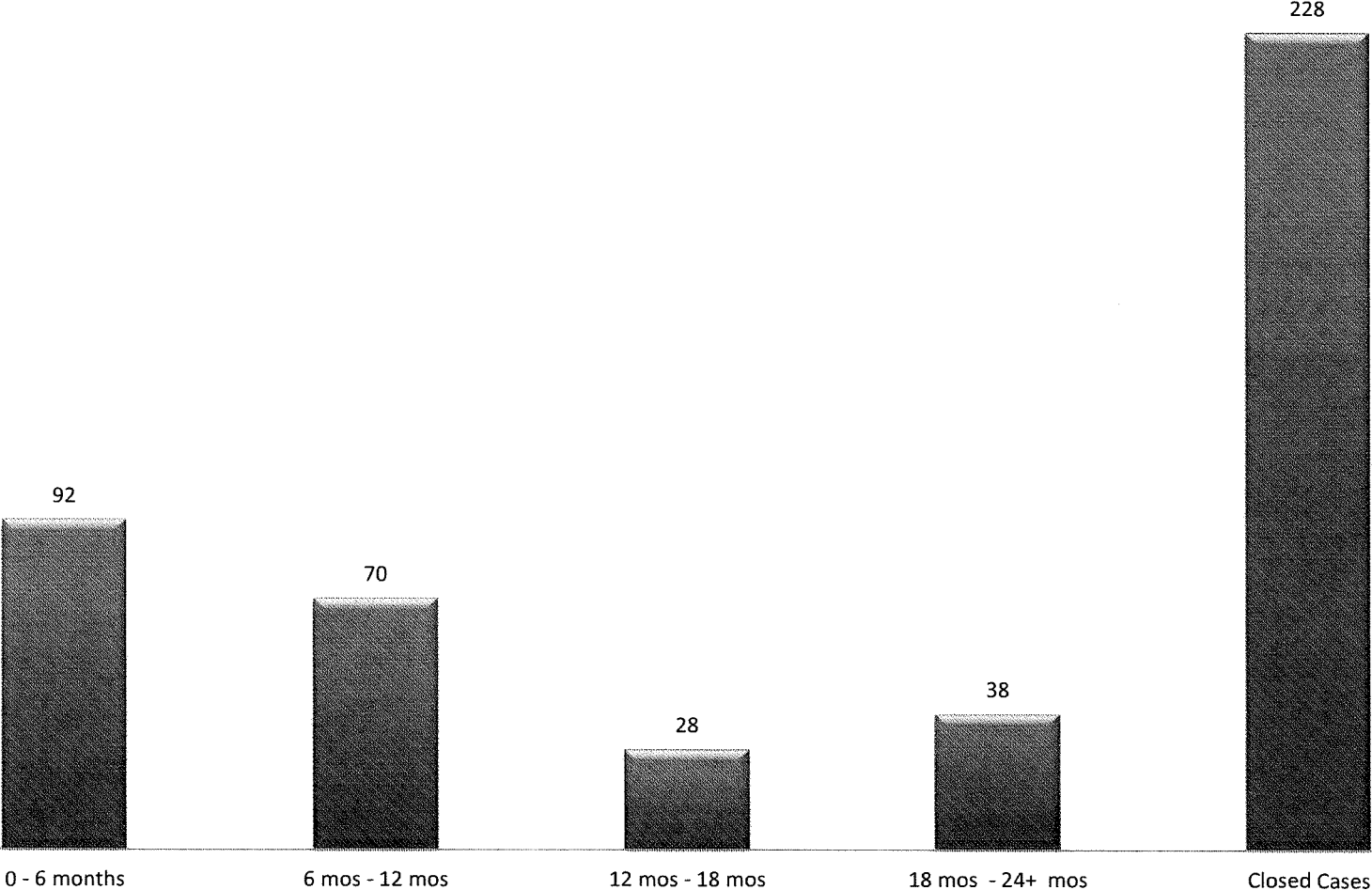
Responses

I do not believe this at all.	6%	13
I slightly believe this to be true.	8%	16
I somewhat believe this to be true.	28%	57
I strongly believe this to be true	55%	114
Not Applicable / Unanswered	3%	6
		206



# EXHIBIT 6

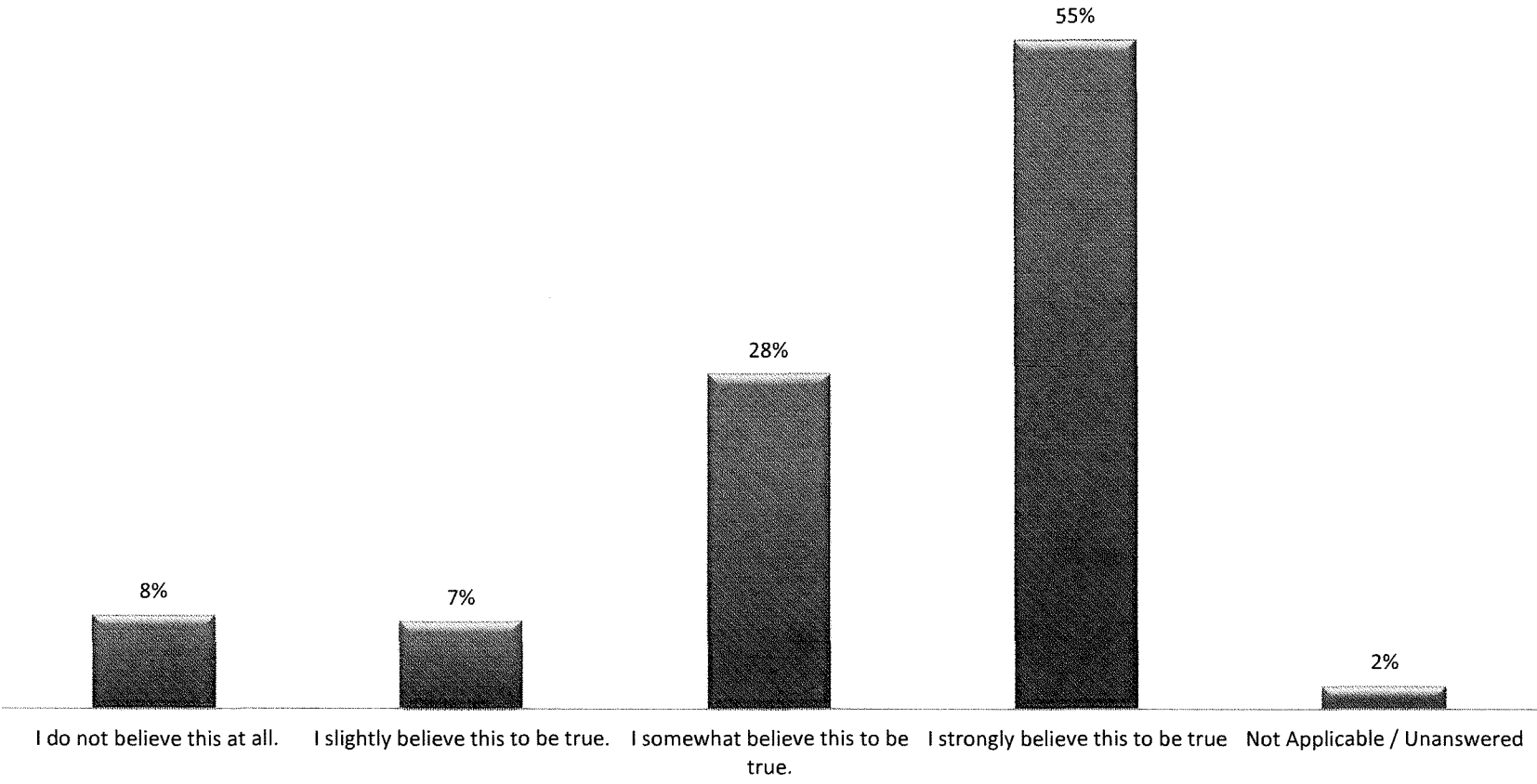
**Commercial Court Docket**  
**Time to Disposition (Closed Cases)**  
July 01, 2017 - Sept. 13, 2024



# EXHIBIT 7

**Q1. Providing a judge with experience in managing complex business litigation cases.**

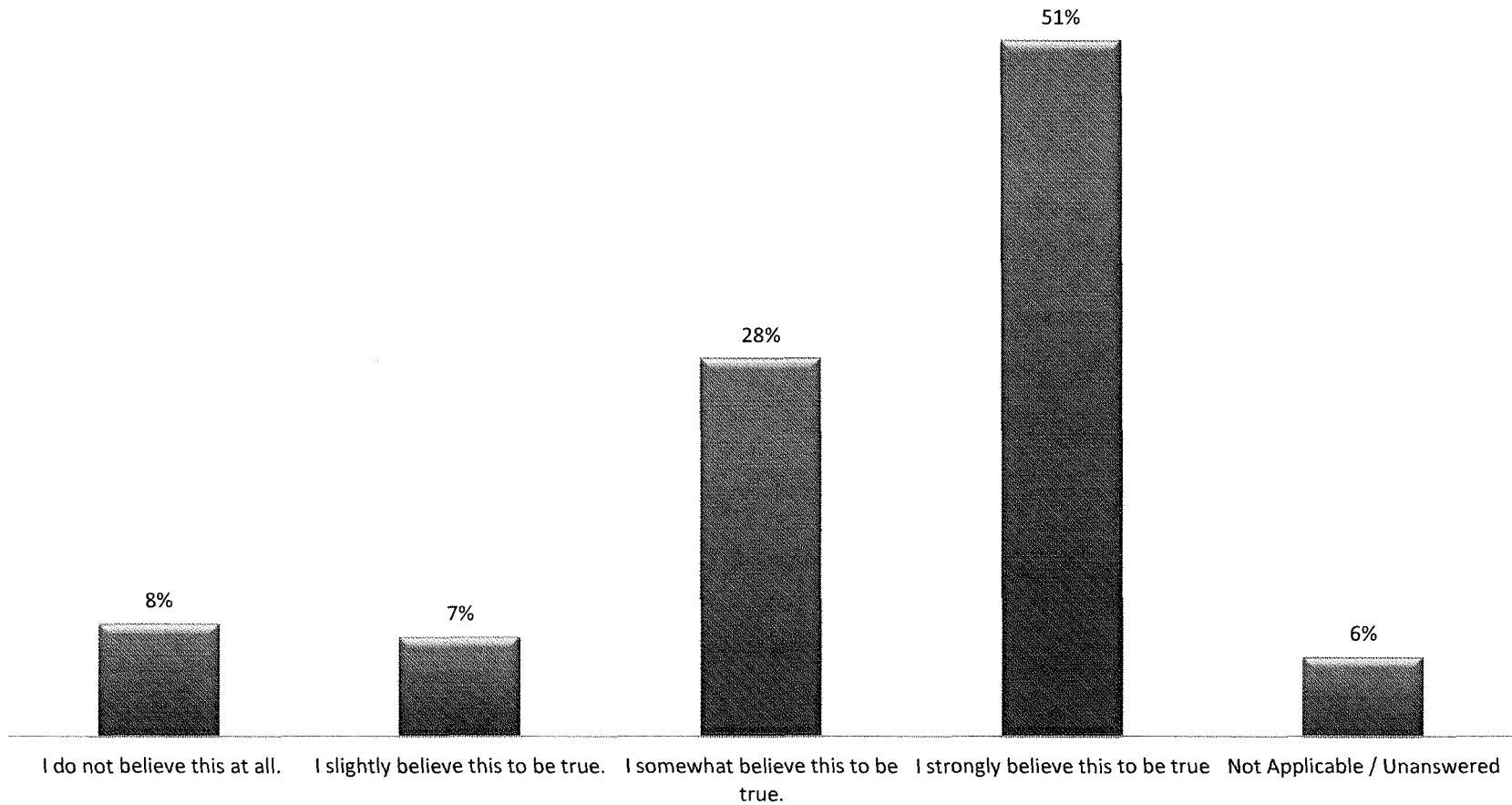
I believe the commercial court docket demonstrated this feature more effectively than the traditional circuit court docket.





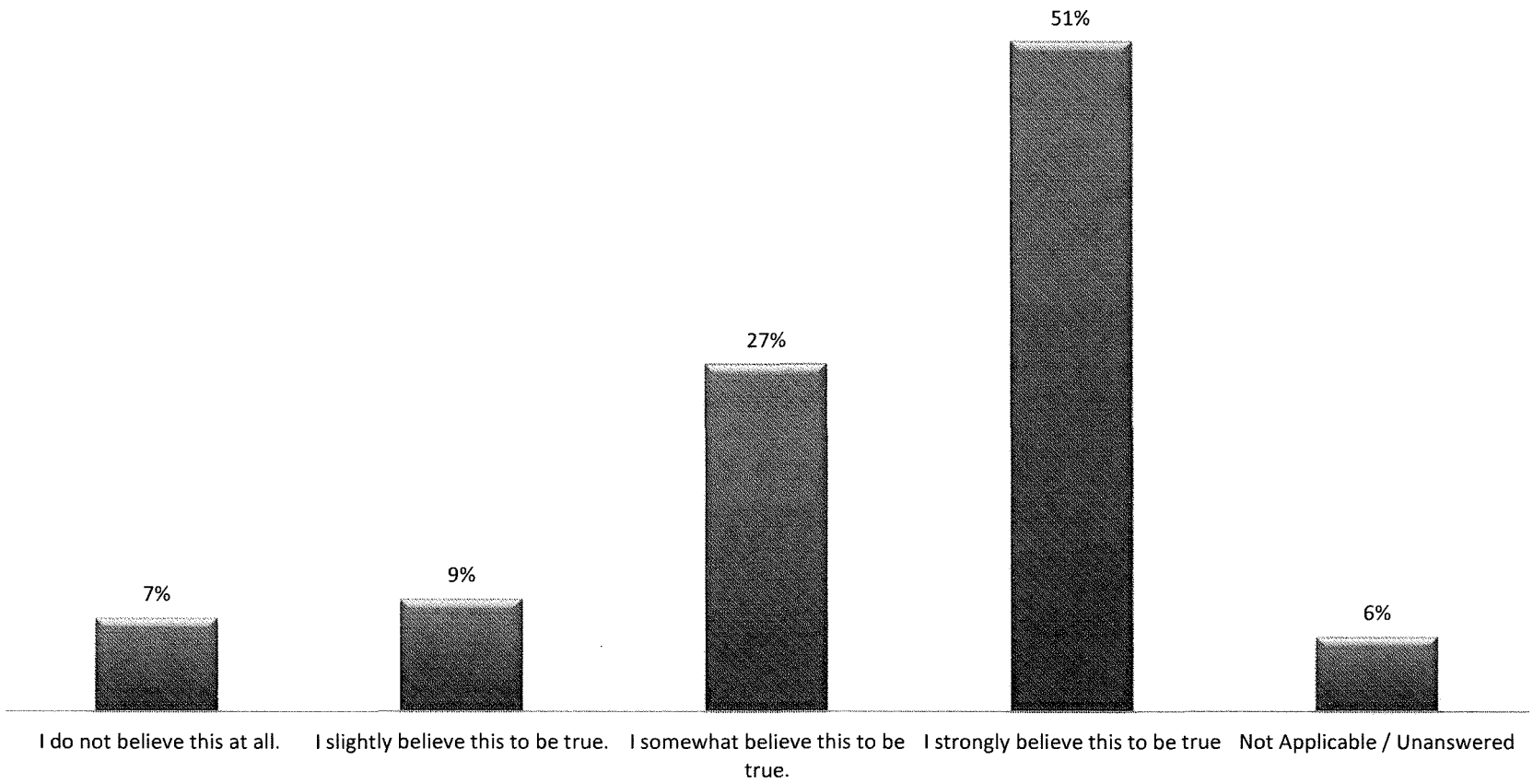
## Q2. Developing a detailed case management timeline with the court.

I believe the commercial court docket demonstrated this feature more effectively than the traditional circuit court docket.



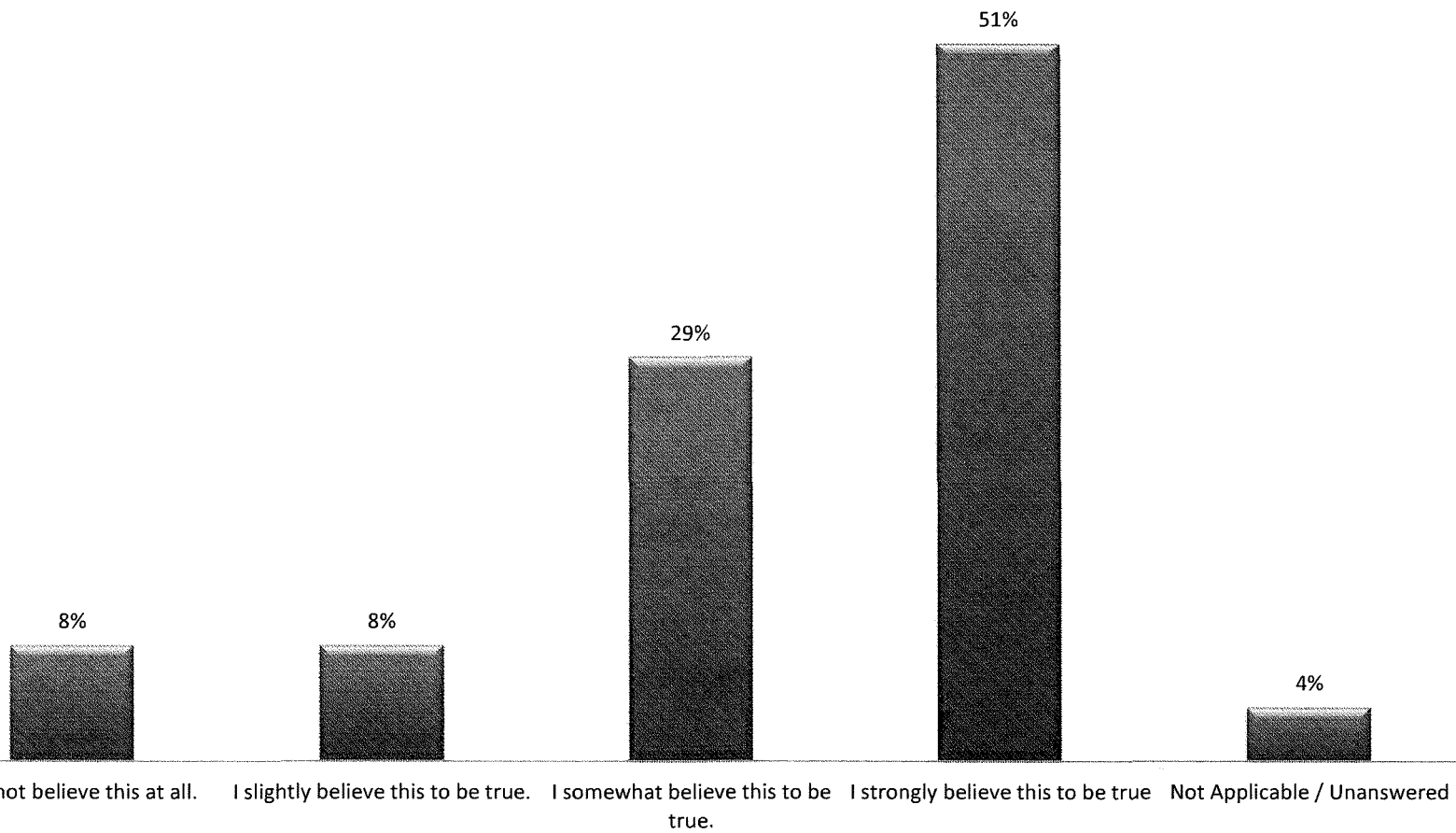
### Q3. Effectively managing discovery-related issues.

I believe the commercial court docket demonstrated this feature more effectively than the traditional circuit court docket.



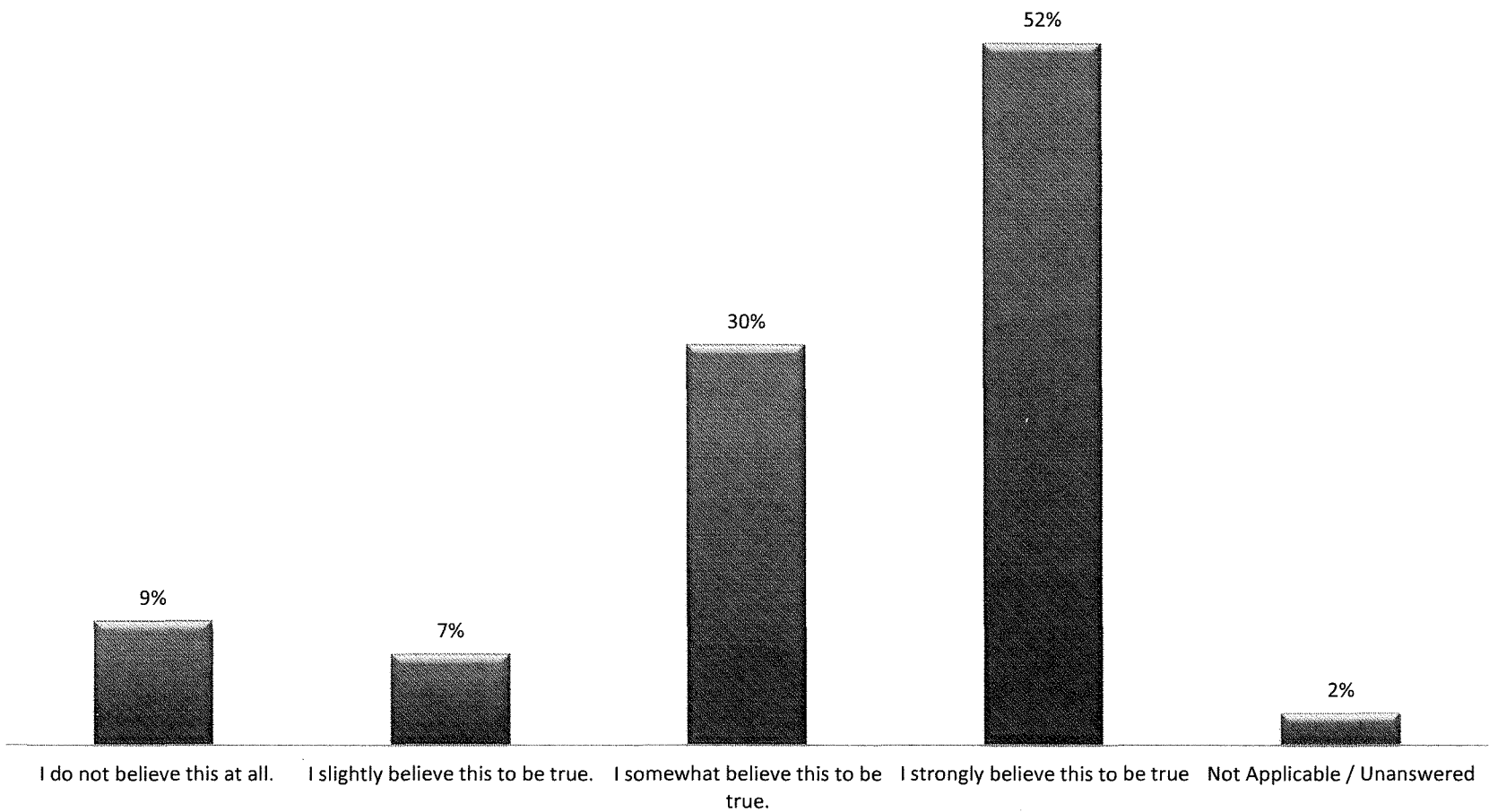
#### Q4. Limiting the number of continuances.

I believe the commercial court docket demonstrated this feature more effectively than the traditional circuit court docket.



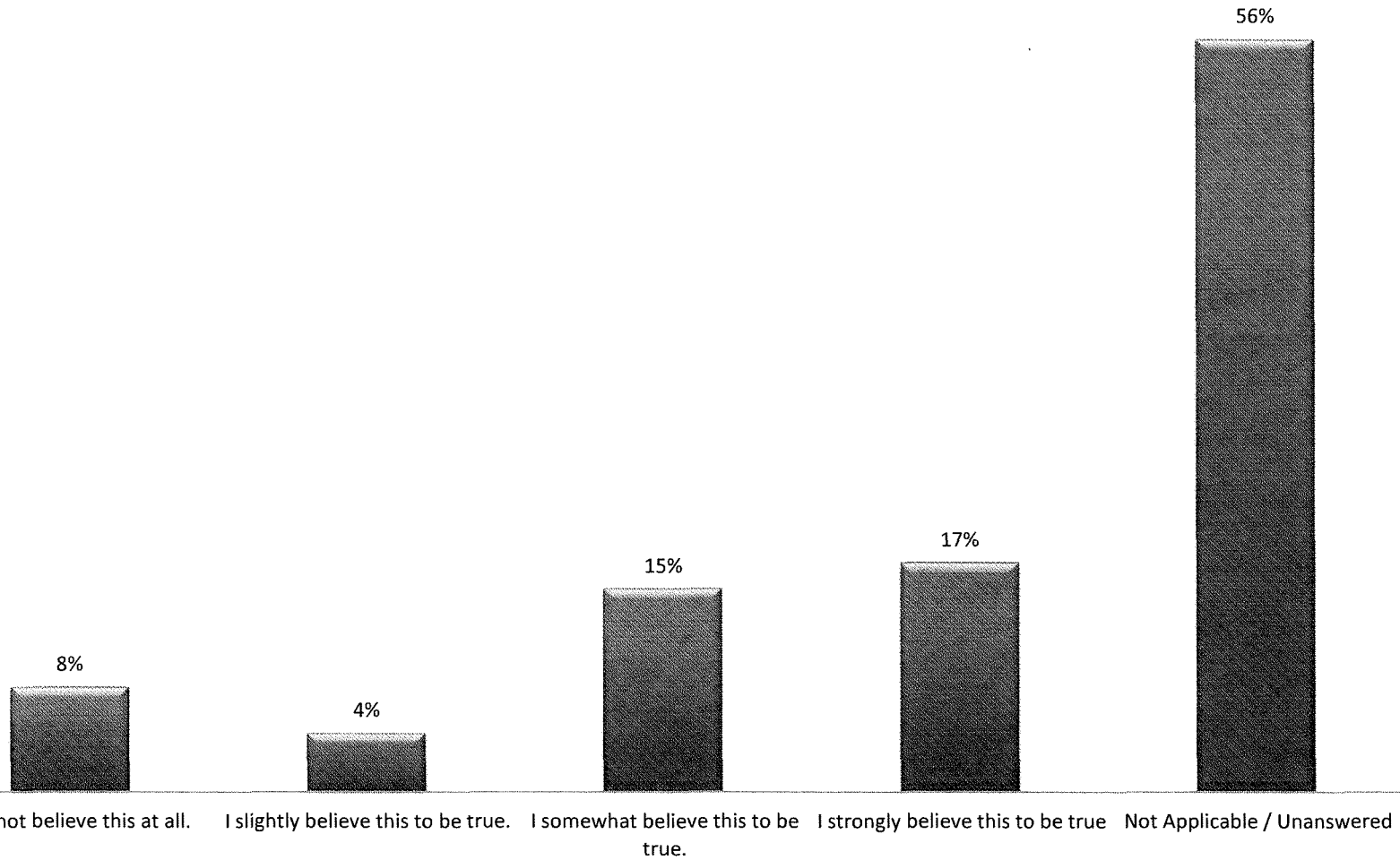
### Q5. Judge employing an effective strategy for settling the case.

I believe the commercial court docket demonstrated this feature more effectively than the traditional circuit court docket.



## Q6. Judge effectively managing the trial.

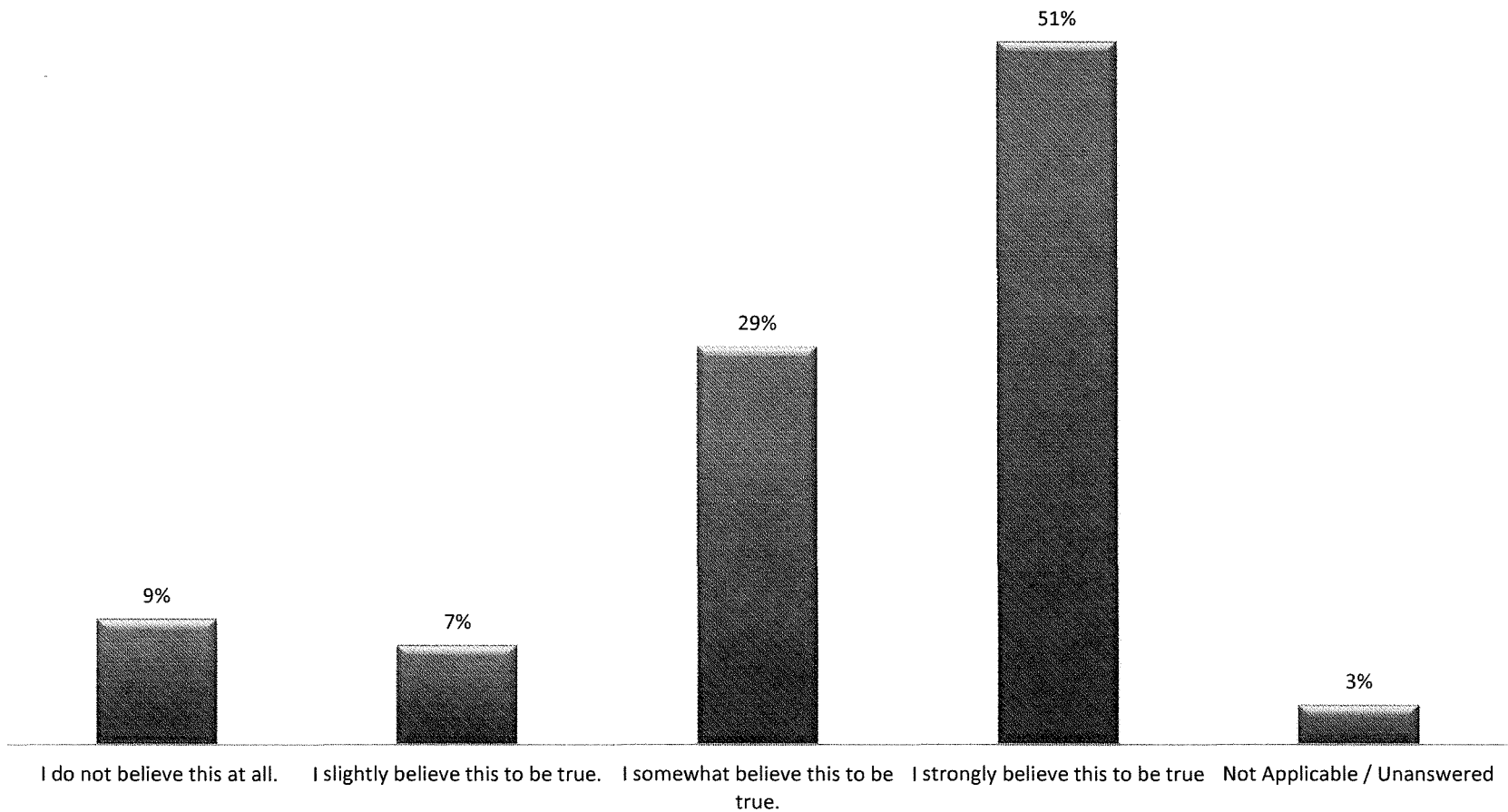
I believe the commercial court docket demonstrated this feature more effectively than the traditional circuit court docket.





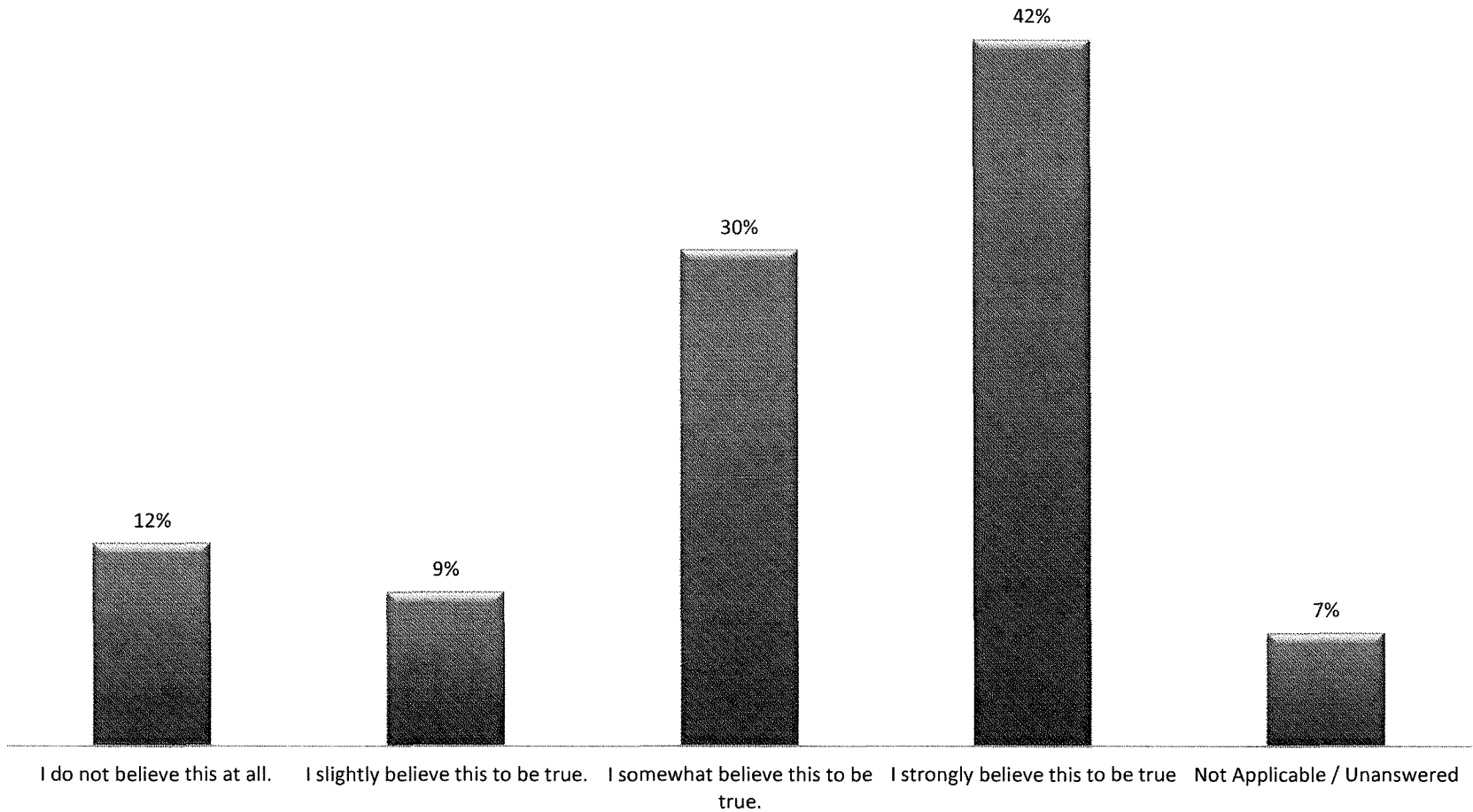
## Q7. Reducing delays in bringing the case to trial or settlement.

I believe the commercial court docket demonstrated this feature more effectively than the traditional circuit court docket.

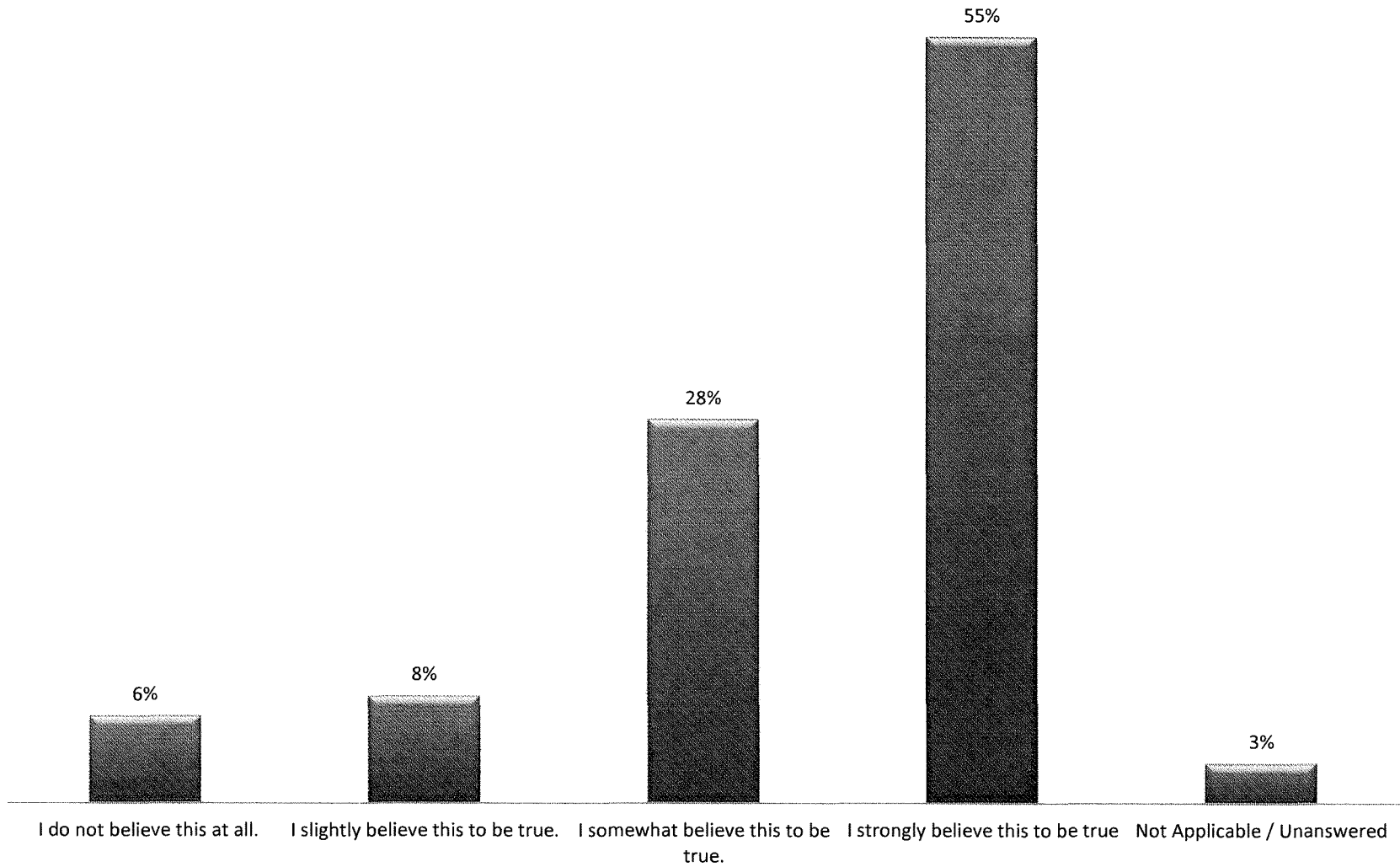


## Q8. Achieving a resolution of the case at a lower overall cost (work time and expenses).

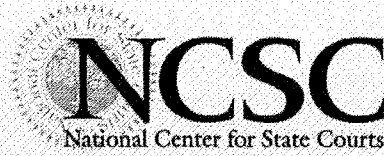
I believe the commercial court docket demonstrated this feature more effectively than the traditional circuit court docket.



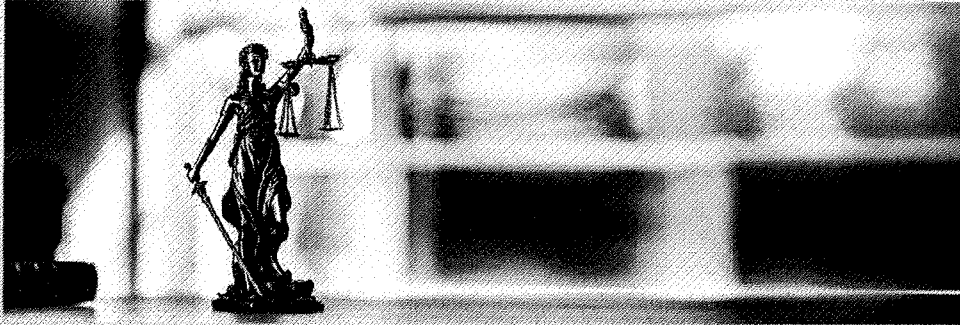
**Q9. I believe the commercial court docket should become a permanent component of the Wisconsin Court System.**



# EXHIBIT 8

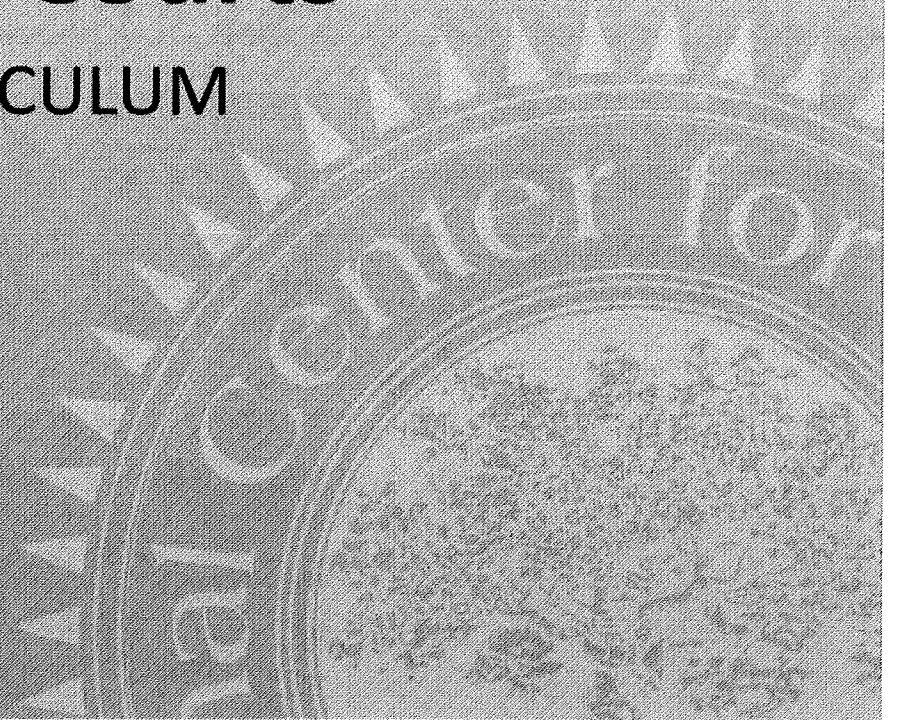


FACULTY GUIDE

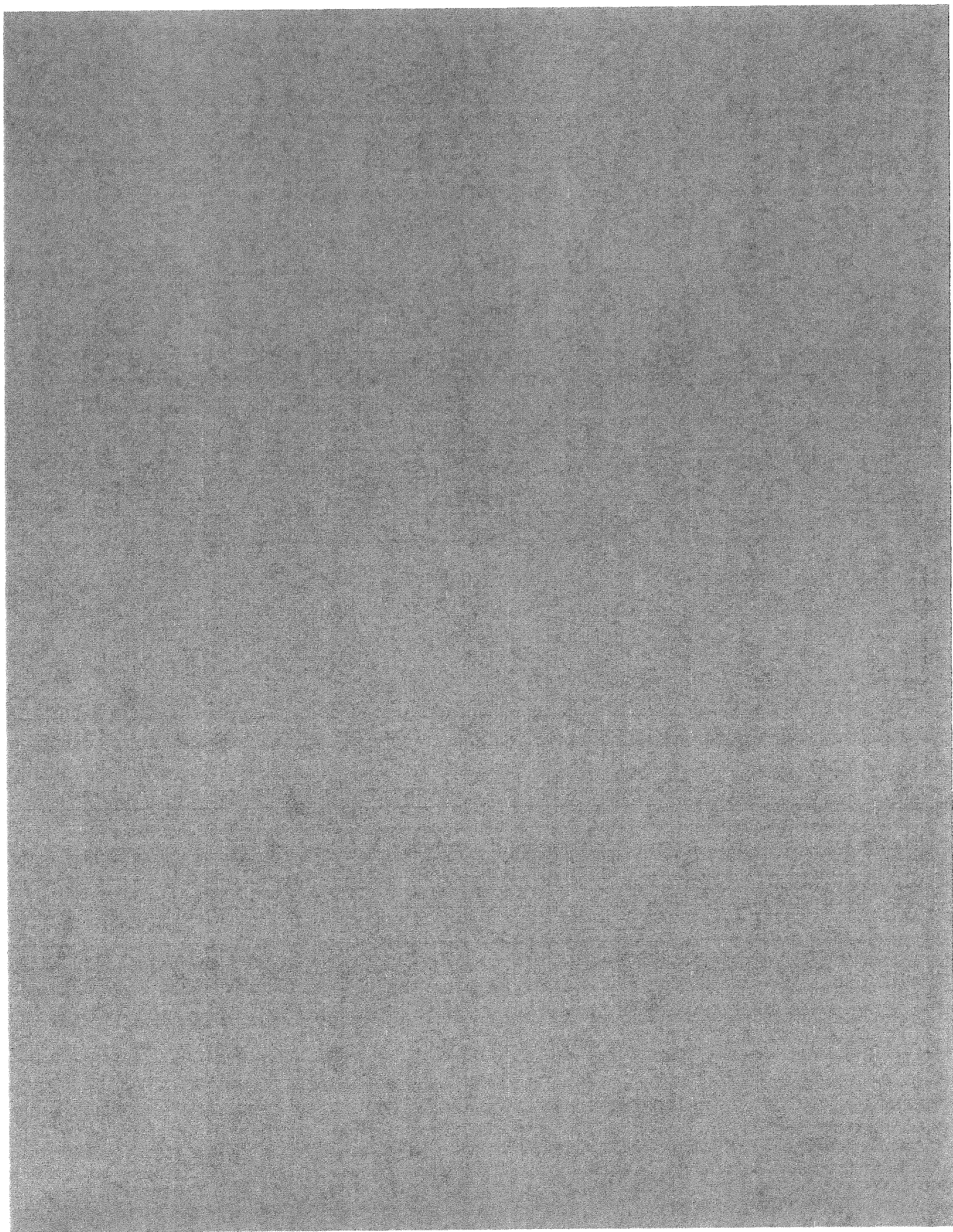


# Business and Commercial Litigation Courts

COURSE CURRICULUM



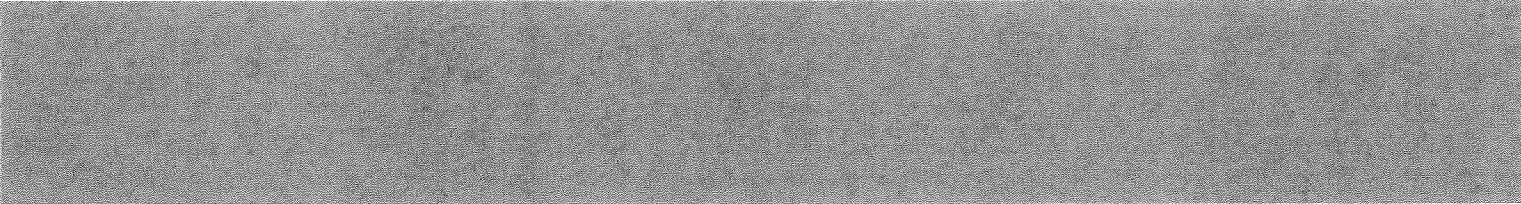




# Outline of the Presentation

<b>Introduction – The History and Purpose of Business and Commercial Litigation Courts</b> (Slides 1 – 14) .....	1
<b>Part I – Business Court Creation</b> (Slides 15 – 62) .....	11
Determining Whether a Court is Right for Your Jurisdiction (Slides 16 – 23) .....	12
Organization, Funding and Resources (Slides 24 – 37) .....	20
Geographic and Subject Matter Jurisdiction (Slides 38 – 43) .....	30
Judicial Selection (Slides 44 – 50) .....	36
Creation of Business Court Rules (Slides 51 – 56) .....	42
Staffing (Slides 57 – 59) .....	46
Best Practices (Slides 60 – 62) .....	49
<b>Part II – Business Court Operation</b> (Slides 63 – 81) .....	51
Managing Complex Commercial Litigation (Slides 64 – 71) .....	52
Assessment (Slides 72 – 78) .....	62
Training for Judges (Slides 79 – 82) .....	66
<b>Wrap Up</b> (Slide 83) .....	69



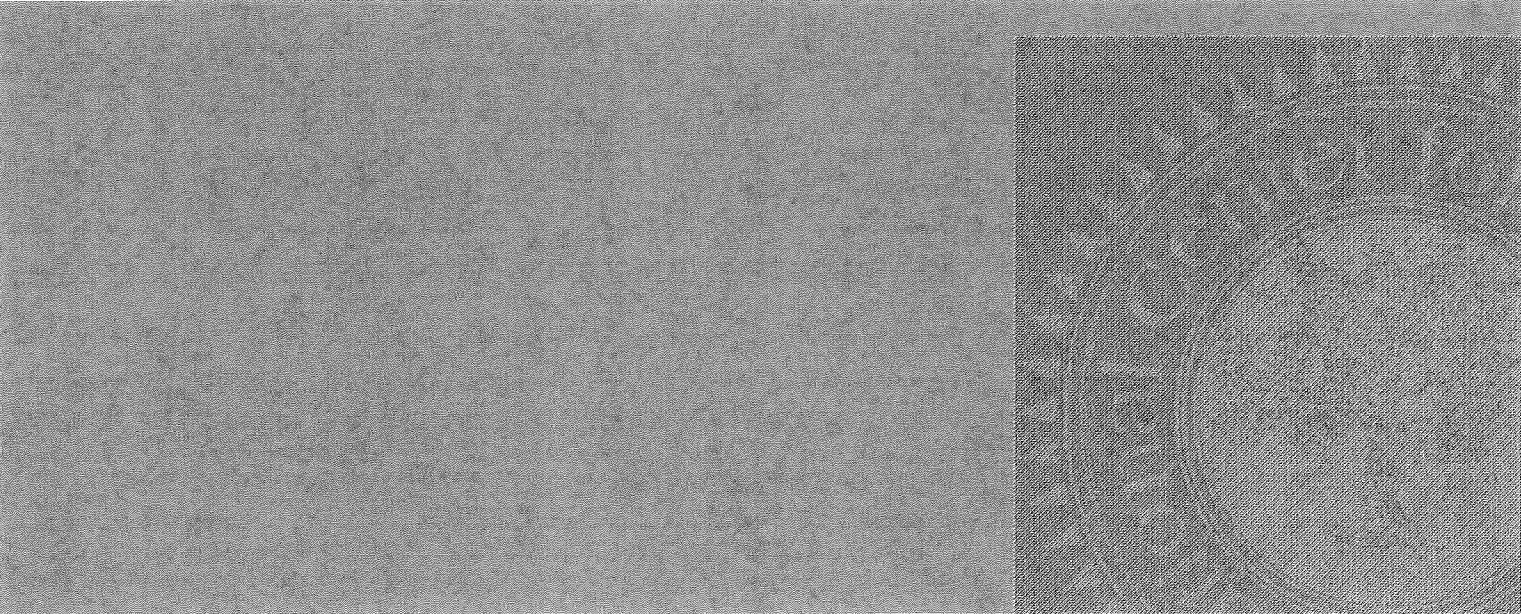


# Notes and Background Information for Faculty

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This Guide includes a copy of each of the PowerPoint slides, background notes and information related to the slide, and suggestions for other activities for use by faculty during the presentation.

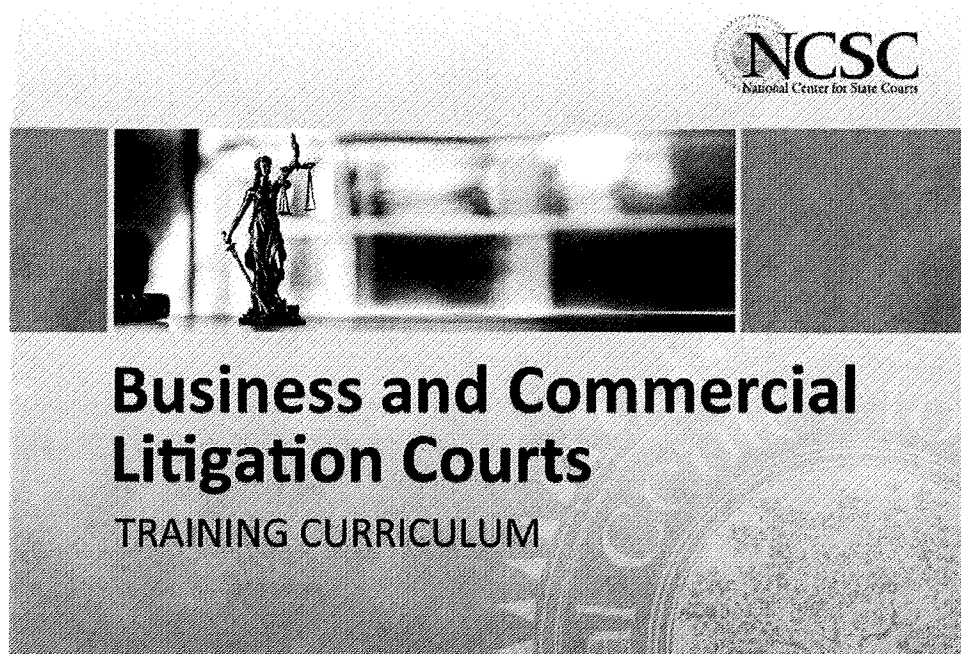
Periodically throughout the course, there will be discrete opportunities to encourage audience participation for the exchange of ideas and information through group and individual discussions, neighbor talks, and identified small group activities. These opportunities are generally noted throughout the Guide. They are not, however, the focus of the presentation, which is geared to educating judges, court administrators, court staff, lawyers, and others about business courts. These opportunities are interspersed throughout the presentation simply to create variety, avoid the tedium frequently encountered by listening to talking heads over an extended period of time, and enhance the learning experience. But they should be used sparingly, as there is a lot of information to cover.



# Introduction & Welcome

Introduce the speaker, special guests, and, depending on the size of the class, provide an opportunity for a very brief introduction of the class members. Explain the general purpose for the course and what it is designed to provide in the way of an introduction to understanding the operations of a business/commercial litigation (“BCL”) court and why such courts are important to our system of justice.

Title Slide for Overall Presentation (SLIDE 1):



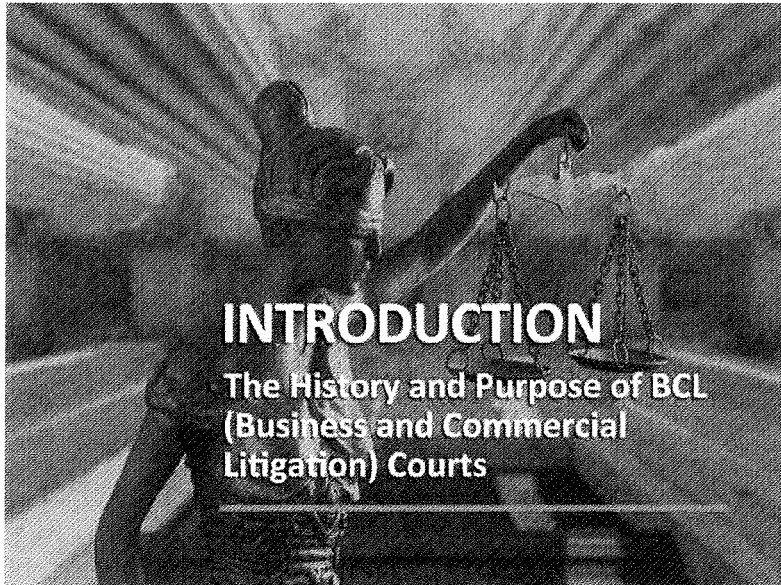
# Introduction to BCL Courts

## BCL Court History and Purpose

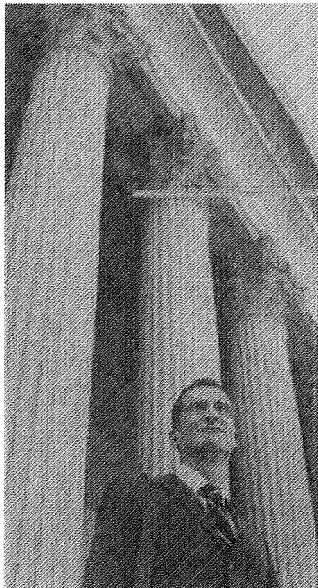
- PURPOSE** Introduce participants to purposes & benefits of BCL courts.
- OVERVIEW** Discuss with participants the history, purposes and benefits of having a BCL court.
- TOPICS**
- Present and discuss purpose of BCL court in resolving complex business disputes.
  - Review benefits to business community.
  - Review benefits to court system having a BCL court.
  - Review benefits to public in increased access to other court services.
  - Why use a specialty BCL court to resolve business disputes?
- TIME ESTIMATE** 40-45 minutes.
-



SLIDE 2



SLIDE 3



**World-Wide Growth  
of BCL Courts**

---

- 15-20 International Courts
- BCL Courts Operational in 25 U.S. States as of July 2019
- Latest Entrant – Kentucky’s Jefferson County Pilot Project

Prior to the presentation, faculty members should research whether additional courts have been created since the time this slide was created. One good resource for further information is <https://www.ncsc.org/Topics/Special-Jurisdiction/Business-Specialty-Courts/Resource-Guide.aspx>.

## SLIDE 4



### Purposes of BCL Courts

- **To provide commercial enterprises** with access to a judicial forum in which complex business disputes can be expeditiously adjudicated by a judge with expertise in resolving business and commercial issues.
- **To create a body of judicial precedent** that will provide guidance in the negotiation and documentation of commercial transactions and promote certainty in business dealings.

This slide explains that the growth of BCL courts is often driven by the need for the business community to have legal guidance in how to conduct business, structure transactions, and maintain mutually beneficial relationships with other business enterprises.

BCL courts are thus, in their own right, specialty courts offering expertise in particular areas of law and helping to generate a body of precedent.

- Can you suggest other purposes for a BCL court?
- Why is it important to business litigants to have a sense of predictability?
- How do your judiciary and the local business community view the prospect of having a BCL court?
- Without such a court, how are BCL cases handled? What is the perception of the business community about the efficacy of judicial dispute resolution in your jurisdiction?

SLIDE 5

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## Challenging the Hegemony of Commercial Arbitration

- |  |  |
|--|--|
| <ul style="list-style-type: none"><li>· <b>Duplicating advantages of commercial arbitration:</b></li><li>· Choice of laws</li><li>· Choice of forum</li><li>· English as the <i>lingua franca</i> of international commercial dispute resolution</li></ul> | <ul style="list-style-type: none"><li>· <b>Gradual dissatisfaction with commercial arbitration:</b></li><li>· Not quicker</li><li>· Not cheaper</li><li>· Failure to contribute precedential decisions to promote clarity and certainty in negotiating and documenting commercial transactions</li></ul> |
|--|--|



This slide is intended to explain why the courts are enjoying some success in reclaiming business and commercial disputes from commercial arbitration, which became popular in the 1970s as purportedly a faster and less expensive means of commercial dispute resolution.

Arbitration is still widely used in commercial disputes, but businesses have gradually become disenchanted with it because, in contrast to the way in which it has been touted, it is frequently not cheaper and not faster as a means of dispute resolution.

SLIDE 6



The following slides cover each of the major benefits and are self-explanatory.

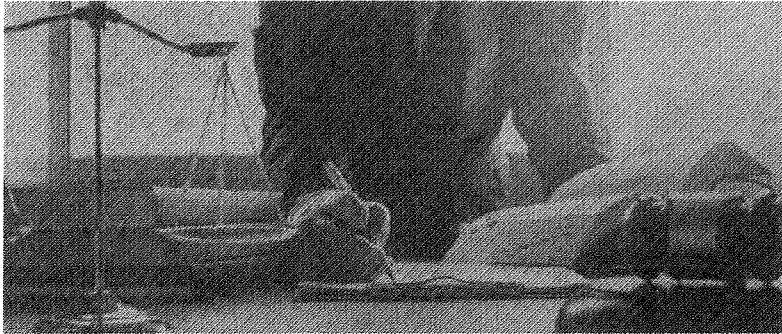
SLIDE 7



*Judges with knowledge and expertise in both business law and effective case management methods.*

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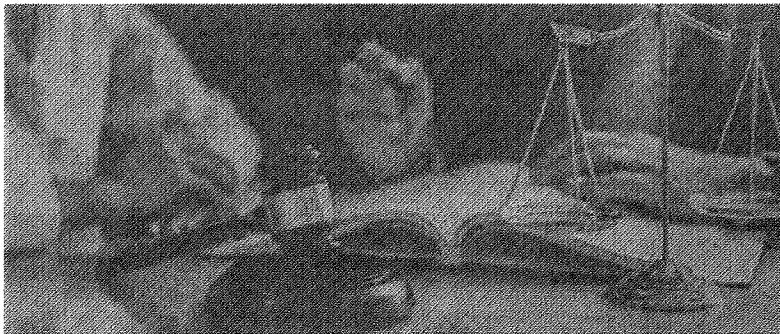
SLIDE 8



*Docket management with rules specifically applicable to complex BCL cases.  
(e.g., motion deadlines, information exchange timelines, on-target dispositions, supervised ADR options).*

---

SLIDE 9



*A management plan with definite and attainable deadlines for the case.*

---



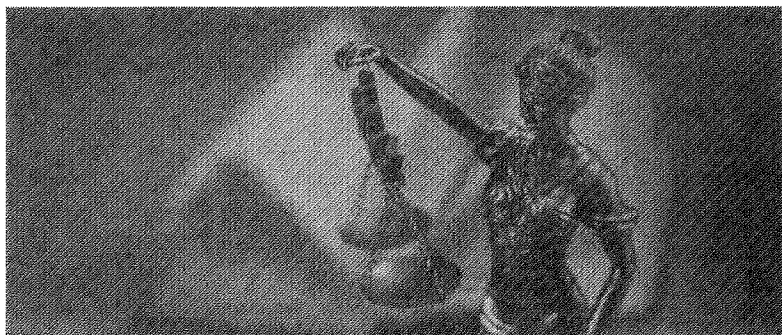
SLIDE 10



*Developing and publishing  
a centralized body of  
commercial precedent.*

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SLIDE 11



*Providing users certainty in the  
application of rules and procedures  
and consistency in rule enforcement.*

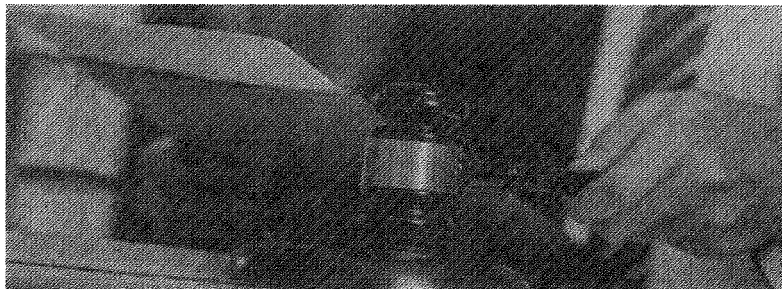
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SLIDE 12

**A Court Culture Familiar with  
Business Law/Practices:**

- 1) understanding how the various corporate structures work,
- 2) how commercial transactions are financed,
- 3) how dissolution can occur,  
**requires less investment in educating the court.**

SLIDE 13



*Faster disposition times are reported by BCL jurisdictions. The reduced caseload and expertise allows quicker access to hearing and expedites resolution. Complex cases don't have to compete for attention with the balance of the caseload.*

---

SLIDE 14



*Less competition for limited judicial resources (compared to general civil docket) and avoidance of backlog.*

---

This is an opportune moment to introduce the BCL Court Bibliography and recommend to participants that they avail themselves of materials listed therein.

## Part I – Business Court Creation

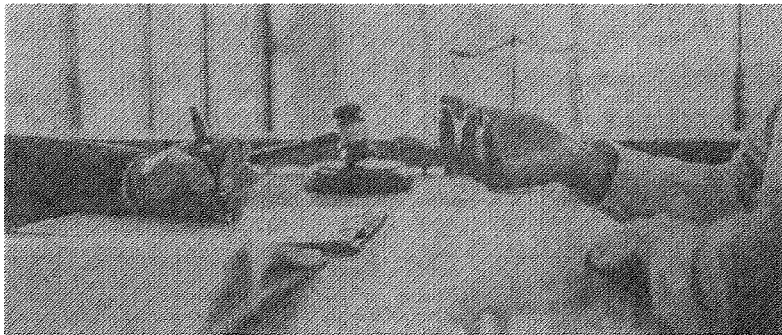
### Determining if a Court is Right For You

<b>PURPOSE</b>	Understand the potential reasons for the creation of a business court and the process for considering creation of a new court.
<b>OVERVIEW</b>	BCL courts are designed to serve a specific need and purpose. Jurisdictions should carefully analyze the need for and impact of a court before its creation.
<b>TOPICS</b>	<ul style="list-style-type: none"><li>• Reasons to create BCL courts</li><li>• Criticisms of BCL courts</li><li>• Determining the need for a court</li><li>• Developing an advisory committee</li></ul>
<b>TIME ESTIMATE</b>	35-40 minutes.

SLIDE 15



SLIDE 16



*Determining whether a BCL Court  
is right for your jurisdiction*

---

SLIDE 17

### Why Organize a BCL Court?

In seeking specialized dockets, businesses were not looking for fixed results. Nor were they seeking tort reform, as the cases at issue would most typically involve businesses or sophisticated parties as litigants, not consumers. Commercial and business litigants did not need to know that they were going to win the case or cap their losses, but simply that a decision would be made in a reasonable time and that the decision would have an articulated core of legal principles shaping the court's ruling. Such express judicial reasoning would not only promote confidence in the process, Delaware's chancery court being the aspirational model, but also provide future guidance for conducting ongoing business practices outside the courtroom. Theoretically, a business might look favorably on a city, region, or state with courts that could engender such confidence.

Lee Applebaum, Future Trends in State Courts: The Steady Growth of Business Courts 79 (2011).

Lee Applebaum is a Philadelphia lawyer, now retired, who has long held an interest in BCL courts. He has written or co-authored several articles and maintains an informative blog on the subject.

This slide quotes from an article written in 2011, but the points made are still relevant today.

---

Neighbor talk (turn to your neighbor and talk) – What do you think of the points Applebaum makes in this passage? – 5 minutes

- Do you agree with the suggestion that having a BCL court might incline business more favorably to a jurisdiction? Attract new businesses to organize there? Dissuade existing businesses from leaving and re-domesticating elsewhere?



## SLIDE 18



### Economic Considerations

- **Business Development & Retention**
  - Showcase fairness and access
  - Create atmosphere of commercial sophistication
  - Facilitate creation of databases to inform transactions
- **Create climate hospitable for local entrepreneurs**
  - Increase productivity of existing business enterprises
  - Enhance stature and vibrancy of local business community
- **Recoup revenues going to commercial arbitration**
- **Promote Understanding of Business Statutes and Regulations**

- In your assessment, how valid are these economic considerations?
- How important would the creation of databases be?
- Is the existence of a local BCL jurisprudence really likely to increase productivity? Why or why not?
- How realistic is it to expect the courts to recoup revenues now going to commercial arbitration? Could this be effected through higher filing fees than in the typical civil case? Would any such recoupment be significant?
- How important is it to promote understanding of business statutes and regulations? How will this benefit the business community? The public at large?

SLIDE 19

### Criticisms of BCL Courts

- **“Elitism”**
  - But not different in concept from other specialized tribunals (*e.g.*, family courts, probate courts)
  - Judicial expertise in commercial matters not different in kind from other specialized courts – are bankruptcy courts “elitist”?
- **Bias in Favor of Business vs. Consumers**
  - Jurisdiction typically limited to business-to-business context or shareholder litigation
  - Consumer litigation not typically heard in BCL courts
- **Competes with other court services for limited judicial resources**
  - Each jurisdiction must weigh costs and benefits
- **BCLs provide less confidentiality to trade secrets or other sensitive information**

This slide identifies the most frequent criticisms of the concept of BCL Courts. These are worth discussing, as they are frequently raised during the planning stages of a BCL court.

- Present and briefly discuss each criticism. Does any of them hold water? Are the countervailing arguments persuasive?
- One weakness of BCL courts is that they provide less confidentiality to trade secrets and other sensitive information that sometimes find their way into disputes. Those creating business courts should consider how to address these concerns.
- What is the reaction to the suggestion that the “elitism” critique comes from other judges?
- Are other specialty type courts subject to the same level of criticism?
- Are there other critiques of BCL courts that need to be identified and discussed?
- In your opinion, do BCL courts fulfill a justice system need?

## SLIDE 20

**Involves “Business Entity”**

**Broadly defined, a “business entity” encompasses a potentially wide range of enterprises:**

- **Corporations**
- **Limited Liability Companies (LLCs)**
- **Partnerships**
  - General partnerships
  - Limited partnerships
  - Limited liability partnership or limited liability limited partnership
- **Other unincorporated businesses**
- **Trusts**
  - Statutory trust
  - Common law trust
  - Business Trust or association
  - Real estate investment trust

This slide provides a useful definition illustrating the range of enterprises that can invoke BCL court jurisdiction.

SLIDE 21

**Ascertaining Need (1)**

- **Concerns have been expressed about the pace of BCL litigation –**
  - By the business community
  - By the Bar
- **Court’s own assessment of disposition statistics vis-à-vis general civil docket**
  - Number of open/closed cases
  - Number of motions undecided over six months from briefing (and argument, if applicable)
  - Time from case filing to final disposition and compare with the model disposition standards for civil cases adopted by CCJ and COSCA

This slide illustrates that both the business community and the legal community are important – indeed, indispensable – constituencies of BCL courts. The other important motivating factor is a congested civil docket. In many jurisdictions, Speedy Trial Act requirements move the criminal docket and put the civil docket on the back burner. Delay in resolution of civil matters can be exacerbated in complex cases.

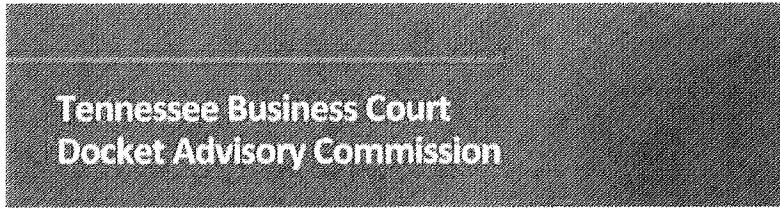
Nevertheless, in some jurisdictions, even though these factors are aligned, the effort to create a BCL court has not been successful. Further impetus is needed.


## SLIDE 22

**Ascertaining Need (2)**

- **Involve the Chief Justice and State Court Administrator, AND, to assist them, and achieve “buy-in”:**
  - **Empanel a statewide committee or task force (the “Advisory Commission”) comprised of**
    - Prominent members of the Bar (corporate and litigation)
    - Corporate general counsel
    - Prominent in-state business executives/CEOs
    - Judges
    - Court management officials
    - Representatives of the Chamber of Commerce
    - Community leaders
- 
- Are there other methods by which a jurisdiction could determine the need for a BCL court?
  - Should chief judges and court administrators take the lead in discussing with the bench the need for a BCL court?
  - Are there other constituencies, besides those listed on the slide, who should have a seat at the table and be a part of the Advisory Committee?
  - Corporate general counsel are often the ones making the decision about where to file cases; more so than the business executives. Their participation may be helpful in the short and long term.

SLIDE 23



  
 BUSINESS COURT DEVELOPMENT COMMISSION  
 MEMPHIS, TENNESSEE  
 MAY 11, 2017

- I. Call to Order
- II. Welcome and Approval of Revised Commission Minutes (2/14/17, 1/18/17 and December 21, 2016)
- III. Update on Status of Work Report - Chief Justice Brink and Executive Line
- IV. Development of Court and Model Rules of Appellate Procedure - Chief Justice Brink and Executive Line
- V. Legislative Update - Director Lee
- VI. Monthly Report from Businesses and Docket Advisors - Peter Hester
- VII. Director's Current Policy Report - Justice Swanson
- VIII. Business Court Docket Process - Director Lee, Justice Swanson, Kim Moulton
- IX. Development of Business Court Docket Participants
- X. Future Meetings - The Honorable
- XI. Open Business
- XII. Adjournment

Organization, Funding and Resources

- PURPOSE** Understand the variety of ways states have created and funded BCL courts
- OVERVIEW** Law, custom and potential resources are different in every jurisdiction and will impact how the BCL court will be organized and structured.
- TOPICS**
  - What is the source of the authority to create a court?
  - What funding is needed?
  - What other potential sources for resources exist?
- TIME ESTIMATE** 40-45 minutes.



SLIDE 24



SLIDE 25

**Authority to Organize BCL CT**

*"a decision to be made..."*

**Three sources of authority:**

1. **Creation by the judiciary**
  - a) Order of the Chief Justice
  - b) Order of State Court of Last Resort
  - c) Promulgation of Court Rules
2. **Creation by the legislature**
3. **Creation by constitutional amendment**

***Consideration of a preliminary, "pilot" project?***

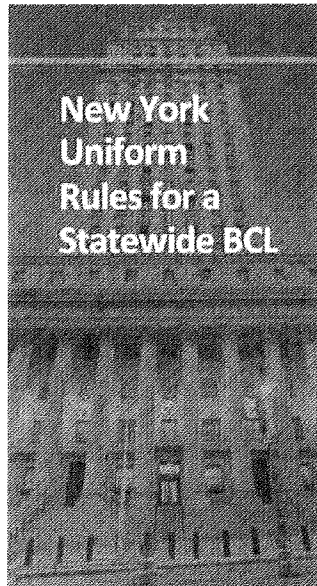
This slide lists sources of authority for BCL court creation in order of increasing difficulty of attainment.

- Are there other methods in your jurisdiction?
- Participants give examples of how their individual states have created, or would create, a BCL court.
- Do see any bottleneck concerns with some of the outlined methods to create a court? (Delays, public vote, lobbying efforts, availability of resources)
- What are the perceived benefits of having a pilot BCL court?





SLIDE 30



Section 8217 of Rules of the Commercial Division of the Supreme Court

(Article 8217 of the Rules)

Except as set forth in subsection (b), the filer(s) of the Uniform Rules of the Commercial Division, as adopted by the Court, shall pay the filing fee and the cost of the Uniform Rules, as established by the Court.

Albany County	\$50,000
Brooklyn County	\$750,000
Orange County	\$450,000
Westchester County	\$500,000
New York County	\$500,000
Westchester County	\$500,000
Queens County	\$500,000
Westchester County	\$500,000
Westchester County	\$500,000
Westchester County	\$500,000

(b) Filers who are:

(1) Attorneys in good standing in the State of New York or members of the bar of any other State or the District of Columbia; or

(2) Partners, officers, directors, or members of the board of directors of a corporation, partnership, limited liability company, or other business entity, shall pay the filing fee and the cost of the Uniform Rules, as established by the Court, in the amount specified in the table set forth in subsection (a).

(3) Filers who are not attorneys in good standing in the State of New York or members of the bar of any other State or the District of Columbia, shall pay the filing fee and the cost of the Uniform Rules, as established by the Court, in the amount specified in the table set forth in subsection (a).

(4) Filers who are not partners, officers, directors, or members of the board of directors of a corporation, partnership, limited liability company, or other business entity, shall pay the filing fee and the cost of the Uniform Rules, as established by the Court, in the amount specified in the table set forth in subsection (a).

(5) Filers who are not partners, officers, directors, or members of the board of directors of a corporation, partnership, limited liability company, or other business entity, shall pay the filing fee and the cost of the Uniform Rules, as established by the Court, in the amount specified in the table set forth in subsection (a).

(6) Filers who are not partners, officers, directors, or members of the board of directors of a corporation, partnership, limited liability company, or other business entity, shall pay the filing fee and the cost of the Uniform Rules, as established by the Court, in the amount specified in the table set forth in subsection (a).

SLIDE 31

## Funding & Resources

### • BCL SHOULD BE SUPPORTED BY STATE FUNDS

#### – MAKE THE CASE

- Work with state or local chambers to assess the business climate
- Work with the state ECD Commissioner (“another tool in the state economic development toolkit”)
- Meet with the appropriate bar committees and/or leadership to marshal their support
- Note that BCLs have the potential to generate revenue for the community and for local/state governments in the future

#### – DEVELOP A COMMUNICATION PLAN

- Press releases and coverage for targeted events and activities
- Recruit key supporters to write op-ed
- Use of court websites and social media
- Support of communication officers from other partners (chamber, bar, etc.)

Obtaining funding for the judicial branch is always challenging. It is not possible for a BCL court to be self-funding. Nor should it be. Both CCJ and COSCA have passed resolutions plainly stating that courts should not be revenue centers. As a branch of government, the judiciary should be state-funded. Yet legislators are always thinking about other priorities; generally speaking, funding must be taken from some other program and reallocated to the courts.

This slide suggests ways to leverage existing judicial branch resources to support a BCL court.

- What other strategies can you think of to obtain funding from the legislature?
- Are there other sources of funding available in your jurisdiction?



SLIDE 32



**Funding & Resources**

- **USING EXISTING COURTHOUSE RESOURCES**
  - Courtrooms
  - Chambers
  - Law Clerks
  - Court Staff

SLIDE 33



**Funding & Resources**

- **LEGISLATIVE APPROPRIATIONS**
  - Need a plan: Strategize with Adv. Comm.
  - Make a case for economic benefits to the State
  - Enlist Adv. Comm. members and members of the State Bar to advocate for more funding

*Example.* Georgia Judiciary requests \$1.6m to fund newly created Statewide Business Court

SLIDE 34



**Funding & Resources**

- **GEORGIA** – fully funded statewide courts
- **NORTH CAROLINA** – started with seed funding and now funds annually four regional business courts (five judges)

SLIDE 35



**Cultivate Local Law School**

- **Using Law School Resources**
  - Law clerks and interns
  - Access to Law School library
  - Access to research and law school faculty
- **Building Courtroom Facilities**
  - Chambers
  - Courtrooms
  - Option for Cameras in Courtroom (students able to watch in classrooms)
- **Publications**
  - Court opinions
  - Digests

## SLIDE 36

**Cultivate Local Law School**

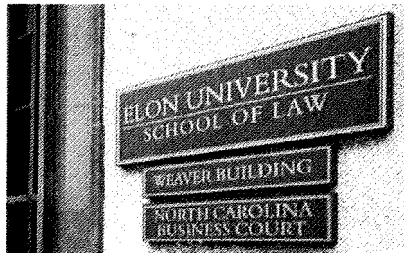
- **Use for office space and courtroom**
- **Publications**
  - Court opinions
  - Digests
  - Building state jurisprudence for complex litigation
- **Use of Law Faculty to Train Judges and Staff**

There may be a benefit to cultivating law professors with expertise in commercial and business law to teach some or all of the sessions provided for judges and legal staff. It removes potential ethical concerns when active practitioners are involved and helps to create a source for clerkships and adds prestige to the bench and the institution.

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SLIDE 37

**NC Business Court at  
Elon University**



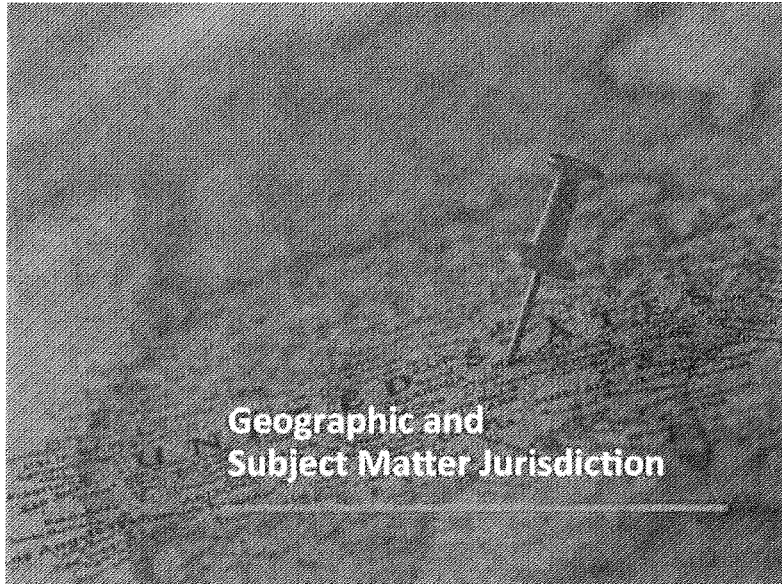
- NC has relationships with law schools in each region
- Provides courtroom space
- Access to law professors with expertise
- And law clerks

This slide details some of the benefits of an existing, but underutilized resource in most jurisdictions. North Carolina has been particularly successful in this regard.

### Geographic and Subject Matter Jurisdiction

<b>PURPOSE</b>	Review jurisdiction of BCL courts.
<b>OVERVIEW</b>	<ul style="list-style-type: none"><li>• Present methods of establishing BCL court jurisdiction.</li><li>• Present information about case assignment process.</li><li>• Review types of disputes that are usually subject to BCL court jurisdiction/assignment.</li></ul>
<b>OBJECTIVES</b>	Understanding of the types of disputes normally assigned to BCL courts.
<b>TOPICS</b>	<ul style="list-style-type: none"><li>• Present information regarding how BCL court jurisdiction is authorized.</li><li>• Review the typical case type disputes that are addressed by BCL court jurisdiction to include case assignment processes.</li></ul>
<b>TIME ESTIMATE</b>	40-45 minutes.

SLIDE 38



## SLIDE 39

### Geographic Jurisdiction

#### Statewide

Can be at one locations (e.g. MA) or in multiple locations but all constitute one and the same court.

- Indiana
- Iowa
- Maine
- Maryland
- Michigan
- Minnesota
- New Hampshire
- New Jersey
- New York
- North Carolina
- Ohio
- Oregon
- Rhode Island
- South Carolina
- West Virginia
- Georgia

Defining jurisdiction requires consideration of both geography and subject matter. This slide illustrates options for the former.

- How has geographic jurisdiction been defined in your State?
- What are the advantages and disadvantages of statewide and local/regional jurisdiction?
- Which would be the better approach for your State and why?
- If have statewide jurisdiction, should BCL court judges “ride circuit” or should litigants come to a central courthouse?
- Want to ensure statewide discovery, regardless of which approach is chosen.
- Question of forum shopping (i.e., judge shopping) if a particular judge is found in one local/regional court: How should this be addressed?



SLIDE 40



## Geographic Jurisdiction

### Local

Unique to a specific area or judicial district

- Atlanta\*
- Boston
- Kent County, Michigan
- Miami
- Nashville
- New Castle Co., Delaware
- Orlando
- Philadelphia
- Phoenix
- Pittsburgh
- Tampa
- Milwaukee Metro
- Williamson Co., TN

SLIDE 41

## Subject Matter Jurisdiction

- **Several approaches, depending on the nature of the forum:**
  - Is it specifically a “business court”?
  - Is it a more generalized complex litigation docket in which certain business disputes are subsumed?
- **Methodology**
  - By statute
  - By court order
- **Listing of included subject matter**
- **Minimum amount in controversy**
- **Exclusions**

How would (has) your jurisdiction establish(ed) jurisdiction of a BCL court?

- Is amount in controversy a suitable proxy for ensuring the appropriate level of complexity for assignment to a BCL court?
- What is an appropriate amount in controversy? \$50K? \$100K? \$250K? More?

In many jurisdictions a large percentage of cases are small business cases, so in those locales you would need a smaller amount in controversy. Alternatively, you could have a separate track for simple, small business disputes. (Perhaps on stipulated facts?) This could be a good training ground for BCL court judges (and for young lawyers).

Another option to consider is a kind of BCL court “rocket docket: – a streamlined track for the BCL court that does not require any specific minimum amount in controversy. It is a good way for new judges to get experience adjudicating BCL cases and to give young lawyers a place to go try cases and get some business trial experience that they’re not getting anymore. It also avoids the elitism argument and attracts the growing number of small business disputes involving people who otherwise could not afford to go to court. As part of such a program, you can either limit or get the parties to waive motion practice.

Those designing business courts should be aware that once subject matter jurisdiction is set (whether dollar amount or case type), making changes will create ripple effects throughout the court system and should not be undertaken lightly.

## SLIDE 42

**Examples – Complexity Levels**

- Amount in controversy
- Multiple parties/multiple claims
- Large class actions
- High volume of technical evidence
- Significant expert testimony
- Substantial post-judgment judicial supervision
- Transnational issues
- Difficult/novel legal issues

Do you agree that these factors are appropriate metrics for determining which cases should be assigned to a BCL court?

Are there other factors, not on this list, that you would include as indicia of a suitable level of complexity for a specialized docket?

Another issue that may need to be considered is how cases will be handled where only equitable relief is sought, such as non-competition and intellectual property disputes.

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SLIDE 43

**Exclusions – Some Examples**

- Disputes involving consumers
- Tax cases
- Commercial real estate disputes
- Construction disputes
- Professional fee disputes/collections
- Products liability
- Discrimination cases
- Residential real estate disputes and foreclosures
- Proceedings to enforce judgments
- Declaratory judgments (personal/property injury)
- Occupational health & safety

Not all jurisdictions agree on what types of cases should be included and excluded. This is partially a function of judicial philosophy, partially a function of the way certain States have created specialty courts (*e.g.*, some States have their own tax courts), and partially a reflection of the types of business found in discrete geographies. Commercial real estate, construction, and professional malpractice disputes are examples of subject matters that are treated differently in different States that have BCL courts. In contrast, most such states exclude discrimination cases and any disputes involving consumers.

Additionally, there should be a decision about what to do about attempts to confirm or reject arbitral awards in the business court when the case otherwise fits the court’s jurisdictional guidelines.

**Judicial Selection**

- PURPOSE** Finding the “right” person to serve as judge of the BCL court will be critical to its success.
- OVERVIEW** Depending on the method of judicial selection in the state, work to create a new court should include ways to attract and recruit the most qualified judges.
- TOPICS**
- Methods of choosing BCL court judges.
  - What makes a successful BCL court judge?
  - How to attract qualified BCL court candidates.
- TIME ESTIMATE** 35-40 minutes.

## SLIDE 44



Small Group Breakout (no more than 10 minutes) Identify preferred qualifications of a BCL court judge and why such qualifications are relevant.

## SLIDE 45

### Methods of Selection

- **Method may be prescribed by statute, court rule or administrative order, or by the State Constitution**
- **Appointment**
  - By the Judiciary (e.g., the Chief Justice)
  - By the Governor
- **Election**
  - *Ab initio*
  - After initial appointed term
- **Hybrid Methods**
  - E.g., Nominating Commission that makes recommendations to the Governor or the Chief Justice
- **Assignment**
  - Judge currently in office
  - Assigned by the Chief Justice or Presiding Judge to the BCL docket



## SLIDE 48

**Qualifications – Appointment/Assignment**

- **Subject matter experience**
  - Transactional lawyer
  - Commercial litigator
  - Bankruptcy lawyer
- **General experience with document-intensive, complex litigation**

If a current judge is assigned or the new judgeship is subject to appointment (as opposed to election), this slide lists pertinent qualifications to look for.

- Discuss why it is important to have a judge with business or commercial law knowledge and experience. This is a key benefit of offering a specialized judicial forum to BCL litigants.
  - Discuss whether bar associations and their leaders should play a role in selecting judges for business courts when openings arise.
  - States which have created BCL courts report that the success of the court is strongly linked to the person selected to serve as judge.
-



SLIDE 49



**Attracting Qualified Individuals  
to the Bench**

- **Judicial tenure**
  - Term limits
  - Renewal
  - Terms of office where election is necessary
  - Retention
- **Salaries**
- **Retirement Benefits**
- **Involve the Bar in recruitment of qualified candidates**

In an era in which the disparity between monetary compensation earned by judges versus practicing lawyers (and especially business lawyers and commercial litigators, many of whom practice in large law firms), finding ways to attract qualified individuals to the bench presents considerable challenges. This is especially true for BCL courts. Unlike general jurisdiction courts, where many former prosecutors and public defenders may be found among the ranks of the judiciary, one is less likely to find lawyers in government service with the right set of credentials.

This slide identifies some methods of attracting qualified individuals to the BCL court bench.

- Many such individuals can earn considerably more serving as commercial arbitrators. What kinds of incentives would attract them to choose a judicial career instead?  
Some people may see it as an opportunity:
  - o For advancement (*e.g.*, to a federal court or appeals court)
  - o For doing private sector dispute resolution after retirement (*e.g.*, as an arbitrator or mediator)

- Can you think of other techniques or incentives to attract highly qualified individuals to the BCL court bench?
- Recruit lawyers from State or municipal corporation counsel offices and from certain state regulatory agencies (*e.g.*, State banking, securities, or insurance commissions)?
- Want to assure:
  - o Competence
  - o Diligence
  - o People skills
  - o Substantive commercial expertise
- If judges have to work through judicial rotations in a court of general jurisdiction, (family, criminal, etc.), this may be a disincentive for business lawyers to want to become a judge.
- If you don't have a stand-alone court, this can be another disincentive, as they'll have to work their way up through the judicial hierarchy.

## SLIDE 50

**BCL Judge Desiderata**

- **Can draw from existing, experienced judges**
  - Familiarity with commercial/corporate/business-related issues and/or complex litigation is a plus
- **Retired or former state or federal judges**
- **Attorney candidates** (see previous slide)
  - Typically experienced commercial or bankruptcy litigators or transactional lawyers
  - Trial experience is helpful but not indispensable
- **Ability to lead, innovate, and manage a process**
- **Demonstrated sense of public service and importance of maintaining public trust/confidence**

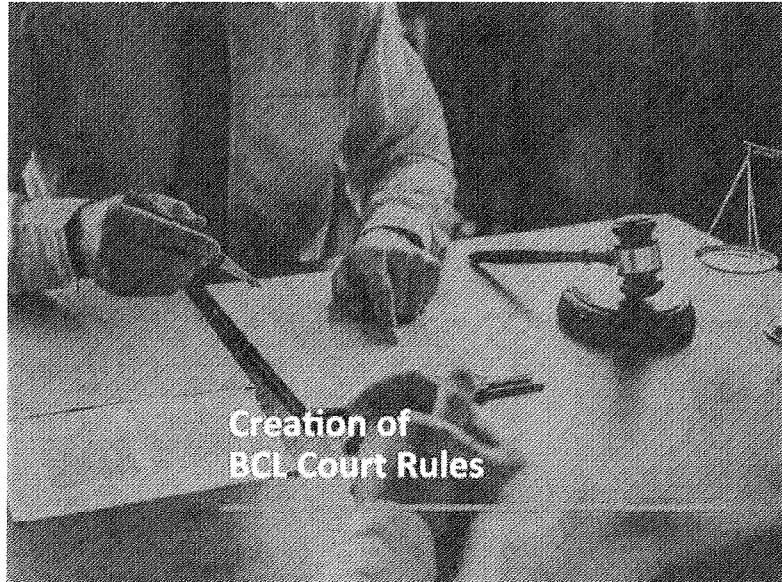
This slide continues the discussion by identifying some of the desirable characteristics of individuals suitable for the BCL bench.

- Can you think of additional characteristics that should be added to this list?
- Do you agree that a transactional lawyer with no trial experience would be a good choice for a BCL court judge?
- Similarly, is a general jurisdiction judge with no particular experience or background in business or commercial law a good choice?
- Newly minted BCL judges should be required to complete specialized training, which would include substantive law topics as well as trial practice and evidence.

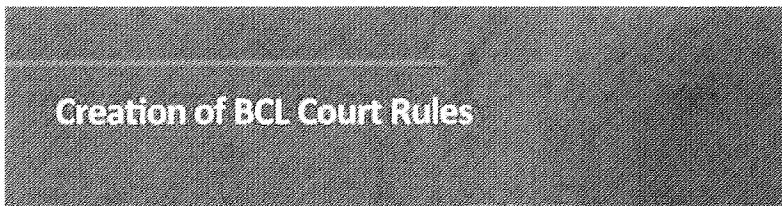
### Creation of Business Court Rules

<b>PURPOSE</b>	Consideration of common court and case events for which special rules or procedures are needed.
<b>OVERVIEW</b>	Develop understanding of the importance of court rules and procedures in a complex litigation setting.
<b>TOPICS</b>	<ul style="list-style-type: none"><li>• Review and discuss court events for which rule guidance action is generally provided.</li><li>• Review and discuss the importance of developing rules to establish a predictable and efficient process for dispute resolution.</li></ul>
<b>TIME ESTIMATE</b>	45-60 minutes.

SLIDE 51

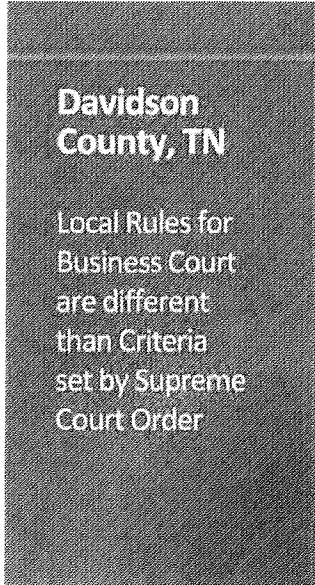


SLIDE 52



- As authorized by State high court, Chief Justice, local chief administrative judge, or state statute
- Assistance from Adv. Comm. is recommended
- Guidance from existing BCL Court Rules in other jurisdictions
- Possible pilot programs
- Periodic Adv. Comm. and state high court review and amendment as necessary
- May be supplemented by individual BCL court judge's standing order, provided the order is not incompatible with the Rules

SLIDE 53



**Guide To The Business Court Docket—Phase 2**

Changes to the Order Establishing the Business Court Docket from Phase 1 to Phase 2. Phase 1, issued April 8, 2015, by the Supreme Court of Tennessee, established the local rules for conducting proceedings in Phase 1 of the Pilot Project. The Business Court Docket is governed by the Tennessee Rules of Civil Procedure, the Tennessee Rules of Evidence and the Tennessee Unified Judicial Code (Tennessee Code). These operating and administrative rules of the Business Court Docket are contained in this Guide.

**Introduction:**

**Explanation of Updates of Guide From Phase 1 to Phase 2**

Updates by the Supreme Court to March 2015 of the Order establishing the Business Court Docket Pilot Project (the "Pilot Project") to Guide was prepared for the purpose of providing an updated version of the Pilot Project.

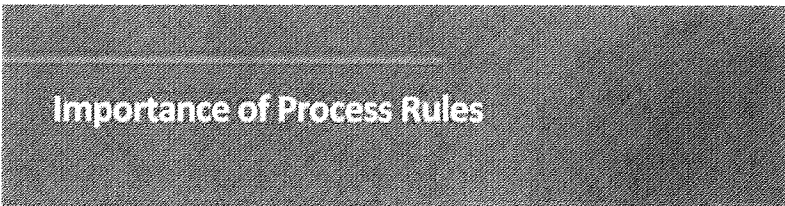
With effect on the April 8, 2017 Supreme Court order establishing Phase 2 of the Pilot Project, provided below is an updated Guide.

The primary change from Phase 1 to Phase 2 is in Article 2 of the Guide. This Section provides the criteria for designation of a case to the Pilot Project. The April 8, 2017 Supreme Court order changes the amount threshold for designation of a case to the Pilot Project from \$500,000 to \$1,000,000, and changes the criteria of the criteria which qualify a case to be designated to the Pilot Project, in that, in such matters, the court shall designate a case to the Pilot Project, in that, in such matters, the court shall designate a case to the Pilot Project, in that, in such matters, the court shall designate a case to the Pilot Project.

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SLIDE 54



- Help ensure efficient processing, fairness, and outcome predictability
- Provide guidance to litigants re: timely and efficient dispute resolution
- Create sense of effective management
  - Promote public trust and confidence, especially in the business community
- Align court actions with available funding and staffing resources
- Support environment of responsible court governance
- Provide guidance for court staff

Discussion Point: Why are rules and procedures even more important for a BCL court than for a court of general jurisdiction?

Whatever rules are chosen for the business court, they can be used to experiment practices and procedures on a pilot basis for potential use elsewhere in the court system. The business court may helpfully serve as a controlled environment or “laboratory” for rules and procedures.

A few additional, fundamental points about BCL court rules should be noted (the following two slides should be largely self-explanatory):

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## SLIDE 55



### About BCL Court Rules

- **They are modeled after and adapted from general civil rules**
- **They are layered on top of an existing body of procedural rules, which apply unless otherwise expressly provided:**
  - Rules of Civil Procedure
  - Local Rules
  - Rules of Evidence

SLIDE 56



**Examples**

- **Case designation to BCL Court calendar**
- **Use of Forms/Standing Orders**
- **Motion Practice**
  - Pre-filing requirements to confer and try to resolve
  - Limitations on motion length, style
  - Scheduling
- **Mandatory vs. elective mediation**
- **Case management conferences**
- **Discovery limitations (interrogatories, depositions)**
- **Use of witness declarations and expert statements**

**Assignment:** Cases that meet the applicable criteria (*i.e.*, subject matter jurisdiction, amount in controversy, etc.) can be assigned to the BCL Court. To a certain extent, these are self-identifying, as the lawyer(s) filing the case will often seek to designate it as a BCL case. Even if not so designated, a judge may *sua sponte* designate a case as belonging on the BCL court calendar. Conversely, a case filed as a BCL case may be rejected and sent to a different calendar. In some jurisdictions (*e.g.*, NC), the Chief Justice designates cases for the BCL calendar.

**Forms and standing orders** are useful case management tools and are commonly used by all judges, not just BCL court judges. The same is true for **case management conferences**.

**Mediation/ADR** will be considered shortly as its own topic.



## Staffing

- PURPOSE** Understand the staffing needs required to support a successful BCL court operation.
- OVERVIEW** While BCL courts require staff positions similar to other general jurisdiction courts, the unique jurisdiction and procedures of the BCL court require special skills in key positions.
- TOPICS**
- Staff positions required for successful BCL court operation.
  - How to determine needed staffing levels.
- TIME ESTIMATE** 10-15 minutes.

## SLIDE 57



## SLIDE 58

### Determining Staffing & Resources

- **Using historical projections for pilot program**
- **Using NCSC Workload Assessment Process**
  - Documentation of case filings by case type
  - Time studies
  - Weighted case factors (multiple parties, difficult legal issues, extensive discovery needs)
  - Determine appropriate number of judgeships
  - Determine appropriate number of staff positions (can be challenging given complexity of BCL cases)
- **BCL Court as a “High Performance” Court**
  - Use NCSC High Performance Ct. Framework

The workload assessment model developed by NCSC is used by courts nationwide to calculate and justify staffing needs and resource expenditures.

- How, if different, is staffing determined by courts in your jurisdiction?

The high-performance court methodology proceeds from certain administrative management principles imbued with a task-driven culture of efficiency and effectiveness. Operational practices are determined by leadership of the local judiciary and the clerk of the court, working cooperatively. Among the principles animating this approach are:

1. Giving each case individual attention;
2. Treating cases proportionately;
3. Employing court procedures that are demonstrably fair and easy to understand;
4. Exercising judicial control over the legal process; and
5. Collective and cooperative determination of court policies and procedures.

Business courts often have motion-heavy dockets. Should the performance standards used for other courts and the allocation of staff be amended for business courts to account for this difference in practice?

The next slide delineates typical BCL court staffing, which is not very different from normal civil court staffing, and includes:

1. the judge and chambers staff, which includes the judge's law clerk(s), administrative assistant, and the judge's case management clerk (this function may also be divided between the administrative assistant and the law clerk(s));
2. courtroom staff, which includes the judge's courtroom deputy (usually assigned by the clerk's office) and the bailiff (usually furnished by local law enforcement, such as the sheriff's office); and
3. the clerk's office, which has front-line responsibility for new case intake (including, perhaps, reviewing designation of a case for the BCL court), case assignments to judges, overall case management, financial transactions, and interaction with lawyers and the public.

## SLIDE 59



### JUDGE

- Law clerks(s), legal research and drafting duties
- Case management clerk: CMS\* entries, schedules, tracks case progress and liaises with court staff and lawyers
- Administrative assistant: clerical assistance and back-up for case manager
- Supervised by judge
- \*CMS = Case Management System

### COURTROOM

- Courtroom clerk (generally assigned from clerk's office) assists with courtroom clerical duties and CMS\* docket updates
- Bailiff (may be law enforcement officer) provides court security and monitors courtroom functions and behaviors
- Supervised by judge

### CLERK'S OFFICE

- Court Clerk reviews new cases for complexity level, case assignments to judges, financial transactions, attorney instructions, public services
- Supervised by clerk of court or court administrator

Obviously, the duties performed by many of these employees are fluid and may change depending on workload, degree of other available resources, and local court rules and procedures.

**One point that should be emphasized is that judges of BCL courts must have their own law clerks in order to manage review of the high levels of documents and research necessary to decide motions and the case as a whole. These law clerks are often recent law school graduates who serve for a term (typically 1-2 years) but may also be career law clerks.**

- In your opinion, does your court system have staff support adequate to support a BCL court?

### Best Practices

**PURPOSE** Understand the practices required for the most successful operation of a BCL court

**OVERVIEW** The study of complex commercial litigation and the experience of other BCL courts have produced best practice recommendations that should be considered.

**TOPICS**

- Examples of best practices adopted by successful BCL courts and utilized for efficient and effective adjudication of complex commercial cases

**TIME ESTIMATE** 10-15 minutes.

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### SLIDE 60



## SLIDE 61

**Best Practices (1)**

- **Single judge assignment from case filing date**
  - Cradle to grave
  - Judge assumes “hands on” case ownership and responsibility for managing case events and party discussions
  - Establish proportional oversight commensurate with number of parties and level of complexity
- **Initial complexity review and track assignment**
- **Early and active judicial involvement is essential**
  - Initial case management conference within 30 days
  - Establish case resolution timeline
  - Involve counsel from the outset in the importance of adherence to procedures and case management

## SLIDE 62

**Best Practices (2)**

- **Promote awareness of judge’s managerial approach and expectations**
  - Court staff
  - Parties and counsel
- **Emphasize need for productive motion practice**
- **Create discovery plan (rule or standing order)**
- **After discovery, ascertain witness attendance needs and establish exhibit management protocols**
- **Timely rulings on motions**
- **Publish opinions where necessary to promote transparency and predictability**

## Part II – Business Court Operation

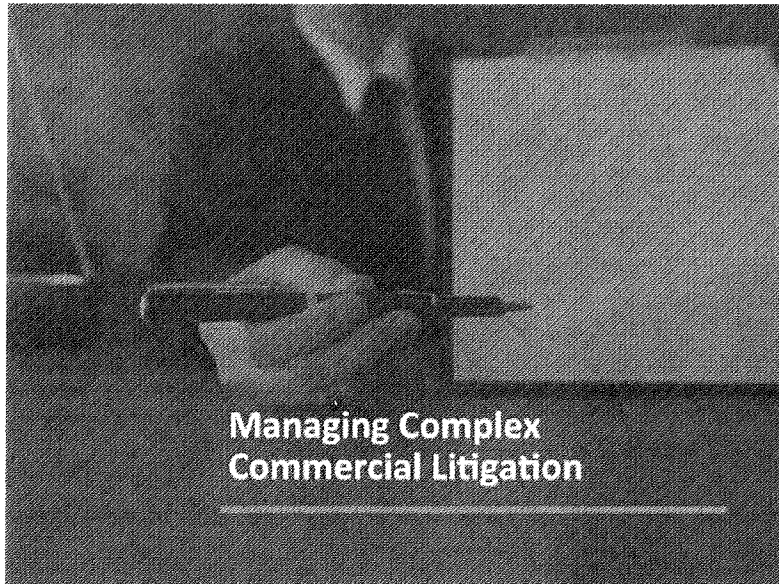
### SLIDE 63



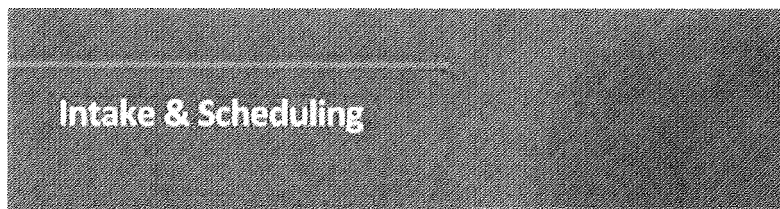
### Managing Complex Litigation

<b>PURPOSE</b>	Understand all aspects of the processes involved in the trial of a complex litigation case
<b>OVERVIEW</b>	BCL court judges can be instrumental in adopting the best practices to aid in the most efficient and effective processing of the cases before them.
<b>TOPICS</b>	<ul style="list-style-type: none"><li>• Case processing issues and techniques</li><li>• Use of special masters</li><li>• Handling confidential information</li><li>• ADR and settlement negotiations</li><li>• Use of technology</li></ul>
<b>TIME ESTIMATE</b>	45-60 minutes.

SLIDE 64



SLIDE 65



- **Initial complexity review & Tracking**
  - Expedited
  - Standard
  - Complex
- **Conferences**
- **Orders**
- **Deadlines for Dispositive Motions**
- **Trial Dates**



There is a huge disconnect between incentives governing the lawyers and incentives governing the clients. There should be a case management schedule that the client sees.

The judge should consider inviting the clients to a case management conference and telling them, "We're here to spend your money."

One technique for a judge to consider in appropriate cases is to give the clients an estimate of what the judge thinks they'll spend on litigation. It can serve as a "barometer": If the bill for legal services passes that estimate, the client will want an explanation, which can speed things up.

This will also work for deadlines. Clients should know the deadlines set by the judge, so that they can hold their attorneys accountable if necessary.

The initial scheduling conference is important to set the tone and manage discovery. Many cases are small business cases, so you need to rein in the lawyers and have proportionality in discovery. An extreme example makes the point: You don't want to spend \$50,000 on discovery for a case that's likely worth only \$20,000.

Motion practice is extremely important in BCL court. In many general jurisdiction courts, there is not much briefing done in the civil docket. BCL court is different – there is a lot of briefing.

At intake, the court should do a complexity analysis of the case and then assign it to a particular track: *e.g.*, "expedited," "standard," or "complex."

Every BCL court case should have a case management order that sets significant benchmarks. Having a cut-off date for discovery is critical for case management. And there should be a target date for having a hearing on dispositive motions prior to trial. Lawyers often need that type of case management order-created discipline. Once you're at the dispositive motion deadline, it should not be changed except for very compelling and extraordinary reasons.

## SLIDE 66



## Special Masters

- **Pros and Cons**
- **Academia vs. Private Practice**
- **In some states, may need consent of the parties**
- **Ethical Considerations**

What is a “special master”? Typically, he or she is an individual lawyer or law professor appointed by a judge to hear evidence on behalf of the judge in a particular case and to make recommendations to the judge about the disposition of the issue. A judge will send some part of a case to a special master who will serve as the judge’s eyes and ears and take a first cut at difficult issues. The parties can ask that they be given a report and recommendation that may be good enough to avoid having the judge rule on the matter (the judge can simply adopt the special master’s recommendation).

Certainly, there are niche areas in business law and commercial law where the use of a special master with the requisite expertise is extraordinarily useful. The master can help to resolve – or, even if not resolve, frame – these arcane issues for trial. For discovery purposes it would help a lot. For example, when someone gives the judge too many documents, and the judge needs to decide what to read.

If you have the right person they can facilitate the case because it’s their niche, and they really understand it. But, if you get the wrong special master it can be awful.

In some states, the availability and use of high-level or quasi-judicial court employees, such as special referees or magistrates, may be able to fill the same role as a master but at little or no cost to the parties.

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SLIDE 67



**Handling Confidential  
Business Information**

- **Non-Disclosure Agreements**
- **Non-Solicitation Covenants**
- **Protective Orders**

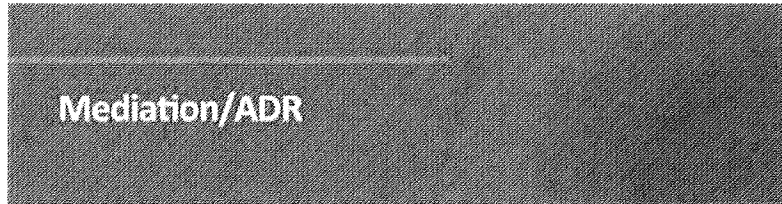
Some judges have a standing order dealing with such confidential information. It is something that has to be dealt with early on.

Procedurally, if a business that has a trade secret problem files a complaint, you need to establish whether, in terms of the confidential information itself, something separate needs to be filed. It is problematic by nature, since the party may have to disclose what the trade secret is at the outset. If both parties are willing to keep it secret, they might agree not to file it. But a protective order is filed for the judge to decide whether it is confidential.

Problems can arise, however, if a newspaper or another 3rd party wants to see what it is.

At the other end of the spectrum, there is a significant problem with the over-designation of information as confidential.

## SLIDE 68



- **Types**
  - Compulsory
  - Permissive
  - Court Rule or Individual Standing Order
- **Mediator Qualification Standards**
  - Training programs for mediators
  - Matching mediators by experience to case type
- **Maintain a roster of neutrals**
- **Establishing time limits**

Some jurisdictions require mediation in BCL cases; in others, it is optional.

- Assuming that mediation/ADR (referred to collectively from here on as “mediation”) is desirable in a particular case, which type of mediation do you think is most effective?
  - o Compulsory
  - o Permissive
  - o Court Rule
  - o Individual Judge’s Scheduling Order
- Should the BCL court establish mediator qualification standards by rule?
- What is a reasonable time limit for mediation? A sweet spot for mediation is prior to expert witness depositions, which are usually a huge cost for the parties. That, in turn, suggests that the cutoff for mediation should be at some point before the discovery process ends.
- Should the roster of neutral mediators be specific to the BCL court or part of a more general roster maintained by the courts of general jurisdiction?

One category of cases in which mediation makes a big difference is where there is outside money (e.g., insurance coverage), though often there is a question about who pays for the mediator’s services.

Mediation is something of a cottage industry. Like many other professionals, mediators are always trying to drum up business. On the other hand, they can be extraordinarily effective in promoting settlement.

Cost is a factor. Typically it will have to be borne by the parties. In BCL cases, this may not be as much of an issue. Note, however, that in some places (e.g., NY) mediators volunteer their services for the BCL courts, up to a certain number of hours.

Judges cannot require parties to mediate for money. This has to be done by rule of court if at all.

Likewise, judges should not be involved in selection of mediators. First, there is an appearance of impropriety or a lack of impartiality if a judge selects a friend or professional acquaintance. Second, if the mediator fails or if they're leaning a certain way, then it looks like the judge is responsible.

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## SLIDE 69



### Managing Settlement

- **Extent of Involvement**
  - Court Rule or Individual Standing Order
  - Use of Other Judicial Officers?
  - Requirements for Attorneys
- **Ethical Considerations**

- Should settlements be confidential or public?
- Some judges, particularly those with substantial civil litigation experience, are good at getting the parties to settle.

- Cases never settle unless the lawyers are devoting attention to the file. One of the key tasks for the judge is to make sure the lawyers are “touching the file.”
- Should there be special training for judges in managing settlement?
- What are the ethical constraints on judges in connection with settling cases?

There is a line between encouraging settlement and coercing it. Judges must not cross that line. Rule 2.6(B) of the ABA Model Code of Judicial Conduct (which may not have been adopted in every jurisdiction) treats this issue in detail. There are also some judicial opinions and disciplinary opinions in this area.

Judges should be in charge of the process, not the result. Parties and counsel in BCL cases tend to be more sophisticated than those in the general civil docket. They can reach conclusions and solve problems on their own. Judges should simply create an environment where the lawyers can come to an answer with which they and their clients are satisfied.

Dispositive motions are often an impetus to settlement.

In jury trials, it helps to ask the lawyers to prepare jury instructions on issues that cannot be settled. This may even guide discovery efforts

SLIDE 70



## Special Actions

- **Coordinating Multi-Jurisdictional Litigation**
- **Class Actions**
- **Receiverships**

SLIDE 71



## Other Issues

- **Streamlining Trials**
  - Stipulations
  - Motion practice
- **Jury trials**
- **Managing Experts**
- **Technology and Facilities**
  - Electronic filing
  - Video/teleconferencing
  - Electronic/digital evidence
  - Computer monitors/keyboards



**Jury trials:** Data suggest that roughly 80% of BCL court cases do not involve a request for jury trial. Bench trials are more work for the judge, as they require a tremendous amount of attention to detail. Many BCL court trial judges feel their job is predominantly about pretrial procedures, though, to be sure, those are equally important in jury cases.

- In your jurisdiction, how many BCL jury trials are there each year?

One of the challenges in jury trials is the relative lack of good jury instructions in BCL cases, in contrast to general civil and criminal cases. The problem is how detailed and specific the instructions get in BCL cases. It is a much bigger challenge than general jurisdiction. BCL judges should share jury instructions with each other to alleviate this problem.

**Expert witnesses:** Expert testimony in BCL cases can be quite complex. One way to manage it, particularly in a bench trial, is to deviate from the usual order of proof by bringing both sides' experts in to testify at roughly the same time. In effect, they help to cross-examine each other. This also helps streamline and reduce the length and expense of expert testimony.

There are some ethical pitfalls when it comes to expert witnesses. Judges must be careful not to interfere unduly with a party's ability to adduce expert testimony or to conduct independent research (including consulting outside experts) as to factual issues, including industry practices and standards, trade usage, etc. A judge may, however, ethically consult an expert on the *law*.

Business courts may consider whether to direct a "meet-and-confer" of the parties and their experts to see if there are issues that the experts agree on and, therefore, do not need to testify about, in favor of a fact stipulation.

**Technology and Facilities:** Technology and facilities are another area of concern. BCL courts often need significant technology support (video hearings, digital displays, etc.). In addition, there is a facility management challenge (*e.g.*, so many lawyers – where will they go?). Judges must have systems for this – they aren't thinking about these issues on day one of the case.

**It is vitally important that BCL court judges have access to qualified, technologically savvy, court staff.**

The following are important aspects of an adequately equipped, BCL court:

- Electronic filing of pleadings and documents is critical to the successful and efficient operation of BCL courts
- Video and teleconferencing use in the courtroom:
  - Used at the judge's discretion
  - Accommodates remotely located witnesses who cannot easily travel to court
  - Assists with overall witness testimony and related costs

- Database information systems and interactive software are available for judges, court staff, and authorized attorneys.
- Electronic/digital evidence presentation systems should be available in the courtroom:

Computer monitors are typically located at the witness stand, courtroom podium, jury box, attorney tables.

Keyboard entry stations are often situated at the bench, clerk's station, courtroom podium, and attorney tables.

An electronic document camera and video display system, typically located at the podium or at a separate in-courtroom station.

- A wireless microphone recording system typically located in the area of the judge's bench or court record station.
- Computer keyboard and monitor access is typically located at the bench or clerk's work station.

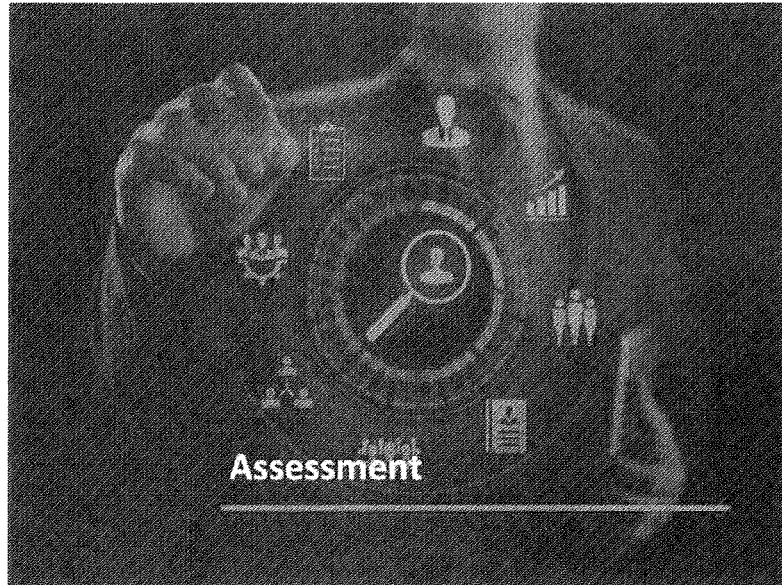
Judges are becoming more comfortable with the use of technology. Most modern courtrooms have this type of equipment; access and use are usually managed by the presiding judge or designated court staff.

In addition, trial counsel and their assistants are frequent users of courtroom technical equipment. It is therefore important that before being allowed to use it, they receive training on the equipment by court staff.

## Assessment

<b>OVERVIEW</b>	High performing courts support the adoption of standards and the use of performance measures to identify problems, improve practice, and share information with the public about the court's performance.
<b>TOPICS</b>	<ul style="list-style-type: none"><li>• What measures are most helpful and important for BCL courts?</li><li>• How can BCL courts best go about measuring their performance?</li><li>• What are the most effective types of assessments that can be used?</li></ul>
<b>TIME ESTIMATE</b>	40-45 minutes.

## SLIDE 72



## SLIDE 73

**Purposes of Performance Measurement  
(e.g., COURTOOLS)**

- Collect and preserve evidence of success in meeting the needs and expectations of court users.
- Useful for reports to coordinate branches of government and to the public.
- Helps establish the framework of discussions and evaluations within the judicial branch of institutional performance
- Supports regular feedback to Supreme Court or appointing authority
- Enables potential revision of structure, process and procedure as demonstrated by data
- Provides information to funding authority to demonstrate value

CourTools are used to measure and assess court performance and are suitable for adaptation to BCL court operations. The ultimate goal is to enhance public trust and confidence in the courts.

Essential indicators include accountability, effective governance, and communicability of the availability and accessibility of justice to the public and to co-equal branches of government.

## SLIDE 74

### Questions for Operational Self-Assessment

- Is the court meeting expectations of the public and the business community?
- Do they consider the court to be accessible, fair, and trustworthy?
- Are procedural rules and management practices being consistently used and applied?
- Are assigned staff duties effectively and efficiently performed?
- Are allocated staff and funding resources adequate?

This slide is self-explanatory, and basically asks whether court leadership and staff are doing the right things the right way.

- Can you think of other internal assessment questions?

In order to assess the operations of a BCL court, it may be useful to divide performance evaluation into four principal operational categories:

- i. Effectiveness;
- ii. Efficiency;
- iii. Procedural satisfaction; and
- iv. Productivity.

These are explored on the next two slides.

## SLIDE 75

### BCL Court Assessment Areas (1)

#### Effectiveness

- Gauges match between stated operational goals and achievement:
  - Consistent enforcement of case management rules, principles & best practices
  - Trial date certainty
  - Effective use of court staff
  - Organization-centric communication about operations and their assessment
  - Juror usage

#### Efficiency

- Gauges the variability and stability in key operations and procedures:
  - Clearance rate
  - Age of pending cases
  - Case classification and filing integrity
  - Use of case progress tracking
  - Enforcement of case action deadlines and timelines

## SLIDE 76

### BCL Court Assessment Areas (2)

#### Procedures

- Gauges users' perceptions about fair and accessible court services:
  - Clear and understandable access to justice
  - Overall perception of fairness
  - Timeliness of scheduled hearings and actions
  - Timeliness of completion of tasks and final resolution
  - Quality and competence of services provided by staff

#### Productivity

- Gauges effectiveness of use of judicial and staff time:
  - Time to disposition
  - Estimated cost per case
  - Workflow/staff time related to case management processes
  - Use of technology in support of judicial and administrative performance

SLIDE 77

## Sample Assessment Methods

### External Assessment

- Attorney and public surveys or questionnaires
- Review of community perceptions through Adv Comm
- Juror exit questionnaire
- Website ratings re: access and transparency of public information and records
- Website suggestion boxes
- Review of appellate actions and outcomes

### Internal Assessment

- CourTools studies and reports (e.g., filing to disposition time, age of pending cases, resolution time for motions, success of ADR, timeliness of opinions)
- Staff surveys related to needs/ ideas for improvement
- Meetings and discussions with all court employees
- Create strategic plan re: mission, governance, communications, and operations
- Staff advisory committee

SLIDE 78

## Tennessee Survey (external assessment)

**Tennessee Business Court Docket Evaluation**

\* 1. Are you:

- Attorney As Plaintiff
- Party Plaintiff
- Attorney for Defendant
- Party Defendant

\* 2. Is this your first experience with the Business Court Docket in Tennessee?

- Yes
- No

\* 3. Have you participated in a specialized Business Court in other states/countries?

- Yes
- No

\* 4. How would you rate the level of judicial involvement in your case?

Very low (Court involves minimal in decision making and/or resolution of disputes)

Low

Moderate

High

Very high (Court is heavily involved in decision making and/or resolution of disputes)

\* 5. How would you rate the level of case management in your court?

Very low (Court involves minimal in decision making and/or resolution of disputes)

Low

Moderate

High

Very high (Court is heavily involved in decision making and/or resolution of disputes)

## Training for BCL Judges

- OVERVIEW** Review training expectations for specialized judicial officers handling BCL cases.
- TOPICS**
- Periodic training programs on a variety of substantive, procedural, and ethics topics.
  - Separate focus on initial training (shortly after election or appointment) and annual, supplemental training on BCL law updates and judicial ethics.
- TIME ESTIMATE** 15 minutes.
- 

### SLIDE 79





SLIDE 80

### Initial Training Topics

- Law of Business Enterprises
- Commercial Transaction Law
- Statutory/Contract Interpretation
- Judicial Review of Agency Rulemaking and Adjudication
- Judicial Ethics

SLIDE 81

### Periodic Training

- **Comprehensive, Initial Training**
  - Shortly after election or appointment
  - Should cover state, federal, and international legal topics relating to subject matter jurisdiction and judicial conduct
- **Annual Supplemental Training**
- **In-house vs. Outsourced**
- **Mentorship Programs**

## SLIDE 82

**Supplemental Training**

- **Key Substantive BCL Updates**
  - Statutory developments
  - Case law developments
- **Judicial Ethics Training**  
(can be combined with annual judicial ethics requirements for all judges)
- **Education Programs Offered by National Organizations**
  - American College of Business Court Judges, George Mason University
  - ABA Section of Business Law and Business Courts

**Final Wrap-Up & Review**

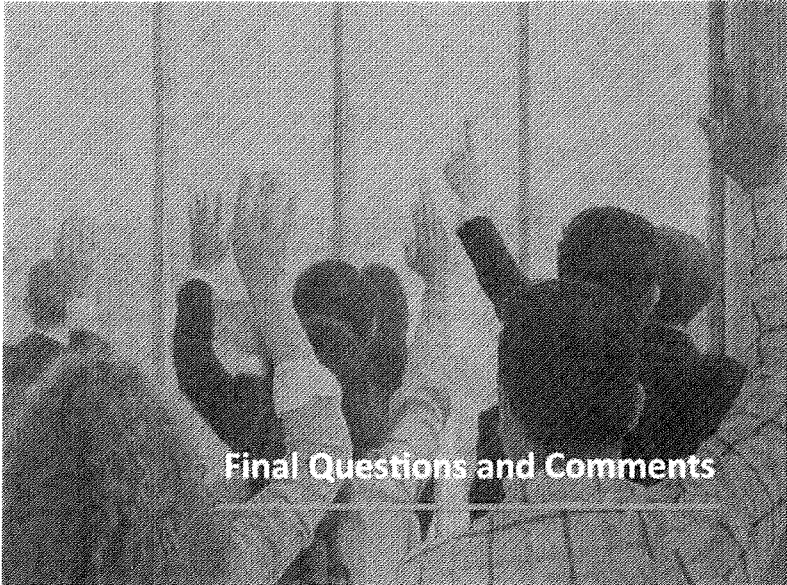
**TOPICS** Review some of the principles we have discussed in the context of identifying “best practices” for BCL courts.

Provide an opportunity for final questions and comments from class participants.

**TIME ESTIMATE** 15 minutes.

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SLIDE 83



# EXHIBIT 9

# Through the Decades: The Development of Business Courts in the United States of America

By Lee Applebaum, Mitchell Bach, Eric Milby, and Richard L. Renck\*

*This article interprets the meaning of the term “business court” as it has developed through the variety of implementations and describes the successful development, and occasional failure, of those courts across the country.*

## INTRODUCTION

Once the concept of a specialized business court applied only to the Delaware Court of Chancery. Since the early 1990s, however, the concept has taken hold and expanded continuously across the United States with increasing momentum. This article completes a trilogy of *The Business Lawyer* articles charting the history of state “business courts” and explains what that term has come to mean in different jurisdictions, each with different challenges.<sup>1</sup> As detailed below, many

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Mitchell L. Bach is an experienced commercial litigator with extensive experience in securities fraud, RICO, construction litigation, intellectual property litigation, environmental litigation, banking litigation, real estate litigation, and major commercial disputes. He is a member of Eckert Seamans Cherin & Mellott, LLC located in the Philadelphia office.

Eric C. Milby is a shareholder of Lundy Beldecos & Milby, P.C. in Narberth, Pennsylvania, outside of Philadelphia. Eric’s practice involves a wide variety of commercial litigation matters with a special emphasis on “business divorce,” or intra-company disputes among owners. He is a contributing author of *Litigating the Business Divorce* and lectures frequently on the topic of business divorce for the American Bar Association, the Philadelphia Bar Association, and other groups.

Richard L. Renck engages in a litigation and advisory practice that centers on advising directors, senior executives, and owners of Delaware entities on matters of Delaware law or in litigation in Delaware’s state and federal courts—appearing most often in the Court of Chancery. Richard is a partner in the Trial Practice Group in the Wilmington, Delaware, office of Duane Morris LLP, currently serves as the co-chair of the Section’s Judges’ Initiative Committee and is a former co-chair of the Section’s subcommittee on business courts.

1. See Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 Bus. Law. 147, 223–26 (2004) [hereinafter *Business Courts History*]; ABA Ad Hoc Comm. on Business Courts, *Business Courts: Towards A More Efficient Judiciary*, 52 Bus. Law. 947 (1997). The 2004 article by Bach and Applebaum provides one of the best early

states have sought and found diverse solutions in implementing special procedures for the efficient resolution of complex business disputes.

## I. WHAT IS A BUSINESS COURT?

The term “business court” does not have a single specifically defined meaning but “encompasses an array of specialized formats for administering business and commercial cases at the state civil trial court level.”<sup>2</sup> This includes specialized dockets, tracks, or programs within an existing civil trial court system, separate divisions of a civil trial court system, or in some cases a separate court in the sense that the Delaware Court of Chancery is a separate court within an overall court system.<sup>3</sup> All business courts are “primarily designed to provide timely and well-reasoned case management and disposition to (1) commercial disputes between businesses, sometimes involving individuals with an interest in the business, and (2) internal disputes over the management and control of business entities.”<sup>4</sup> One description of business court objectives is “to provide an efficient forum for the just, expeditious, and consistent resolution of complex commercial or business cases[,]”<sup>5</sup> though not all business courts include a requirement that the case be complex.<sup>6</sup> As explained in a recent business courts primer published by the ABA’s Section of Business Law:

There are common elements underlying all of these business courts, binding them together under that rubric. They each have: (1) a specialized jurisdiction focusing on business and/or commercial disputes; (2) one judge, or a set of judges, specially assigned to the business court; and (3) the same judge handling a single case from beginning to end. In practice, there are variations in jurisdiction and in the nature of judicial assignments to business courts. For example, in some courts a specially assigned business court judge may hear only business court cases, while in other court systems the business court judge may also handle non-business civil, or even criminal, cases. The one constant is a single specialist judge for a single case from beginning to end.<sup>7</sup>

There are significant variations in business court jurisdiction, i.e., in the means of determining which cases will go into the business courts and how they will get there. Thus, some business courts may have hundreds, or thousands, of

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histories of the development of business courts in the United States as seen through the eyes of two lawyers who were among those who were instrumental in those efforts.

2. VANESSA R. TIRADENTES ET AL., *THE BUSINESS COURTS BENCH BOOK: PROCEDURES AND BEST PRACTICES IN BUSINESS AND COMMERCIAL CASES* xv (2019) [hereinafter *BUSINESS COURTS BENCH BOOK*].

3. *Id.*; Lee Applebaum & Mitchell L. Bach, *Business Courts in the United States: 20 Years of Innovation*, in *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 869 (Peter M. Koelling ed., 8th ed. 2016) [hereinafter *Business Courts in the U.S.*].

4. Lee Applebaum, *The Steady Growth of Business Courts*, in *FUTURE TRENDS IN STATE COURTS* 70 (Nat’l Cir. State Courts 2011) [hereinafter *Steady Growth*].

5. Ann Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. ST. U. L. REV. 477, 478–79 (2007) [hereinafter *Making a Case for Business Courts*].

6. *Business Courts History*, *supra* note 1, at 223–25.

7. *BUSINESS COURTS BENCH BOOK*, *supra* note 2, at xv.

cases filed annually, and others many fewer.<sup>8</sup> We describe three basic models, which in practice have a wide range of permutations unique to each business court.

The first model is aimed at being objective in nature. Jurisdiction is determined by setting forth a clear list of case types that fall within the business court's jurisdiction, along with a jurisdictional minimum amount-in-controversy. Under this model, the business court may also set forth a clear list of case types that do not fall within the business court's jurisdiction. The case need not be complex or complicated. It simply needs to come within a listed case type.<sup>9</sup> The minimum amount-in-controversy can function to limit the number of cases allowed,<sup>10</sup> and might be considered as a gloss on the notion that cases with a more serious impact are better suited to the business court.

The second model is more subjective. The case must be a business or commercial case, but only is permitted in the business court if it is a "complex" business or commercial case.<sup>11</sup> Thus, one or more judicial gatekeepers play a critical role in determining whether a case goes into the business court; something unnecessary, for the most part, in the first model. "These courts rely on judicial gatekeepers to make discretionary decisions as to whether a business or commercial case is sufficiently complex to warrant inclusion on a business court docket. For example, a genuinely complex case may have a relatively low dollar value, while a procedurally and legally simple case could involve large sums."<sup>12</sup>

The third model is a hybrid, with both mandatory and discretionary jurisdiction. In these hybrid business courts, the enabling statutes, rules, or orders include a list of mandatory case types, along with discretionary judicial authority

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8. For example, on one end, from 2006 to 2016, the Metro Atlanta Business Court accepted 239 cases, *see* FULTON CNTY. SUPERIOR COURT, METRO ATLANTA BUSINESS COURT 2016 ANNUAL REPORT 5 (2016), and from its inception in late 2012 through 2018, West Virginia's Business Court Division accepted ninety-three cases. *See* W. VA. JUDICIARY, BUSINESS COURT DIVISION 2018 ANNUAL REPORT 6–7 (2018). *See also* HON. ELLE HOBBS LYLE & JUSTIN SEAMON, REPORT FROM THE DAVIDSON COUNTY PILOT BUSINESS COURT: COMPLETION OF MARCH 16, 2015 SUPREME COURT ORDER 2 (Mar. 31, 2016).

On the other end, in its tenth year of operations (2009), Philadelphia's Commerce Case Management Program took on nearly 700 new cases in that year alone, *see* OFF. OF THE COURT ADM'R, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA 2010 ANNUAL REPORT 71–72 (2010), and in the Massachusetts Business Litigation Session's first four years, when it had a narrower jurisdiction than at present, 1,029 cases came onto that business court's docket. *See* BUS. LITIG. SESSION RESOURCE COMM., THE MASSACHUSETTS BUSINESS LITIGATION SESSION: DOCKET AND CASELOAD ANALYSIS (Dec. 2004). Just five years into Chicago's Commercial Calendar, in 1998, nearly 3,700 cases were assigned in that year alone, *see Business Courts History*, *supra* note 1, at 163, and the proliferation of cases in Manhattan's Commercial Division caused the jurisdictional minimum amount-in-controversy to be raised from \$150,000 to \$500,000. *See* THE CHIEF JUDGE'S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS TO THE CHIEF JUSTICE OF THE STATE OF NEW YORK 8 (June 2012); N.Y. State Unified Court Sys. Off. of Court Admin., Administrative Order of the Chief Administrative Judge of the Courts No. 32/14 (Jan. 28, 2014), <https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO-32-14.pdf>.

9. *Business Courts History*, *supra* note 1, at 223–24; *see also* BUSINESS COURTS BENCH BOOK, *supra* note 2, at xvi; *Business Courts in the U.S.*, *supra* note 3, at 870–71.

10. BUSINESS COURTS BENCH BOOK, *supra* note 2, at xvi, 19; *Business Courts in the U.S.*, *supra* note 3, at 871.

11. BUSINESS COURTS BENCH BOOK, *supra* note 2, at xvi, 19; *Business Courts in the U.S.*, *supra* note 3, at 873–75; *Business Courts History*, *supra* note 1, at 225.

12. BUSINESS COURTS BENCH BOOK, *supra* note 2, at xvi, 19.



to allow other complex, non-mandatory, business and commercial cases onto the docket. North Carolina's business court provides a clear example of a hybrid business court.<sup>13</sup> It evolved from the discretionary gatekeeping model in the mid-1990s into a hybrid model through the later addition of mandatory case types in 2005.<sup>14</sup> Moreover, it subsequently added high jurisdictional minimum amount-in-controversy requirements, further controlling the docket by objective means.<sup>15</sup>

As stated, these three models do not apply in cookie-cutter fashion to actual practice among business courts. Each business court has its own variations, although typically within the realm of business and commercial litigation. In one state, the business court also encompasses consumer-based actions within its jurisdiction,<sup>16</sup> and some business courts have taken on other cases not commonly seen as business court cases.<sup>17</sup>

There is another specialized court program that is closely associated with business courts, known as complex litigation courts.<sup>18</sup> Rather than focusing on subject matter to define their jurisdiction, as with business courts, complex litigation courts are process driven. Jurisdiction is defined by whether a case is sufficiently complex to merit specialized assignment.<sup>19</sup> Thus, a case will be assigned to a complex litigation court, e.g., if it has a multitude of litigants and lawyers, requires extensive depositions and discovery, includes an intense motion practice and a multitude of legal issues, and will involve a lengthy and burdensome trial.<sup>20</sup> These dockets may include business and commercial cases if sufficiently complex, but may also include cases involving other subject matter unrelated to business or commercial matters. In the 1990s, complex litigation courts were originally perceived as alternatives to business courts, or even adverse to business courts, e.g., in California and Connecticut.<sup>21</sup> In California, a Judicial Council of California appointed task force reported that business courts were "not supported by important constituencies whose support would be necessary to

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13. BUSINESS COURTS BENCH BOOK, *supra* note 2, at 19–20.

14. ABA BUS. LAW SECTION, BUS. & CORP. LITIG. COMM., ANNUAL REVIEW OF DEVELOPMENT IN BUSINESS AND CORPORATE LITIGATION 160–161 (2006).

15. N.C. STAT. § 7A-45.4(a)(9), (b)(2), (d)(4) (2019).

16. *See* State of Me. Supreme Judicial Court, Administrative Order JB-07-1 (A. 11-08) (Nov. 2, 2008), [http://www.courts.maine.gov/rules\\_adminorders/adminorders/JB-07-1.html](http://www.courts.maine.gov/rules_adminorders/adminorders/JB-07-1.html) ("The Business and Consumer Docket (BCD) shall be a statewide docket comprised of selected actions involving business and/or consumer disputes, and shall be managed by two judges from either trial court designated by the Chief Justice of the Supreme Judicial Court.")

17. For example, Philadelphia's Commerce Court was assigned tax sequestration cases on commercial property where the city held tax liens, *see* FIRST JUDICIAL DIST. OF PA., 2015 ANNUAL REPORT 26 (2015), and North Carolina's Business Court had certain tax cases added as part of its mandatory jurisdiction. N.C. STAT. § 7A-45.4(b)(1) (2019).

18. BUSINESS COURTS BENCH BOOK, *supra* note 2, at 18–19; *Business Courts History*, *supra* note 1, at 204–16.

19. *Business Courts in the U.S.*, *supra* note 3, at 886–87 (citing *Business Courts History*, *supra* note 1, at 204–13).

20. *Id.* at 887.

21. *Business Courts History*, *supra* note 1, at 206–07, 211–12.

make the concept viable.”<sup>22</sup> Years earlier, the California State Bar’s Board of Governors had prohibited the State Bar’s Business Courts Subcommittee from pursuing or supporting the creation of business courts in California.<sup>23</sup> In 2000, the Complex Civil Litigation Pilot Program was created in six of California’s superior courts.<sup>24</sup> In Connecticut, opposition to business court proposals came from various parts of the bar and editorial sources, alternatively proposing the now twenty-two-year-old Complex Litigation Docket<sup>25</sup> as more suitable for Connecticut than a specialized business court.<sup>26</sup> As time passed, however, the sense of adversity faded and common ground has become apparent, in both practice and how business court and complex litigation court judges perceive themselves.<sup>27</sup> For example, complex litigation judges have served as presidents of the American College of Business Courts Judges<sup>28</sup> and as Business Court Representatives in the ABA’s Section of Business Law.<sup>29</sup>

## II. HISTORY OF BUSINESS COURTS

As of January 1, 2020, twenty-five states around the country have some type of specialized business court or commercial docket as a feature of their judicial systems. Some are limited to specific locales within a state, others operate state-wide. While Delaware’s Court of Chancery has existed for over two centuries, it was not until the early 1990s that other states’ efforts to establish specialized courts and dockets to handle complex business and commercial disputes began to bear fruit. As discussed below (grouped by decade), what began as relatively modest efforts in five jurisdictions in the 1990s swelled in the following decades, as successes in early-adopting jurisdictions were built upon and replicated by others. A complete primer on the particulars of each court in each jurisdiction is beyond the scope of this article, but additional information regarding specific courts or states is readily available.<sup>30</sup>

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22. *Id.* at 206 (quoting Press Release, Judicial Council of Cal., State Courts Resolve Complex Cases More Efficiently National Report Finds (Aug. 29, 2003)).

23. *Id.* at 207.

24. *Id.*

25. *See, e.g.*, STATE OF CONN. JUDICIAL BRANCH, FACTS OF THE CONNECTICUT JUDICIAL BRANCH COMPLEX LITIGATION DOCKET (June 5, 2018), [https://www.jud.ct.gov/external/super/FACTS\\_060418.pdf](https://www.jud.ct.gov/external/super/FACTS_060418.pdf).

26. *Business Courts History*, *supra* note 1, at 211 & n.531 (“The debate in Connecticut clearly reflected (i) a belief that there had to be a choice between these two types of courts; and (ii) strong passions on which choice should be made.”).

27. *Business Courts in the U.S.*, *supra* note 3, at 886–88.

28. BUSINESS COURTS BENCH BOOK, *supra* note 2, at 19.

29. ABA Section of Bus. Law, *Business Court Representatives*, AM. B. ASS’N, [https://www.americanbar.org/groups/business\\_law/migrated/committees/CL109000pub/](https://www.americanbar.org/groups/business_law/migrated/committees/CL109000pub/) (last visited Apr. 17, 2020).

30. *See, e.g.*, *Business Courts in the U.S.*, *supra* note 3; John Coyle, *Business Courts and Inter-State Competition*, 53 WM. & MARY L. REV. 1915 (2012); Ann Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. ST. U. L. REV. 477 (2007); Joseph R. Slights III & Elizabeth A. Powers, *Delaware Courts Continue to Excel in Business Litigation with the Success of the Complex Commercial Litigation Division of the Superior Court*, 70 BUS. LAW. 1059 (2015) [hereinafter *Delaware Courts Continue to Excel*]; Hon. Ben F. Tennille, Lee Applebaum & Anne Tucker Nees, *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases*, 11 PEPP. DISP. RESOL. L.J. 35 (2010); BUSINESS COURTS BENCH BOOK, *supra* note 2.

### A. THE BUSINESS COURTS IN DELAWARE: THE COURT OF CHANCERY AND THE COMPLEX COMMERCIAL LITIGATION DIVISION OF THE SUPERIOR COURT

The Court of Chancery of the State of Delaware, established in 1792, is often considered one of the first, if not the first, court to develop skills, expertise, and procedures that garnered a reputation for being able to efficiently hear and decide sophisticated business and commercial disputes.<sup>31</sup> As opposed to the courts and dockets for the states described below—which were specifically created to specialize in handling business and commercial disputes—the Court of Chancery grew organically into that role over the course of 225 years. This specialization was a logical outgrowth given that the court’s historical subject-matter jurisdiction over equitable claims frequently resulted in it hearing claims seeking injunctive relief (such as claims seeking to enjoin mergers) or claims challenging the conduct of fiduciaries.<sup>32</sup> Delaware’s law court, the Superior Court, also saw its fair share of complex commercial legal disputes—that is, non-equity disputes—over the years.

Delaware recognized sophisticated litigants with complex commercial disputes in that court would benefit from a “Chancery-like” experience for their cases too—primarily from the litigation being assigned to a single, specialized jurist from its filing to final disposition, but with the added feature that a dispute could be submitted to a jury.<sup>33</sup> Thus, in 2010, the President Judge of the Delaware Superior Court issued an administrative directive creating the Complex Commercial Litigation Division of the Superior Court.<sup>34</sup> Thus, for a decade, Delaware’s commitment to the use of business and commercial courts to efficiently adjudicate complex commercial and business disputes has found a home in both the legal and equitable courts of the state.

By the early 1990s, other jurisdictions outside the First State began to evaluate the use of specialized business and commercial courts (or dockets within existing courts) as features for their judicial systems. As discussed below, a movement that began with five states in the final decade of the twentieth century swelled to half of the United States by the dawn of 2020.

### B. THE 1990S—BUSINESS COURTS MAKE THEIR DEBUT IN NEW YORK, ILLINOIS, NEW JERSEY, AND NORTH CAROLINA

As noted, by the early 1990s, jurisdictions outside of Delaware had begun to consider and study whether the creation of specialty business or commercial

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31. See, e.g., Jack Jacobs, *The Delaware Court of Chancery: A 225-Year Retrospective*, LAW360 (Sept. 27, 2017, 4:05 PM), <https://www.law360.com/articles/968498/the-delaware-court-of-chancery-a-225-year-retrospective>. This article was written to commemorate the 225th anniversary of that court and contains information addressing the history of the court’s preeminence as a business court.

32. It is important to note that the equitable jurisdiction of the Court of Chancery extends far beyond the corporate and business disputes for which it is famous and includes important disputes touching the daily lives of Delaware citizens like real property, estate, or guardianship matters.

33. *Delaware Courts Continue to Excel*, *supra* note 30, at 1039–40.

34. See Administrative Directive No. 2010-3 (Del. Super. Ct. Apr. 26, 2010), [https://www.courts.delaware.gov/superior/pdf/Administrative\\_Directive\\_2010-3.pdf](https://www.courts.delaware.gov/superior/pdf/Administrative_Directive_2010-3.pdf).

courts could improve those jurisdictions' ability to administer justice to corporate and commercial litigants involved in civil disputes. California, New York, and Illinois (Chicago) were three jurisdictions giving early and serious consideration of how business courts might improve justice in those locations.<sup>35</sup> While California passed on the idea, New York and Illinois moved forward with the concept of creating business courts.<sup>36</sup>

### New York

To that end, in 1993 the Supreme Court of New York in New York County (Manhattan) created a pilot commercial program in an effort to identify ways to shore up confidence in the ability of the state courts of New York to effectively and efficiently address complex commercial disputes.<sup>37</sup> Buoyed by immediate signs of success in the pilot program, in November 1995 the office of the chief judge created the Commercial Division of the Supreme Court of New York.<sup>38</sup> In the beginning, the Commercial Division was limited to New York and Monroe Counties.<sup>39</sup> By 1998 the Supreme Court of New York expanded the Commercial Division to Nassau, Erie, and Westchester Counties and, four years later, further expanded the program to Albany, Suffolk, and Kings Counties. By the close of 2019, the Commercial Division was located in the following New York locations: 7th Judicial District (Rochester), 8th Judicial District (Buffalo), Albany County, Kings County, Nassau County, New York County (Manhattan), Onondaga County, Queens County, Suffolk County, Westchester County, and the Bronx.<sup>40</sup>

### Illinois

The creation of a specific Commercial Calendar in Illinois began with an administrative order issued by the Presiding Judge of the Cook County Circuit Court's Law Division, issued on September 9, 1992, which created a pilot program by which individual judges would handle the entire proceedings for individual cases assigned to them.<sup>41</sup> While the pilot program was to include "Individual Calendars" in both a General Calendar Section and a Commercial Calendar Section, the Commercial Calendar Section was not operational until 1993.<sup>42</sup> The Commercial Calendar Section was originally staffed with the assignment of

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35. See NAT'L CTR. FOR STATE COURTS, *FUTURE TRENDS IN STATE COURTS 2011: SPECIAL FOCUS ON ACCESS TO JUSTICE 70* (2011), [http://www.utcourts.gov/committees/social\\_media/COURT%20TRENDS\\_book2011.pdf](http://www.utcourts.gov/committees/social_media/COURT%20TRENDS_book2011.pdf).

36. See *id.*

37. See *Business Courts History*, *supra* note 1, at 152.

38. *Id.* at 153.

39. *Id.* at 153–54.

40. See, e.g., *Commercial Division—N.Y. Supreme Court*, NYCOURTS.GOV, <http://ww2.nycourts.gov/courts/comdiv/index.shtml> (last visited Apr. 28, 2020); *12JD—Civil Supreme, Bronx—Filing Rules*, NYCOURTS.GOV, <http://ww2.nycourts.gov/COURTS/12jd/BRONX/Civil/filingrules.shtml#Commercial> (last visited Apr. 28, 2020).

41. *Business Courts History*, *supra* note 1, at 160.

42. *Id.* at 160–61.

three judges over the course of 1993–1994.<sup>43</sup> The Commercial Calendar Section was successful—and busy—and by 2001 the number of judges assigned to the Section had risen to eight.<sup>44</sup> At the end of 2019, the Commercial Calendar Section was still comprised of eight assigned judges.<sup>45</sup>

### North Carolina

While New York and Illinois had paved the way by establishing commercial divisions or calendars within existing courts (in specific locales), in 1995 North Carolina chose a different path by creating a business court,<sup>46</sup> whose jurisdictional reach would be statewide. The North Carolina Business Court was created by order of the Supreme Court of North Carolina, and was initially staffed by one judge, The Honorable Ben F. Tennille (Ret.).<sup>47</sup> The task assigned to Judge Tennille included the mandate that the business court generate a body of case law addressing corporate governance matters in North Carolina, upon which the citizens (corporate and otherwise) of North Carolina could rely.<sup>48</sup> The North Carolina Business Court has been viewed as a success, receiving accolades from the bar and serving as a catalyst for the creation of similar courts in other states.<sup>49</sup> By the early 2000s, North Carolina had created a Commission on the Future of the North Carolina Business Court to consider, among other things, the court's expansion.<sup>50</sup> The Commission's report, issued in October 2004, did, indeed, recommend the expansion of the business court to three judges, sitting in three counties.<sup>51</sup> As of June 30, 2019, the business court had been expanded to include five active business court judges, sitting in Charlotte, Greensboro, Raleigh, and Winston-Salem, who may hear cases originating in locations throughout North Carolina.<sup>52</sup>

43. *Id.* at 161.

44. *Id.* at 161–62.

45. *Commercial Calendar Section*, STATE ILL. CIRCUIT COURT COOK CNTY., <http://www.cookcountycourt.org/ABOUTTHECOURT/CountyDepartment/LawDivision/CommercialCalendarSection.aspx> (last visited Apr. 28, 2020).

46. “The North Carolina Business Court is a specialized forum of the [North Carolina] superior court . . . .” *Superior Court*, N.C. JUDICIAL BRANCH, <https://www.nccourts.gov/courts/superior-court> (last visited Apr. 28, 2020).

47. *Business Court's History*, *supra* note 1, at 166–67.

48. *Id.* at 167–68.

49. *Id.* at 170. One study indicates that a significant number of out-of-state plaintiffs chose to litigate in the business court, suggesting “that in some cases, out-of-state plaintiffs are selecting North Carolina as their home for litigation.” Gregory Day, *Revisiting the North Carolina Business Court After Twenty Years*, 37 CAMPBELL L. REV. 277, 317 (2015).

50. *Business Court's History*, *supra* note 1, at 170.

51. See CHIEF JUSTICE'S COMM'N ON THE FUTURE OF THE N.C. BUS. COURT, FINAL REPORT AND RECOMMENDATION (Oct. 28, 2004), <https://businesscourtsblog.com/wp-content/uploads/2019/01/North-Carolina-2004-01545787xB05D9.pdf>.

52. See N.C. ADMIN. OFF. OF THE COURTS, REPORT ON NORTH CAROLINA BUSINESS COURT 2 (Aug. 1, 2019), [https://www.nccourts.gov/assets/inline-files/20190801-Business-Court-Report.pdf?jlxJNA.44eUzy4zc5Sw\\_r6\\_Fb\\_Y3pSCZ](https://www.nccourts.gov/assets/inline-files/20190801-Business-Court-Report.pdf?jlxJNA.44eUzy4zc5Sw_r6_Fb_Y3pSCZ); see also Andrew Jones, *Toward a Stronger Economic Future for North Carolina: Precedent and Opinions of the North Carolina Business Court*, 6 ELON L. REV. 189, 192, 199 (2014) (“All trial court judges in North Carolina are elected by the voters, with the notable exception of special superior court [business court] judges appointed by the Governor.”).

## New Jersey

In the early 1990s, Essex County, New Jersey, began assigning complex commercial litigation matters to designated judges who would handle the matters from “case management through trial.”<sup>53</sup> By 1996, the informal process being used in Essex County had enjoyed favorable reactions from the bar and business groups, which led the Chief Justice of the New Jersey Supreme Court to create a formal pilot program in Essex and Bergen Counties for the handling of complex commercial disputes.<sup>54</sup> Between 1996 and 2013 there were a number of efforts in New Jersey to build on the early successes in Essex and Bergen Counties;<sup>55</sup> and, in the latter year, the Chief Justice of the Supreme Court created a Working Group on Business Litigation to study further how New Jersey might address complex commercial litigation going forward.<sup>56</sup> In April 2014, the Working Group on Business Litigation released its report.<sup>57</sup> While the Working Group did not recommend any changes to the existing court structure in New Jersey, it did recommend that the existing pilot programs in Essex and Bergen Counties be expanded statewide.<sup>58</sup> On January 1, 2015, the New Jersey Supreme Court expanded the programs statewide with the creation of the Complex Business Litigation Program, pursuant to which in each location (or vicinage as the courts are divided in New Jersey) at least one judge would be designated to handle all cases filed in that jurisdiction under the Complex Business Litigation Program.<sup>59</sup> New rules governing practice and procedure in the Program became effective on September 1, 2018; and, as of July 1, 2019, all fifteen vicinages in New Jersey had at least one judge assigned to the Program.<sup>60</sup>

### C. 2000–2010—THE EXPANSION CONTINUES

During the opening decade of the twenty-first century, the following jurisdictions joined those discussed above by creating their own versions of business courts: Pennsylvania, Massachusetts, Nevada, Rhode Island, Maryland, Georgia, Maine, Florida, South Carolina, New Hampshire, Ohio, and Delaware.

## Pennsylvania

In the late 1990s, after the failure of multiple efforts at statewide legislative efforts to establish business courts in Pennsylvania, members of the bar in Philadelphia worked with the Administrative Judge of the Philadelphia Court of

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53. *Business Courts History*, *supra* note 1, at 171.

54. *Id.* at 171–72.

55. *See, e.g., id.* at 171–76.

56. *See, e.g.,* REPORT OF THE WORKING GRP. ON BUS. LITIG. (Mar. 2014), <https://businesscourtsblog.com/wp-content/uploads/2019/01/New-Jersey-2014-01545807xB05D9.pdf>.

57. *See id.*

58. *See id.* at 7.

59. *See Complex Business Litigation Program*, NJCOURTS.GOV, <https://www.njcourts.gov/courts/civil/cblp.html> (last visited Apr. 28, 2020).

60. *See id.*

Common Pleas to create a Commerce Case Management Program in that court.<sup>61</sup> Created by administrative order, and patterned after the Commercial Division in New York, the Commerce Case Management Program opened for business effective January 1, 2000, in the Philadelphia Court of Common Pleas.<sup>62</sup> The goal of Philadelphia's Commerce Case Management Program, according to one of its judges, is "provide a quality product" via the expertise and focus of assigned jurists.<sup>63</sup> The Commerce Case Management Program began with two assigned judges.<sup>64</sup> While currently up to four judges may be assigned to the Commerce Program, since 2002, there have been three sitting judges in the program.<sup>65</sup> In 2007, the western end of Pennsylvania received its own form of business court with the creation of the Commerce and Complex Litigation Center in the Fifth Judicial District in Pittsburgh.<sup>66</sup>

### Massachusetts

In October 2000, the Chief Justice of the Massachusetts Superior Court established a two-year pilot program creating a Business Litigation Session in the Suffolk County Superior Court in Boston.<sup>67</sup> In February 2003, the Chief Justice of the Superior Court issued an administrative directive making the Session permanent in Suffolk County and expanding its jurisdiction to hear disputes from the neighboring counties of Essex, Norfolk, and Middlesex—so long as all parties to such disputes from the three counties consented to venue in the Business Litigation Session in Boston.<sup>68</sup> A superseding administrative directive in 2009 opened up the Business Litigation Session to cases from all counties in Massachusetts, but with the same caveat that all parties must consent to venue.<sup>69</sup> It is worth noting that the Business Litigation Session is also somewhat unique in that its judges are assigned to one of two sessions of six months each, and with two judges working as a team in each session.<sup>70</sup>

### Nevada

In 2000, the Supreme Court of Nevada issued rules establishing business courts in Nevada's Second Judicial District (Reno) and Eighth Judicial District

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61. *Business Courts History*, *supra* note 1, at 176–77.

62. *Id.* at 176–77.

63. *Id.* at 177.

64. *Id.*

65. See Administrative Docket No. 01 of 2016, <https://www.courts.phila.gov/pdf/regs/2016/cp-aj-ad-01-2016.pdf> (Pa. Ct. Comm. Pl. Aug. 2, 2016).

66. See *Civil—Commerce and Complex Litigation Center*, FIFTH JUDICIAL DIST. OF PA., [https://www.alleghecourt.us/civil/commerce\\_complex\\_litigation.aspx](https://www.alleghecourt.us/civil/commerce_complex_litigation.aspx) (last visited Apr. 28, 2020).

67. *Business Courts History*, *supra* note 1, at 180.

68. See Administrative Directive No. 03-01, <https://www.mass.gov/files/documents/2016/08/xl/03-01.pdf> (Mass. Super. Ct. Feb. 12, 2003).

69. See Administrative Directive No. 09-1, [https://bostonbar.org/pub/bw/0809/011209/buslit\\_diirective.pdf](https://bostonbar.org/pub/bw/0809/011209/buslit_diirective.pdf) (Mass. Super. Ct. Jan. 19, 2009).

70. See *About the Superior Court Business Litigation Session: Overview*, MASS.GOV, <https://www.mass.gov/info-details/about-the-superior-court-business-litigation-session> (last visited Apr. 28, 2020).



(Las Vegas).<sup>71</sup> The Nevada Supreme Court's actions on this front were the product of a wider examination by the state (via a legislative subcommittee) of ways it could foster business formation and development in Nevada.<sup>72</sup> Key to this examination was the Sub-subcommittee for the Examination of Business Court and Business Laws.<sup>73</sup> Ultimately, Nevada determined to model its business courts after those of New York and would limit it to the two jurisdictions—Reno and Las Vegas. While in 2009 Nevada explored the possibility of establishing a Court of Chancery as a statewide form of business court, the state decided not to establish such a court in favor of continuing with the business courts established in 2000.<sup>74</sup>

### **Rhode Island**

In April 2001, the Presiding Justice of the Rhode Island Superior Court issued an administrative order establishing a Business Calendar for the Superior Court in Providence and Bristol Counties.<sup>75</sup> In July 2011, the Superior Court expanded the Business Calendar statewide.<sup>76</sup>

### **Maryland**

In the early 2000s, the General Assembly of Maryland established the Maryland Business and Technology Task Force to examine “the feasibility of establishing a specialized court function within Maryland’s circuit courts to adjudicate business and technology disputes.”<sup>77</sup> The Task Force completed its studies and recommended the creation of the Maryland Business and Technology Case Management Program, which became operational in 2003.<sup>78</sup> The Program was promulgated via the rulemaking process of the Maryland Court of Appeals, and created a statewide Program within the existing circuit courts within the state.<sup>79</sup> The Program required that judges appointed to the Program attend specialized training to assist in the management of complex business and commercial litigation matters,<sup>80</sup>

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71. *Business Courts History*, *supra* note 1, at 184.

72. *Id.*

73. *Id.* at 184–85.

74. See Legislative Commission Subcommittee to Study the Benefits, Costs, and Feasibility of the Implementation of Courts of Chancery in Nevada, Bulletin No. 09-03 (Jan. 2009), <https://www.leg.state.nv.us/Division/Research/Publications/InterimReports/2009/Bulletin09-03.pdf>.

75. *Business Courts History*, *supra* note 1, at 188.

76. See State of Rhode Island and Providence Plantations, Superior Court, RE: Business Calendar, Administrative Order No. 2011-10 (July 29, 2011), <https://www.courts.ri.gov/Courts/DecisionsOrders/AdministrativeOrders/2011-10.pdf>.

77. *Business Courts History*, *supra* note 1, at 190.

78. AMELIA PARSONS & BRETT BURKA, REPORT ON BUSINESS COURTS, RECENT DEVELOPMENTS, AND RELATED ISSUES 10 (May 2015), [https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member\\_Groups/Sections/Business\\_Law/Report%20on%20Business%20Courts,%20Recent%20Developments,%20and%20Related%20Issues.pdf](https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member_Groups/Sections/Business_Law/Report%20on%20Business%20Courts,%20Recent%20Developments,%20and%20Related%20Issues.pdf).

79. *Business Courts History*, *supra* note 1, at 191.

80. See PARSONS & BURKA, *supra* note 78, at 10.

and, by 2006, each judge that had been assigned to the Program had completed such training.<sup>81</sup> More recently, the Maryland State Bar Association created an Ad Hoc Task Force to engage in a two-year study of certain key factors that it had identified as having “limited the effectiveness of the Program,” which included concerns such as a perceived non-uniformity in the Program across the various circuit courts and a resulting inconsistency in forms and procedures.<sup>82</sup>

## Florida

Effective on January 2, 2004, the Presiding Judge of the Ninth Judicial Circuit (Orlando) established a Complex Business Litigation Division within the Civil Division of that court.<sup>83</sup> That same year, the Seventeenth Judicial Circuit (Ft. Lauderdale) also created a Complex Business Litigation Division.<sup>84</sup> The Eleventh Judicial Circuit (Miami metro) created its own Complex Business Litigation Division in 2006 “to address the overwhelming number of complex business cases” being filed in that circuit.<sup>85</sup> In 2007, the Thirteenth Judicial Circuit (Tampa) followed the lead of earlier adopting circuits and established its own complex business litigation subdivision.<sup>86</sup> While the Ninth Judicial Circuit (Orlando) was an early adopter of a complex business litigation division, by 2018 the circuit faced a critical shortage of resources and, therefore, ordered the cessation of all activities in that division in order to allocate additional resources to the family court division in that circuit.<sup>87</sup> This was so, even though, in 2017, the Eleventh Judicial Circuit (Miami metro) reaffirmed the creation of its Complex Business Litigation Division in its civil division, and adopted certain changes to the division’s administration that had been part of a pilot project beginning in the prior year.<sup>88</sup> Following a short hiatus, however, Orlando’s complex business litigation division was reinstated in October 2019.<sup>89</sup>

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81. *See id.* at 11.

82. *See* MSBA BUS. LAW SECTION AD HOC TASK FORCE, FINAL REPORT AND PROPOSED RECOMMENDATION: BUSINESS & TECHNOLOGY CASE MANAGEMENT PROGRAM 1 (Jan. 31, 2017), <https://businesscourtsblog.com/wp-content/uploads/2019/01/Maryland-2017-01545805xB05D9.pdf>.

83. *Business Courts History*, *supra* note 1, at 194.

84. *See Circuit Civil*, SEVENTEENTH JUDICIAL CIRCUIT COURT FLA., <http://www.17th.flcourts.org/01-civil-division/> (last visited Apr. 28, 2020).

85. *See Complex Business Litigation*, ELEVENTH JUDICIAL CIRCUIT COURT FLA., <https://www.jud11.flcourts.org/About-the-Court/Our-Courts/Civil-Court/Complex-Business-Litigation> (last visited Apr. 28, 2020).

86. *See* Thirteenth Judicial Circuit of Fla., Administrative Order S-2013-021 (Apr. 18, 2013), <https://www.fljud13.org/Portals/0/AO/DOCS/2013-021-S.pdf>.

87. ABA BUS. LAW SECTION, BUS. & CORP. LITIG. COMM., RECENT DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION 140–42 (2015).

88. *See In re Reaffirmation of the Creation of Complex Business Litigation in the Circuit Civil Division of the Eleventh Judicial Circuit of Florida; Re-Designation of CBL Sections; and Modification of Procedures for the Assignment and Reassignment of Cases to CBL Sections*, Administrative Order No. 17-11 (Dec. 12, 2017), <https://www.jud11.flcourts.org/Render?fileid=%7BF8D3A74F-EFC8-4506-9416-85A8A5580ACC%7D>.

89. *See Business Court to Reopen on October 21, 2019*, NINTH JUDICIAL CIRCUIT COURT FLA., <https://www.ninthcircuit.org/news/business-court-reopen-october-21-2019> (last visited Apr. 28, 2020).

## Georgia

In 2005, Georgia entered the market for business courts. On June 3 of that year, the Supreme Court of Georgia adopted rules for the Atlanta Judicial Circuit, which created a complex business litigation division in Fulton County in metro-Atlanta.<sup>90</sup> These rules were subsequently amended to allow other metro-Atlanta counties to adopt the rules for establishing a business court, and two years later the adjacent county, Gwinnett, adopted a business court pilot program.<sup>91</sup> By amendment to the rules in 2016, the Fulton and Gwinnett Counties' Business Case Division became known as the Metro Atlanta Business Case Division.<sup>92</sup> As of 2017, the Metro Atlanta Business Case Division was staffed with six judicial officers over the two counties, and who received assignments on a rotating basis.<sup>93</sup> In 2019, after a constitutional amendment in 2018,<sup>94</sup> Georgia created its first Statewide Business Court by act of the Legislature dated April 2, 2019, and which was signed by the Governor on May 7, 2019.<sup>95</sup> The Statewide Business Court began operations on January 1, 2020, and will begin taking cases on August 1, 2020. The court has a single judge, appointed by the Governor and confirmed by the State House and Senate Judiciary Committees, and has chambers in Macon, Georgia.<sup>96</sup> The new Statewide Business Court will not serve as the exclusive venue for business disputes in Georgia, as the Metro Atlanta Business Court will continue to operate, and other counties may establish their own business court dockets or programs.

## Maine

By administrative order (effective November 17, 2008), the State of Maine Supreme Judicial Court created a statewide Business and Consumer Docket to be staffed with two judges.<sup>97</sup> The docket description includes consumer disputes with business entities requiring specialized and differentiated case management that are not necessarily class actions, making it unique among existing business courts in this aspect.<sup>98</sup>

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90. See PARSONS & BURKA, *supra* note 78, at 8.

91. See FULTON CNTY. SUPERIOR COURT, METRO ATLANTA BUSINESS COURT 2017 ANNUAL REPORT 2 (2017), <https://www.businesscourtsblog.com/wp-content/uploads/2019/09/2017-Report-01635329xB05D9.pdf>.

92. *Id.* at 2.

93. *Id.* at 3.

94. GA. CONST. art. VI, sec. I, para. I.

95. H.B. 239, 2019–2020 Gen. Assemb., Reg. Sess. (Ga. 2019).

96. See *id.*

97. See State of Me. Supreme Judicial Court, Administrative Order JB-07-1 (Nov. 4, 2008), [https://courts.maine.gov/rules\\_adminorders/adminorders/JB-07-1.html](https://courts.maine.gov/rules_adminorders/adminorders/JB-07-1.html).

98. BUSINESS COURTS BENCH BOOK, *supra* note 2, at 8; *Business and Consumer Court*, STATE ME. JUDICIAL BRANCH, [https://www.courts.maine.gov/maine\\_courts/business/index.shtml](https://www.courts.maine.gov/maine_courts/business/index.shtml) (last visited Apr. 28, 2020).

### South Carolina

Upon petition of the South Carolina Bar, on September 7, 2007, the Supreme Court of South Carolina created a Business Court Pilot Program.<sup>99</sup> The pilot program was to run for two years, and was established in the three primary, commercial counties in the state: Greenville, Charleston, and Richland (Columbia metro).<sup>100</sup> The Supreme Court of South Carolina has extended the pilot program on multiple occasions, and by 2014 it had extended the pilot program to all counties in the state, which were grouped into three regions, with each region having one judge assigned to the pilot program.<sup>101</sup> In August 2014, the Supreme Court added five additional judges (for a total of eight jurists) to the Business Court Pilot Program.<sup>102</sup> By the close of 2017, the Business Court Pilot Program had expanded to ten judges in the three regions.<sup>103</sup> This long-running “pilot program successfully demonstrated the merits of having a business court in the Palmetto State, and in January 2019, the Supreme Court of South Carolina declared the Business Court Program was now permanent and would continue “unless rescinded or modified by Order of the Chief Justice.”<sup>104</sup>

### New Hampshire

In 2008, the New Hampshire Legislature passed legislation creating a Business and Commercial Dispute Docket in the Superior Court.<sup>105</sup> The Business and Commercial Dispute Docket of the Superior Court is a statewide program, but which sits in the Superior Court in Merrimack County (Concord) because the United States District Court “has offered the use of one of its courtrooms for extremely lengthy trials if needed.”<sup>106</sup> Among other things, all parties must consent to its jurisdiction, and unlike its northern neighbor, no party can be a consumer.<sup>107</sup>

### Ohio

In 2007, the then-current Chief Justice of the Ohio Supreme Court created the Supreme Court Task Force on Commercial Dockets, “charging it with assessing

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99. See Supreme Court of S.C., Administrative Order 2007-09-07-01 (Sept. 7, 2007), <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2007-09-07-01>.

100. See *id.*

101. See Supreme Court of S.C., Administrative Order 2014-01-03-02 (Jan. 3, 2014), <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2014-01-03-02>.

102. See Supreme Court of S.C., Administrative Order 2014-08-13-02 (Aug. 8, 2014), <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2014-08-13-02>.

103. See Supreme Court of S.C., Administrative Order 2017-12-20-02 (Dec. 20, 2017), <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-12-20-02>.

104. See Supreme Court of S.C., Administrative Order 2019-01-30-01 (Jan. 30, 2019), <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2019-01-30-01>.

105. See *Business Court Mediation*, N.H. JUDICIAL BRANCH, <https://www.courts.state.nh.us/adrp/business/index.htm> (last visited Apr. 28, 2020).

106. See *id.*

107. N.H. SUPER. CT. R. 207(III)(a)(c) (2019), <https://www.courts.state.nh.us/rules/supercr-new/supercr-new-207.htm>.

the best method of establishing commercial civil litigation dockets in Ohio's Courts of Common Pleas."<sup>108</sup> Upon the recommendation of the Task Force, the Supreme Court adopted temporary rules to set the framework for commercial dockets in Ohio, and by March of 2009, commercial dockets had been established in the Courts of Common Pleas in Cuyahoga (Cleveland), Franklin (Columbus), Hamilton (Cincinnati), and Lucas (Toledo) Counties.<sup>109</sup> In 2013, "the Supreme Court adopted permanent rules that provided for voluntary participation by a Court of Common Pleas and the commercial docket judges in eligible counties, which included counties with either 6 or more general division judges or populations exceeding 300,000."<sup>110</sup>

Given that individual Courts of Common Pleas in the various Ohio jurisdictions control their adoption or rejection of the Commercial Docket program, the commitment to such a program has seen varying levels of fealty over the four jurisdictions that have them. In Cuyahoga County (Cleveland), the Commercial Docket functioned with two assigned judges until 2015, when the judges of the court voted to disband the program.<sup>111</sup> Two years later, however, in 2017, the members of that court voted to restart the Commercial Docket in Cuyahoga County, with four judges hearing cases starting in 2018.<sup>112</sup> In 2012, Franklin County (Columbus) disbanded its Commercial Docket program.<sup>113</sup> In 2017, the Commercial Docket program in Hamilton County (Cincinnati) ceased operating.<sup>114</sup> The Lucas County (Toledo) Commercial Docket program, however, has been stable and fully operational with two judges since formed in 2009.<sup>115</sup> In its 2019 Report of the Corporation Law Committee of the Ohio State Bar Association to that Association's Council of Delegates, the Committee recommended that the Bar Association "support the creation of a statewide commercial docket or similar procedure" to bring stability to the adoption and use of commercial dockets in Ohio to address complex commercial litigation matters.<sup>116</sup>

#### D. 2010–2020—EXPANSION CONTINUES TO THE INTERIOR UNITED STATES

While the first decade of the twenty-first century saw business courts expand predominantly in jurisdictions on the east coast of the country, the second decade witnessed an expansion to the interior states, with the following jurisdictions

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108. See Ohio State Bar Ass'n, Meeting Materials from Council of Delegates Meeting, Report of the Corporation Law Committee 37–38 (May 10, 2019), <https://www.ohiobar.org/globalassets/home/about-the-osba/osba-leadership/council-of-delegates/cod-past-reports/2019/council-of-delegates-book-for-05-10-19-meeting-2.pdf>.

109. See *id.* at 38.

110. *Id.*

111. See *id.* at 39.

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.*

116. See *id.* at 41.

adopting some form of specialized business court: West Virginia, Michigan, Iowa, Arizona, Tennessee, Indiana, Wisconsin, Wyoming, and Kentucky.

### **West Virginia**

In 2010, the West Virginia Legislature passed a bill “authorizing the Supreme Court of Appeals to conduct a study and make a recommendation regarding the creation of a Business Court Division” in West Virginia.<sup>117</sup> The Supreme Court of Appeals appointed a committee to study the issue, and the committee ultimately recommended the creation of a Business Court Division within the circuit courts of the state.<sup>118</sup> On September 11, 2012, the Supreme Court of Appeals acted on that recommendation (after deliberation and public comment) by adopting rules establishing the Business Court Division.<sup>119</sup> On October 10, 2012, the Business Court Division opened for business.<sup>120</sup> The Business Court Division is fully operational, and is served by seven judges appointed by the Chief Justice, each to serve a term of seven years.<sup>121</sup>

### **Michigan**

After many years of efforts, in late 2011 (and into 2012) three counties in Michigan adopted Specialized Business Dockets—Macomb County, Kent County, and Oakland County.<sup>122</sup> Later in 2012, however, the Michigan Legislature passed legislation authorizing the creation of business courts statewide.<sup>123</sup> The legislation was effective on January 1, 2013, and required that any circuit court with three or more judges create a Specialized Business Court Docket and authorized, but did not mandate, other circuits to similarly create a Specialized Business Court Docket.<sup>124</sup> As of June 3, 2019, seventeen counties in Michigan had created Specialized Business Court Dockets, each with the authority to set their own rules and procedures.<sup>125</sup>

### **Iowa**

In 2012, the Iowa Supreme Court created the Iowa Business Specialty Court pilot program.<sup>126</sup> In 2016, the Iowa Supreme Court made the Iowa Business

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117. See W. VA. JUDICIARY, 2018 BUSINESS COURT ANNUAL REPORT 1 (2018), <http://www.courtswv.gov/lower-courts/business-court-division/pdf/2018AnnualReport.pdf>.

118. See *id.*

119. See *id.*

120. *Id.*

121. See *id.*

122. See Douglas L. Toering, *The New Michigan Business Court Legislation: Twelve Years in the Making*, BUS. L. TODAY, Jan. 31, 2013, at 2.

123. See H.B. 5128, 96th Leg., Reg. Sess. (Mich., 2012).

124. See *id.*

125. See *Business Courts*, MICH. COURTS, <https://courts.michigan.gov/administration/admin/op/business-courts/pages/business-courts.aspx> (last visited Apr. 28, 2020).

126. See *Iowa Business Specialty Court*, IOWA JUDICIAL BRANCH, <https://www.iowacourts.gov/iowa-courts/district-court/iowa-business-specialty-court/> (last visited Apr. 28, 2020).

Specialty Court permanent, with three judges in three different judicial districts around the state.<sup>127</sup> In late 2019, two additional judges were assigned to the Iowa Business Specialty Court.<sup>128</sup>

### Arizona

The Arizona Supreme Court created a Business Court Advisory Committee in 2014, which ultimately recommended “the establishment of a pilot commercial court in the Superior Court in Maricopa County.”<sup>129</sup> The Supreme Court authorized such a pilot commercial court via administrative order in 2015, with the pilot commercial court in operation as of July 1, 2015.<sup>130</sup> Effective January 1, 2019, the pilot commercial court in Maricopa County was made permanent; and, while it has not expanded to other locales in Arizona, the new rules permit that individual judges may utilize the case management features of the commercial court in their own courtrooms where they “find[] those procedures beneficial, wholly or partially, in managing a commercial case that is not assigned to the commercial court, or that is pending in a county that has not established a commercial court.”<sup>131</sup>

### Tennessee

By order dated March 16, 2015, the Supreme Court of Tennessee created the Davidson County Business Court Pilot Project “to provide expedited resolution of business cases by a judge who is experienced and has the expertise in handling complex business and commercial disputes.”<sup>132</sup> Nashville is located in Davidson County. The pilot project was expanded with slight modifications in 2017, one of which was to open up the Business Court Pilot Project to disputes from other jurisdictions around the state of Tennessee.<sup>133</sup>

### Indiana

In January 2016, the Supreme Court of Indiana established a three-year Commercial Courts Pilot Project, which was to commence on June 1, 2016, and had

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127. *See id.*

128. Scott Stewart, *Two Judges Join Iowa Business Specialty Court*, DAILY REC. (Dec. 4, 2019), <https://www.omahadailyrecord.com/content/two-judges-join-iowa-business-specialty-court>.

129. COMMERCIAL COURT REV. COMM., SUPREME COURT OF ARIZ., REPORT TO THE ARIZONA JUDICIAL COUNCIL 5 (June 18, 2018), <https://www.ncsc.org/~media/Microsites/Files/Civil-Justice/AZCCRCreport.ashx>.

130. *See* NAT'L CTR. FOR STATE COURTS, SUPERIOR COURT OF ARIZONA IN MARICOPA COUNTY: COMMERCIAL COURT EVALUATION (FINAL REPORT) 1 (Dec. 2018), [https://iaals.du.edu/sites/default/files/documents/publications/az\\_commercial\\_court\\_ncsc\\_evaluation\\_12-12-18.pdf](https://iaals.du.edu/sites/default/files/documents/publications/az_commercial_court_ncsc_evaluation_12-12-18.pdf).

131. Supreme Court of Ariz., *In Re* Rule 8.1, Rules of Civil Procedure: Order Permanently Adopting and Amending Experimental Rule 8.1, Arizona Rules of Civil Procedure (Dec. 13, 2018), <http://www.azcourts.gov/Portals/20/2018%20Rules/R-18-0033-FINAL%20RULES%20ORDER.pdf?ver=2018-12-14-085404-143>.

132. Supreme Court of Tenn., Judicial Order No. ADM2015-00467, at 1 (Mar. 16, 2015), [http://www.tncourts.gov/sites/default/files/docs/order\\_est.\\_davidson\\_countybusiness\\_court\\_pilot\\_project\\_3-16-2015.pdf](http://www.tncourts.gov/sites/default/files/docs/order_est._davidson_countybusiness_court_pilot_project_3-16-2015.pdf).

133. *See* Press Release, Tenn. State Courts, Tennessee Supreme Court Appoints Chancellor Anne C. Martin to Lead Business Court Pilot Project (Sept. 30, 2019), <http://tncourts.gov/news/2019/09/30/tennessee-supreme-court-appoints-chancellor-anne-c-martin-lead-business-court-pilot>.

been scheduled to end on June 1, 2019.<sup>134</sup> However, after finding that the Commercial Court Pilot Project was “successful in advancing” the benchmarks and goals for the pilot project, the Supreme Court ordered that commercial courts be permanently established in six jurisdictions around the state, with one commercial court judge in each location.<sup>135</sup> These commercial courts became permanent as of June 1, 2019.<sup>136</sup>

### Wisconsin

In April 2017, the Wisconsin Supreme Court created a Commercial Docket Pilot Project.<sup>137</sup> The commercial dockets were established in two locations (Waukesha County and the Eighth Judicial District) and were to start on July 1, 2017.<sup>138</sup> The pilot program is to run for three years, at which time the Supreme Court would review the project.<sup>139</sup> At the time of writing this article, the timeline for or results of any such review had not been reported, and the website for the Commercial Docket Pilot Project reflected thirteen written decisions.<sup>140</sup> As of April 2019, parties to litigation in any county in Wisconsin were permitted to jointly petition to have their dispute heard in the Commercial Docket Pilot Project.<sup>141</sup>

### Wyoming

On March 15, 2019, the Governor of Wyoming signed into law legislation creating a statewide chancery court to “provide a forum for streamlined resolution of commercial, business and trust cases.”<sup>142</sup> The Supreme Court of Wyoming is directed to establish court of chancery rules and procedures by January 1, 2020, and has established a committee to accomplish those tasks.<sup>143</sup> Draft rules were adopted for further comment and study on December 30, 2019.<sup>144</sup> The implementing legislation does not specify where the court will sit, but does state that

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134. See Ind. Supreme Court, Judicial Order 19S-MS-295, at 1 (May 16, 2019), <https://www.businesscourtsblog.com/wp-content/uploads/2019/05/Order-Making-Commercial-Courts-Permanent-01593987xB05D9.pdf>.

135. *Id.*

136. *See id.*

137. See Supreme Court of Wis., Judicial Order No. 16-05, *In re* Creation of a Pilot Project for Dedicated Trial Court Judicial Dockets for Large Claim Business and Commercial Cases 4 (Apr. 11, 2017), <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=188391>.

138. *See id.* at 4.

139. *Id.*

140. See *Commercial Docket Pilot Project*, WISC. COURT SYS., <https://www.wicourts.gov/services/attorney/comcourtpilot.htm> (last visited Apr. 28, 2020).

141. See *Guidelines for Transferring a Case to the Commercial Docket*, WISC. COURT SYS., <https://www.wicourts.gov/services/attorney/docs/guidelinestransfercomdocket.pdf> (last visited Apr. 28, 2020).

142. See *Chancery Court*, WYO. JUDICIAL BRANCH, <https://www.courts.state.wy.us/chancery-court/> (last visited Apr. 28, 2020).

143. *See id.*

144. Wyo. Supreme Court, *In re* Adoption of Draft Rules of Civil Procedure for the Chancery Court (Dec. 30, 2019), <http://www.courts.state.wy.us/wp-content/uploads/2020/01/Order-on-Chancery-Court-with-proposed-draft-rules.pdf>.



the chancery court may have up to three judges, who will serve terms of six years.<sup>145</sup>

### **Kentucky**

In his 2018 State of the Judiciary Address, the Chief Justice of the Supreme Court of Kentucky reported on the recommendation, from a Civil Justice Reform Commission, that the state “develop a business courts pilot project in one or more jurisdictions” in Kentucky.<sup>146</sup> The Supreme Court of Kentucky acted on that recommendation in 2019 and issued an order creating the Jefferson County Business Court Docket Pilot Project.<sup>147</sup> The order created a “pilot project for the implementation of a Business Court Docket in Jefferson County Circuit Court,” which includes the city of Louisville.<sup>148</sup> The order also created a Business Court Docket Advisory Committee, which was charged with making recommendations to the Supreme Court on matters necessary to carry out the creation of the Business Court Docket Pilot Project.<sup>149</sup> On November 20, 2019, Kentucky’s supreme court issued an order promulgating Rules of Practice for the Jefferson County Business Court Docket Pilot Project.<sup>150</sup>

### **CONCLUSION**

Nearly every court has faced challenges in finding the resources to allocate to the creation of a specialized business court. However, the desire for judicial efficiency in resolving complex commercial matters has led many enterprising judges and lawyers to develop systems and processes that overcome their own challenges. By cataloguing those efforts, we hope that this article will serve as a resource for the continued development of specialized business courts throughout the United States.

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145. See WYO. STAT. § 5-13-101 *et seq.* (2019).

146. Supreme Court of Ky., 2018 State of the Judiciary Address: Shaping Judicial Branch to Meet Needs of Today’s Society (Nov. 2, 2018), <https://kycourts.gov/Documents/Newsroom/SOJ2018.pdf>.

147. See Supreme Court of Ky., Judicial Order No. 2019-06 (Apr. 9, 2019), <https://www.business-courtsblog.com/wp-content/uploads/2019/06/Kentucky-Order-in-Full-01601275xB05D9.pdf>.

148. See *id.* at 1.

149. See *id.*

150. See Supreme Court of Ky., Judicial Order No. 2019-13 (Apr. 9, 2019), [https://kycourts.gov/courts/supreme/Rules\\_Procedures/201913.pdf](https://kycourts.gov/courts/supreme/Rules_Procedures/201913.pdf).

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**APPENDIX A: TABLE OF CURRENT BUSINESS COURTS**


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<b>Year Business Court became operational<sup>151</sup></b>	<b>Business Court operational and/or later developments</b>	<b>Means of creation</b>	<b>Statewide (S), Regional (R),<sup>152</sup> Local (L)<sup>153</sup></b>
1993	Cook County (Chicago), Illinois Commercial Calendars	Order of Local Court	L
1993	New York County (Manhattan), New York Commercial Pilot Program	Order of Local Court	L
1993	Essex County (Newark), New Jersey Complex Commercial Case Assignment	Order of Local Court	L
1994	Delaware Superior Court Rules Governing Summary Proceedings for Commercial Disputes (rarely used and effectively superseded as a law-side business court with the creation of the Superior Court's Complex Commercial Litigation Division in 2010)	Order of State's Highest Court	S
1995	Commercial Divisions Created in Manhattan and Monroe County, New York	Order of State's Highest Court	R
1996	Commercial Pilot Projects, Essex and Bergen Counties, New Jersey	Orders of Local Courts	L
1996	North Carolina Business Court	Order of State's Highest Court	S

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151. We are referencing the year each business court became operational, rather than the year of any order or legislation creating the business court, if there is a difference between the two. So, e.g., the Cook County Circuit Court Commercial Calendars were created by court order on September 9, 1992, but the first Commercial Calendar only became operational in September 1993. *Business Courts History*, *supra* note 1, at 160–61.

152. Business court located in more than one city or county in a state, but not statewide.

153. Business court located in a single city or county.

1996	Milwaukee County, Wisconsin Circuit Court Summary Proceedings for Business Disputes (rarely used and rules rescinded in 2009; Wisconsin established a business court pilot program in 2017)	Order of Local Court	L
1998	Commercial Divisions in Nassau, Erie, and Westchester Counties, New York	Order of State's Highest Court	R
2000	Philadelphia Commerce Case Management Program	Order of Local Court	L
2000	Suffolk County (Boston), Business Litigation Session (made statewide in 2009)	Order of Statewide Trial Court	L, R, S
2000	Reno and Las Vegas, Nevada Business Courts	Order of State's Highest Court	R
2001	Rhode Island Business Calendar (originally in Providence and Bristol Counties, made statewide in 2011)	Order of Statewide Trial Court	R, S
2002	Commercial Divisions in Albany, Suffolk, and King Counties, New York	Order of State's Highest Court	R
2003	Maryland Business and Technology Case Management Program	Legislation	S
2003	Delaware Court of Chancery adds commercial technology jurisdiction	Legislation	S
2004	9th Judicial Circuit (Orlando), Florida Complex Business Litigation Court (discontinued due to lack of resources in 2018 but renewed in fall 2019)	Order of Local Court	L

2005	Fulton County (Atlanta), Georgia Business Case Division (became Metro Atlanta Business Court in 2016, now covering Fulton and Gwinnett Counties)	Rule promulgated by State's Highest Court	L, R
2005	Commercial Division added in Queens County, New York	Order of State's Highest Court	R
2006	Maine Business and Consumer Docket	Order of State's Highest Court	S
2006	11th Judicial Circuit (Miami), Florida Complex Business Litigation Section	Order of Local Court	L
2007	13th Judicial Circuit (Tampa), Complex Business Litigation Division	Order of Local Court	L
2007	Pittsburgh Commerce and Complex Litigation Center	Order of Local Court	L
2007	South Carolina Business Court Pilot Program (expanded from three to all forty-six South Carolina Counties in 2014; officially made permanent in 2019)	Order of State's Highest Court	R, S
2007	Gwinnett County, Georgia Business Case Division (now within Metro Atlanta Business Court ambit)	Order of Local Court	L
2007	Commercial Division in Onandaga County, New York	Order of State's Highest Court	R
2007	Colorado 4th Judicial District, Commercial Docket (evolved into Public Interest Docket in 2013) (no longer operational)	Order of Local Court	L

2008	17th Judicial Circuit (Ft. Lauderdale), Florida Complex Business Litigation Division	Order of Local Court	L
2008	New Hampshire Business and Commercial Dispute Docket	Legislation	S
2009	Ohio Court of Common Pleas Commercial Dockets (originally in four counties, now only in Cleveland and Toledo)	Order of State's Highest Court	R
2010	Jefferson County, Alabama Commercial Litigation Docket (no longer operational)	Order of Local Court	L
2010	Delaware Superior Court Complex Commercial Litigation Division	Order of Statewide Trial Court	S
2012	West Virginia Business Court Division	Rules adopted by State's Highest Court	S
2011–2012	Special Business Dockets established in Macomb, Kent, and Oakland Counties, Michigan Circuit Courts	Orders of Local Courts	L
2012	Michigan Business Courts established in seventeen out of eighty- three counties	Legislation (providing for business court in circuits with three or more circuit court judges)	R
2012	Judges in Franklin County, Ohio Court of Common Pleas vote to end Commercial Docket <sup>154</sup>		
2012–2013	Iowa Business Specialty Court Pilot Project (made permanent in 2016)	Order of State's Highest Court	S
2015	New Jersey Complex Business Litigation Program	Order of State's Highest Court	S

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154. <https://www.ohioabar.org/globalassets/home/about-the-osba/osba-leadership/council-of-delegates/cod-past-reports/2019/council-of-delegates-book-for-05-10-19-meeting-2.pdf>

2015	Davidson County (Nashville), Tennessee Business Court Docket Pilot Project (expanded to other counties in 2017)	Order of State's Highest Court	L, S
2015	Maricopa County (Phoenix), Arizona Commercial Court Pilot Project (made permanent in 2019)	Order of State's Highest Court	L
2016	Indiana Commercial Courts Pilot Project (made permanent in 2019)	Order of State's Highest Court creating Commercial Court dockets in six Indiana county, superior courts	R
2017	Wisconsin Commercial Docket Pilot Project (made statewide in 2019)	Order of State's Highest Court	R, S
2017	Judges in Court of Common Pleas of Hamilton County, Ohio, chose to end Commercial Docket <sup>155</sup>		
2019	Statewide Georgia Business Court (centered in Macon, becomes operational in 2020, and allows Metro Atlanta Business Court to continue)	Created by constitutional amendment and ensuing legislation	S
2019	Wyoming Chancery Court (to become operational in 2020)	Legislation	S
2019	Jefferson County (Louisville), Kentucky Circuit Court Business Court Docket Pilot Project	Order of State's Highest Court	L
2019	Bronx Commercial Division	Order of State's Highest Court	R

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155. Ohio State Bar Ass'n, *supra* note 108.

# EXHIBIT 10

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Note

Tyler Moorhead<sup>a1</sup>

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## **BUSINESS COURTS: THEIR ADVANTAGES, IMPLEMENTATION STRATEGIES, AND INDIANA'S PURSUIT OF ITS OWN**

### **INTRODUCTION**

Since Delaware established its Court of Chancery over two hundred years ago, the United States has seen a progressive movement towards specialization within its court system.<sup>1</sup> As states have implemented courts to handle bankruptcy, taxes, and juvenile issues, many states have begun seeking a court system dedicated to business disputes.<sup>2</sup> In an effort to alleviate the chaotic problems associated with complex business, supplier, and consumer relationships, many states are creating business courts within their jurisdictions.<sup>3</sup> Currently, over half of the states in the nation have chosen this strategy and have implemented some type of business court or complex litigation court.<sup>4</sup>

A business court, also referred to as a commercial court, is a state program that is dedicated to specifically handling business disputes or complex litigation within its respective jurisdiction.<sup>5</sup> The term "court" can be misleading.<sup>6</sup> A business court is a program, not necessarily a specific courtroom, typically created within a state's existing trial court or civil division.<sup>7</sup> The majority of business courts have several common, fundamental building blocks that allow them to remain successful.<sup>8</sup> In every business court, judges are trained and assigned to the court to handle complex business disputes specifically, and that single judge handles all aspects of the case from beginning to end.<sup>9</sup>

**\*398** The logic behind implementing a business court is that it streamlines the court's efficiency, educates judges and litigants, and creates predictable business case law that encourages companies to incorporate or complete transactions within the state.<sup>10</sup> By taking complex cases that would otherwise force judges to learn the business law as the case develops, and assigning those cases to trained judges, the process frees up the docket and decreases the amount of time spent on expensive litigation.<sup>11</sup>

However, business courts are not without their fair share of skeptics and concerns.<sup>12</sup> Some critics believe that business courts foster a pro-business public perception, isolate judges from other important areas of law, and create an elitist court full of the most educated judges who are only focused on businesses.<sup>13</sup> However, these concerns are not justified and are easily remedied by regulatory procedures; the benefits a business court can provide a state far outweigh any negative concerns.<sup>14</sup>

There are a number of decisions that a state must make to establish a successful business court.<sup>15</sup> Factors such as which cases qualify for the business court, filing fees, jury trials, location of the court, selecting judges, and establishing pilot program policies all have an impact on whether a business court will be effective.<sup>16</sup> By following the policies implemented by the most successful business courts in the nation, any state can establish a business court to overcome the hardships of complex business litigation within its jurisdiction.<sup>17</sup>



As of June 2, 2015, Indiana recognized the benefits a business court can provide and has initiated its pursuit for one of its own.<sup>18</sup> The Indiana Supreme Court created the Commercial Court Working Group to offer proposed next steps and a draft of rules governing Indiana's commercial court.<sup>19</sup> The Working Group has provided the Indiana Supreme Court with recommendations, including solutions to case eligibility requirements, publishing opinions, funding staff, and educating the community.<sup>20</sup> The Indiana Supreme Court has since accepted the \*399 Working Group's recommendations and unanimously decided to institute the Indiana Commercial Court Pilot Project by June 1, 2016.<sup>21</sup>

Part I of this Note explains the fundamental elements of a business court and its purpose within the judicial system.<sup>22</sup> Part II covers the numerous benefits a business court is able to provide its respective state.<sup>23</sup> Part III will discuss, and challenge, the negative perspectives sometimes associated with business courts.<sup>24</sup> Part IV contains an analysis of important decisions a state must determine before implementing a business court within its jurisdiction.<sup>25</sup> Part V provides recommendations on how states can establish a successful business court by implementing proven strategies.<sup>26</sup> Finally, Part VI specifically analyzes how Indiana has taken on these challenges and where the progress of its business court currently stands.<sup>27</sup>

## I. AN EXPLANATION OF BUSINESS COURTS

The increase in large, globalized companies over the last several decades has brought with it a need for state trial courts to establish business courts that can effectively litigate their complex disputes and consumer transactions.<sup>28</sup> A total of twenty-seven states, including business centers such as New York, Illinois, Rhode Island, Nevada, and Delaware, now maintain business courts to streamline this litigation that would otherwise bog down an unprepared civil court staff.<sup>29</sup> Though the majority of states have caught on to this trend rather recently, the "grandfather" of all business courts started with the Delaware Court of Chancery in 1792.<sup>30</sup> Because Delaware's equity cases generally raised issues that coincided with many business issues--duty to disclose, good faith requirements, injunctions, specific performance, accountings, etc.--the Delaware Court of Chancery shed light on the benefits of specialization as it effectively resolved these business disputes.<sup>31</sup>

Corporations have played a significant role in shaping modern society, and their influence in the legal profession is no exception.<sup>32</sup> Many states believe that \*400 these corporations' prevalence and importance to the continued development of the economy justify the use of state resources to better serve the legal industry's needs at large.<sup>33</sup> With commercial litigators, securities prosecutors, transactional attorneys, and securities attorneys, many states have recognized the need to merge the legal and corporate professions by providing a concentrated platform, such as a business court, to specifically target and resolve these business-centered issues.

## II. THE BENEFITS OF A BUSINESS COURT PROGRAM

In the competitive economy of today's corporate landscape, states are implementing business court programs to secure advantages, such as judicial efficiency, judicial expertise, and a streamlined docket.<sup>34</sup> Though targeted at complex litigation and business disputes, a business court is beneficial to a state's entire judicial landscape. These courts consolidate and efficiently resolve disputes that otherwise would delay any case scheduled near it on the docket.<sup>35</sup> As centers of quality, technology, and innovation, business court programs provide benefits that are admired by corporate litigants and court systems alike.<sup>36</sup>

### A. Efficiency

Most participating states agree that the leading benefit a business court provides is the potential efficiency with which it resolves complex disputes.<sup>37</sup> A 2012 study that evaluated total case time measured in days and case complexity measured in docket entries, highlighted the efficiency for which business courts are known.<sup>38</sup> The study found that business courts handled complex

contract claims an average of 1138 days faster than regular civil courts.<sup>39</sup> The same study showed business courts handled complex tort-based claims an average of 718 days faster than civil courts.<sup>40</sup>

The fact that it is mandatory in a business court for a single judge to preside over the entire case is one reason for this level of efficiency.<sup>41</sup> The judge will be readily familiar with the facts of the controversy and the procedural history instead of requiring a summary at every stage of the litigation process.<sup>42</sup> This also gives the judge a chance to manage the discovery, motion deadlines, hearing dates, and designations of evidence with an eye towards the trial or final stages \*401 of the dispute over which he or she will also preside.<sup>43</sup> A judge not presiding in a business court may have the option to devote his or her limited time between managing one complex oral argument or handling a dozen smaller cases.<sup>44</sup> By taking the complex issue off the judge's plate and placing the case in an established business court, the judge can dedicate his or her time to the other dozen cases, and the entire system benefits because the process is effectively streamlined in a manner that expedites cases backing up the docket.<sup>45</sup>

### ***B. Knowledgeable Judges***

A report from the American Bar Association stated that the "hallmark of every business court" is the ability to have one trained judge preside over the case from beginning to end.<sup>46</sup> Business court judges typically volunteer to be assigned to the business court docket and, therefore, are generally experienced and passionate about corporate law issues.<sup>47</sup> These judges have a greater opportunity of setting realistic compromises and potential resolutions because of his or her experience with various business operations.<sup>48</sup> A report from the South Carolina Business Court stated its cases encountered pre-trial disposition more frequently than any other civil cases and that, because of the single judge principle, "unique opportunities to resolve business cases are not lost."<sup>49</sup> As these judges become more familiar with common business disputes within their jurisdictions, their knowledge of business matters will increase and, in return, their efficiency will as well.<sup>50</sup>

Constantly appearing before the same judge also has the added benefit of providing continuity throughout the proceedings and eliminating surprises that may be uniquely attributed to each new judge.<sup>51</sup> Complex business disputes are a difficult breed of litigation that warrants the special attention these judges can provide the litigating parties.<sup>52</sup> Many complex business disputes have extensive pleading schedules, multiple parties, cross claims, complicated discovery schedules, large electronic documents, and a need for responsive judges who can quickly schedule hearings to rule on matters in a timely fashion.<sup>53</sup> With the increased presence of judicial congestion, the amount of time these judges save leads to a large decrease in litigation expenses for each party involved.<sup>54</sup>

### ***\*402 C. Common Law Predictability***

Complaints of the inconsistent application of business law, as well as a lack of alternative dispute resolution options, both govern a corporation's decision on where to file suit.<sup>55</sup> These complaints have driven litigating corporations to "federal court[s], to states with business courts ... or to private adjudication."<sup>56</sup> Because business courts publish opinions at the trial court level, the body of common law governing business cases will increase and become more uniform as more states adopt business court programs.<sup>57</sup> For example, this body of common law makes pre-trial disposition more common and efficient by establishing straightforward law that explains the often complex statutes associated with business disputes.<sup>58</sup> By establishing predictable business case law, a state can effectively give corporations an incentive to conduct transactions within the state and potentially even incorporate there.<sup>59</sup> A business court is a means to assure corporations that the state has the resources to handle its disputes and will effectively resolve its suit with precedent or deliberate reasoning.<sup>60</sup> This gives a state with a business court program an advantage over neighboring states that might lack this judicial advantage.<sup>61</sup>

The large number of companies incorporated on the east coast may correlate to the benefits and security business courts have provided to these corporations.<sup>62</sup> For example, PepsiCo lawyers expressed a desire to have access to a business court that

offered security in the form of predictable case law.<sup>63</sup> The company ultimately reincorporated in North Carolina and considered the state's successful business court as one of the factors in choosing the correct location.<sup>64</sup>

In summary, a business court provides predictable case law that incentivizes corporations to do business within the state and allows a company to be fairly represented by local counsel within the state court system.<sup>65</sup> Corporations and their general counsels are not the only target market for business courts, as lawyers within the state also receive a benefit from the program.<sup>66</sup> A 2002 study showed that a state's lawyers received on average \$4.5 million in additional revenue for every percentage point increase in the number of businesses \*403 incorporated within the state.<sup>67</sup> The more companies a business court can persuade to incorporate within the state, the more its legal and state-wide economy will benefit.<sup>68</sup>

#### ***D. Technology and Innovation***

Another benefit commonly associated with a business court is that it offers cutting-edge technology in an effort to maintain its promised efficiency and to continue to incentivize businesses to file claims within its jurisdiction.<sup>69</sup> Access to electronic filing is often sufficient motivation for corporate attorneys to file claims within the business court.<sup>70</sup> The extensive discovery and file sizes of business litigation almost make electronic filing a necessity.<sup>71</sup> Having electronic documents stored on a searchable server greatly reduces the burden of organizing and reviewing the record for both judges and litigants alike.<sup>72</sup>

However, technology in business courts goes far beyond electronic filing.<sup>73</sup> For example, South Carolina's business court offers video conferencing as a resource for litigants to use.<sup>74</sup> This gives corporations the chance to appear for hearings without having to be physically present in the courtroom.<sup>75</sup> Furthermore, "[e]lectronic presentations and technology-generated demonstrative evidence" allow for exhibits to be presented on large screens for all present in the courtroom to view in unison.<sup>76</sup> In North Carolina, the witness stand is equipped with a touch-screen computer that may be used to demonstrate witness testimony.<sup>77</sup> Collectively, these innovative technologies allow a business court to remain an attractive option for litigants to pursue their claims.<sup>78</sup>

### **III. MISCONCEIVED NEGATIVES SURROUNDING BUSINESS COURTS**

Though many believe in the benefits business courts provide, business courts are not without their fair share of perceived negatives.<sup>79</sup> Whether it be bias or concern for public perception or isolating judges, some states do not implement business courts for fear of change.<sup>80</sup> However, these negatives are often not \*404 warranted and are easily evaded by policies and corrective procedures.<sup>81</sup>

#### ***A. Possible Bias***

Some individuals have expressed concern that a court devoted entirely to business disputes will show a bias favoring business entities and, thus, would have a perceived bias against individual litigants.<sup>82</sup> The fear is that this perspective may make the judges susceptible to politicization and persuasion.<sup>83</sup> This state of mind may erode one's belief in a fair and just courtroom proceeding governing his or her respective case.<sup>84</sup> If this fear becomes actualized, globalized companies with multiple locations that qualify for personal jurisdiction may forum shop for particularly sympathetic business court judges.<sup>85</sup>

However, these concerns are widely unsupported by recorded data.<sup>86</sup> First, a court showing bias by continually ruling against individuals would erode the purpose of the judicial system and quickly gain widespread, negative attention that would put a stop to the prejudicial process.<sup>87</sup> Furthermore, procedural rules would prevent bias.<sup>88</sup> For example, business courts like South Carolina's have appellate procedures that maintain control over business court rulings.<sup>89</sup> The South Carolina Court of Appeals

and the South Carolina Supreme Court effectively curb bias by maintaining the authority to overturn opinions of the business court with which they disagree.<sup>90</sup>

Additionally, business courts publish opinions in an effort to develop predictable common law and to remain completely transparent with litigating parties.<sup>91</sup> With an exposed public record, it would be difficult for a judge to stray from the precedent established by other business court judges within his or her state.<sup>92</sup> Also, most states rotate judges and closely collaborate with the state's bar association to keep policies and practices up to date.<sup>93</sup> The American Bar Association has released a statement explaining, "[T]here is no record to prove that such a bias does, or could, exist."<sup>94</sup> The judges are experienced and have no reason to rule in a manner that contradicts the law or the precedent of the court.<sup>95</sup>

#### **\*405 B. A Pro-Business Public Perception**

Another negative perception of business courts, which likely stems from the bias argument above, is the fear of a negative public perception surrounding these courts.<sup>96</sup> States fear that citizens will lose faith in the judicial system because the name 'business court' implies that the court may be perceived as only assisting the business community and not the individual.<sup>97</sup> Citizens might become averse to their public funds being used to train judges who solve disputes that are predominantly between two private entities.<sup>98</sup>

Almost every state with a business court widely disputes these arguments as false or misleading and instead argue that business courts are similar to other common specialized courts, such as family or juvenile courts.<sup>99</sup> The American Bar Association has compared business courts to the less commonly known specialized courts, governing "mass torts, class actions, or medical malpractice."<sup>100</sup> Furthermore, if a state is concerned that these misconceptions will exist, the state still maintains control as to which cases qualify for placement within its business court.<sup>101</sup> A state could therefore only allow business versus business claims or complex individual claims to enter the court, and any fear about individual oppression would be adequately put to rest.<sup>102</sup> There is no data to support the notion that a negative bias or public misconception actually exists.<sup>103</sup>

#### **C. Isolating Elite Judges**

Critics' arguments specifically against business court judges are two-fold: (1) business courts steal the most educated judges away from other claims that could benefit from their experience; and (2) these judges are isolated with only business claims and, therefore, lose touch with recent developments or trends in other areas of the law.<sup>104</sup> The fear is that this isolation may also impact other judges by limiting their ability to collaborate with the business court judge about trends and recent legal developments.<sup>105</sup>

However, the fear of isolation is unfounded, as most courts, such as the South Carolina Business Court, maintain educational growth by requiring judges to carry a general docket as well as assigned business cases.<sup>106</sup> Additionally, courts **\*406** still maintain typical appellate procedures should any dispute not be resolved with the most up-to-date legal theories.<sup>107</sup> Regulating staffing and training mitigates many concerns that isolation brings with it.<sup>108</sup> For example, "senior judges, rotating terms, continuing education, and interaction with multi-disciplinary associations such as a state or local bar association" provide the opportunity for judges to maintain exposure to other areas of law and to continue legal training.<sup>109</sup>

A similar argument critics of business courts make is that the courts create an elitist system by stealing away the best judges to solely rule on business disputes.<sup>110</sup> This creates one elite judicial system solely for businesses and leaves the leftovers for everyone else.<sup>111</sup> However, many of the arguments above solve this issue as well.<sup>112</sup> Judges carry both types of cases, and additionally, a judge is often selected for his or her passion surrounding business, not because he or she is deemed more educated or superior to other judges.<sup>113</sup> By taking these complicated cases off of the general docket, other cases actually benefit because the presiding judge has more resources to devote to the litigating parties.<sup>114</sup>



#### IV. IMPORTANT DECISIONS A STATE MUST MAKE BEFORE IMPLEMENTING A BUSINESS COURT PROGRAM

Once a state determines a business court would be beneficial, there are a number of variables a state must choose for its program to make it the most effective for its specific goals.<sup>115</sup> The variables represented below demonstrate variations that different states have chosen to pursue for their respective business court programs. Each state should choose a route that is most effective for its current economic and corporate landscape.<sup>116</sup>

##### *A. Types of Business Courts and the Cases Each Allows*

Perhaps the most important decision a state must make before implementing a business court program is which type of business court it wishes to have and, subsequently, which types of cases that court will hear.<sup>117</sup> There are predominantly three types of business courts:

- (1) 'pure business courts,' where the parties must be commercial entities but the dispute need not be complex; (2) 'complex business courts,' \*407 where parties must be commercial entities and the case must be complex; and (3) 'complex civil courts,' where the parties need not be businesses, but the case must be complex.<sup>118</sup>

Pure business courts hear the majority of disputes arising between businesses, regardless of whether the case is complex.<sup>119</sup> States that heavily litigate business-to-business issues such as breach of contract, breach of fiduciary duty, fraud, corporate structuring, partnership, and trade secrets tend to implement pure business courts to effectively handle these predominantly business disputes.<sup>120</sup> In an effort to determine the types of cases allowed, some courts include an exhaustive list of the various types of business claims that qualify, while others use catch-all phrases such as "the case is expected to have implications" on the corporate industry.<sup>121</sup>

Complex business courts require business entities to be the litigating parties and for the issue to be complex.<sup>122</sup> Therefore, these types of business courts are slightly narrower than pure business courts.<sup>123</sup> For example, Arizona uses a series of parameters to determine whether a business dispute is adequately complex to warrant transfer to its business court.<sup>124</sup> Arizona measures the number of witnesses, parties, courts involved, supervision required, and legal issues.<sup>125</sup> This ability to exclude non-complex business disputes helps establish greater efficiency and puts a focus on the more difficult issues that a typical court might not have the resources to handle.<sup>126</sup>

Finally, complex civil courts handle complex disputes, which usually means a business is involved, but there is no requirement that both parties be corporate entities.<sup>127</sup> This type of court is becoming more common for states that want the benefits a business court brings but may not have the corporate landscape to fill a pure business docket.<sup>128</sup> Claims such as environmental litigation, product liability, and consumer class actions usually fall within these complex case types.<sup>129</sup> States choose this route because of the strong base of resources a business court has to offer, as well as the likelihood that a complex dispute will affect the \*408 business community, regardless of whether a business is a party to the suit.<sup>130</sup>

##### *B. Location and Number of Judges*

Another fundamental decision in the implementation process is the location of the state's business court and the number of judges that should be assigned to it.<sup>131</sup> Some states have started business courts in only the largest cities in terms of population or number of cases filed per year.<sup>132</sup> Other states, such as Michigan, require a county to have a business court judge if the county typically has at least three circuit court judges.<sup>133</sup> Other states only have business court judges in one county but have lifted jurisdictional barriers to allow anyone in the state to file there.<sup>134</sup>

Another option in determining the location of a business court is to divide the state into regions.<sup>135</sup> For example, South Carolina is divided into three regions, and parties within those regions file their business disputes with the region's business court judge.<sup>136</sup> Typically, a state will choose between one and three judges to assign to its respective business court.<sup>137</sup> In an effort to provide the expected efficiency, the majority of states provide business court judges with full administrative staff support.<sup>138</sup>

### ***C. Costs and Filing Fees***

One barrier that may keep a state from pursuing the benefits of a business court program is a lack of funding.<sup>139</sup> This begs the question, "How does a state cover the costs?"<sup>140</sup> Some states have been able to implement a business court program without burdening the budget, solely by imposing extra filing fees.<sup>141</sup> These extra fees can be as modest as the cost of transferring a case from the regular court system to the business court.<sup>142</sup> The average filing fee from the business courts in the United States is around \$300, while the highest can be found in Arizona at \$750.<sup>143</sup> Finally, some states procure funds from their legislature or supreme court to adequately staff the business court program.<sup>144</sup>

### **\*409 *D. Routes of Appeal***

Having appropriate routes of appeal is essential to curb any possible negative associations with the business court's public perception.<sup>145</sup> Most cases follow the typical route of appeal that any civil case in its jurisdiction would follow.<sup>146</sup> However, because the majority of cases involve complex issues and have widespread impact on future business litigation within the state, some states allow appeals from business court to travel directly to the highest court in the state.<sup>147</sup>

### ***E. Minimum Amount in Controversy***

As with all of the decisions mentioned above, choosing an amount in controversy requirement must be made to align with the particular goals of the state implementing the business court.<sup>148</sup> For example, South Carolina chose not to place an amount in controversy requirement as a prerequisite to filing within its business court.<sup>149</sup> South Carolina was concerned such a requirement would preclude important disputes from being pursued and would reduce the benefit that the business court provides overall.<sup>150</sup> Other states, perhaps those with large, industrial cities, may find that an amount in controversy is required to free the commercial docket of congestion.<sup>151</sup>

### ***F. Voluntary Filing and Transfer***

States vary on whether to make filing within the business court mandatory for any case meeting the requirements.<sup>152</sup> Many states believe that allowing voluntary filing will give litigating parties more options of dispute resolution and encourage them to file within the court.<sup>153</sup> However, some states find the court's overall benefit increases if parties are required to file within the business court when their case type meets the requirements.<sup>154</sup> In addition, these states typically allow filing directly into the business court, while others require the case to be transferred at the consent of both parties.<sup>155</sup> In the pursuit of maximum accuracy and efficiency, some states have appointed an administrator to determine whether cases will be accepted, instead of accepting cases based on a list of specified criteria.<sup>156</sup>

## **\*410 V. RECOMMENDATIONS: UNIQUE ATTRIBUTES OF SUCCESSFUL BUSINESS COURTS**

By analyzing the twenty-seven business courts across the country, one can observe strong trends and leading courtrooms that are beginning to emerge. The key to developing a successful business court is to determine what each state has done well and mimic

the strategies that have proven useful, while still aligning with the state's specific goals.<sup>157</sup> By implementing the following best practices from around the nation, a business court's likelihood of success and acceptance is greatly increased.<sup>158</sup>

#### ***A. Begin by Developing a Pilot Program***

A pilot program begins with a committee of members dedicated to molding the business court to fit correctly with that specific state's objectives and corporate landscape.<sup>159</sup> These programs essentially create the business court on a county-to-county scale to determine how well the court is received and what must change before implementing the business court on a state-wide level.<sup>160</sup> The benefits of having a pilot program are the flexibility and adaptability that such a program offers early on in the business court's decision-making process.<sup>161</sup>

To uniquely mold a business court for its state, a pilot program must diligently track performance.<sup>162</sup> This includes everything from what types of cases were successfully handled to surveying attorneys to determine points of improvement.<sup>163</sup> Many surveys have found that lack of awareness of the business court as a resource to litigants was a serious problem.<sup>164</sup> Therefore, a main concern for pilot programs is to educate the attorneys and businesses that will be working within its jurisdiction.<sup>165</sup>

Because one of the most difficult decisions in beginning a business court pilot program is determining the type of cases allowed into the business court, many pilot programs have the state's chief justice preside as "gatekeeper."<sup>166</sup> Being a "gatekeeper" means that for each case filed in the state's business court, the chief justice decides whether the court's jurisdiction would be appropriate for the parties and issues involved in the case.<sup>167</sup> This allows the chief justice to monitor the program and make adjustments as trends start to develop from case to case. \*411 An important element of any pilot program is this adaptability.<sup>168</sup> For example, should a complex corporate issue present itself before the business court that would fail to meet the requirements allowed for the court's jurisdiction, the chief justice could permit the complex matter to enter the court anyway and advise the pilot program committee that the policy should be amended to include this new type of complex dispute in the future.<sup>169</sup>

#### ***B. Policies to Ensure Efficiency***

With efficiency as one of the main benefits of a business court program, many states have implemented specific policies in an effort to maximize this effect.<sup>170</sup> Policies such as "mediation programs, case management scheduling conferences, and case tracking programs" reduce not only the amount of time it takes to resolve a dispute, but also the amount of resources the court and litigants exhaust to do so.<sup>171</sup> Around half of the business courts operate mediation programs as a resource for litigants to resolve disputes, but states differ on the necessity of such programs.<sup>172</sup> Some of these courts have decided to make mediation mandatory, voluntary, or only by court order.<sup>173</sup> Furthermore, some of the most successful business courts "utilize some form of a required case management conference and scheduling orders as a required case management tool."<sup>174</sup> Due to the often large size of discovery requests involved in complex business disputes, required case management and scheduling orders allow parties to create an efficient schedule regarding motions, discovery, hearings, and trial dates.<sup>175</sup>

For example, in 2003 the Delaware Court of Chancery began its Business and Technology Case Management Program (BTCMP).<sup>176</sup> This made Delaware the first state with a business court that specifically includes technology disputes and proactively handles the large and complex discovery often associated with these types of disputes.<sup>177</sup> Case tracking is another tactic utilized to pursue efficiency.<sup>178</sup> This assigns different types of cases to predetermined resolution times and scheduling dates.<sup>179</sup> For example, if a complex case has a resolution goal of eighteen months, there are predetermined windows for when discovery or \*412 motions for summary judgment are to be addressed.<sup>180</sup>

New York's business court is one of the leading examples of how certain policies can improve efficiency within a business court.<sup>181</sup> The state has experienced great success by implementing "earlier assignment of cases, more robust expert discovery rules, limits on privilege logs, the creation of standardized forms, and enhancements to the management of e-discovery

issues.”<sup>182</sup> New York also follows a strict case management strategy.<sup>183</sup> New York requires staggered appearances, telephone discovery conference options, and an increase in the judge's participation in early discovery disputes.<sup>184</sup> Each of these policies allow New York to remain a leader in efficiency.<sup>185</sup>

### ***C. Policies to Ensure Quality***

A prerequisite for the business court to be well-received must be a dedication to providing quality judicial services and quality written opinions.<sup>186</sup> Judicial training and close collaboration with the state's bar association ensure cohesion within the state's current legal programs and help maintain the quality litigants of that state have come to expect.<sup>187</sup> Perhaps the most important route a business court can pursue to ensure quality is for its judges to issue published legal opinions.<sup>188</sup> This is a rarity as compared with other trial courts because trial opinions and dispositive motions are sparsely published.<sup>189</sup>

By creating a source of case law, judges have precedent on which to rely.<sup>190</sup> This doctrine of law only grows and provides mores stability as more cases filter through the business court program.<sup>191</sup> This is also a major component in ensuring the benefit of predictable case law to incentivize corporations to do business within the state.<sup>192</sup> By issuing opinions, the business court has solidified this incentive and has increased the quality the court offers.<sup>193</sup> Additionally, even when judges cycle out and the bench changes, this case law will ensure consistent, quality opinions within the business court.<sup>194</sup>

### ***\*413 D. Resources Available to Assist in the Creation of a Business Court***

An important tactic that a state may utilize to ensure the success of its business court is to consult the vast array of resources the legal profession has dedicated to this specific objective.<sup>195</sup> The American Bar Association's Business Law Committee has published a document titled “Establishing Business Courts in Your State” as a resource for states considering pursuing business courts.<sup>196</sup> The Committee on Business and Corporate Litigation has a web page devoted to addressing business court resource distribution.<sup>197</sup> The University of Maryland School of Law's *Journal of Business and Technology Law* maintains a similar webpage for states to utilize.<sup>198</sup> Finally, the National Center for State Courts has an online presence devoted to business courts as well.<sup>199</sup>

## **VI. INDIANA'S JOURNEY: IMPLEMENTING A BUSINESS COURT OF ITS OWN**

On June 2, 2015, the Indiana Supreme Court handed down its “Order Establishing the Indiana Commercial Court Working Group.”<sup>200</sup> This Order assigned nineteen prominent members of the Indiana legal community to participate in the Commercial Court Working Group, with the aspiration of implementing a commercial court of its own in Indiana.<sup>201</sup> Members of the Working Group balance all interests associated with Indiana's commercial court and include: judges such as Judge Craig Bobay, Judge Heather Welch, and Justice Steven David; private practice attorneys such as Karen Moses and Michael Wukmer; and professors such as Professor Frank Sullivan and Professor Jay Tidmarsh.<sup>202</sup>

The goal of the Commercial Court Working Group was to “recommend guidelines for establishing and administering commercial courts” with a specific emphasis on: (1) case eligibility criteria; (2) commercial court education initiatives; (3) procedures for publishing opinions and appointing state paid masters; (4) best complex litigation practices; (5) community involvement; and (6) court staff funding sources.<sup>203</sup> The Indiana Commercial Court Working Group had only four short months to consider these elements and draft official recommendations for the Indiana Supreme Court.<sup>204</sup> On October 1, 2015, the Working Group submitted its “Initial Report of the Indiana Commercial Court Working Group to the Indiana Supreme Court” stating it unanimously **\*414** recommended establishing the Commercial Court pilot program in Indiana and provided a draft of rules intended to govern the procedures of the court.<sup>205</sup>



### A. Case Eligibility Criteria

On October 1, 2015, the Indiana Commercial Court Working Group submitted *Administrative Rule 20*, the proposed rules governing the procedures of Indiana's commercial court.<sup>206</sup> *Administrative Rule 20* states that any civil case is eligible for the commercial docket as long as the central issue relates to any of the following criteria: (1) the formation, dissolution, governance, or liquidation of a business entity; (2) obligations between owners, officers, directors, partners, and a business entity; (3) trade secrets, non-competes, or employment agreements; (4) liability or indemnity of owners, officers, directors, partners, and the business entity; and (5) disputes between business entities or individuals relating to contracts, transactions, or their respective relationships.<sup>207</sup>

This fifth guideline leaves the Indiana commercial court subject to claims from both business entities and private individuals.<sup>208</sup> By leaving the commercial court open to claims arising from individuals, Indiana significantly reduced the threat of a purely pro-business bias or pro-business public perception.<sup>209</sup> The final guideline for case eligibility states "cases otherwise falling within the general intended purpose of the Commercial Docket" will be allowed to file within the commercial court.<sup>210</sup> This provision demonstrates the pilot program's flexibility and ability to adapt.<sup>211</sup> Although it may prove difficult to anticipate every possible situation in which the commercial court would prove to be a useful resource, this provision allows Indiana's commercial court to take claims not otherwise allowed and provides an opportunity to revise *Administrative Rule 20* accordingly.<sup>212</sup>

*Administrative Rule 20* also specifies claims to which the commercial court is *not* intended to apply.<sup>213</sup> The Indiana Commercial Court will not be an option for claims focusing on issues of: (1) personal injury, survivor, or wrongful death; (2) product liability and consumer protection; (3) discrimination; (4) individual residential real estate disputes; (5) matters subject to domestic relations, juvenile, or probate divisions of a court; (6) criminal matters; and (7) consumer debts.<sup>214</sup> These exclusions seem to suggest that the Indiana Commercial Court intends to \*415 focus on claims that revolve around the business transaction itself and not subsequent consumer or personal injury disputes.<sup>215</sup> These rules offer a great foundation for establishing the specific claims eligible for Indiana's commercial court, all while maintaining the flexibility that will allow for growth and specialization.<sup>216</sup>

### B. Publication of Orders and Commercial Court Staff

A large portion of the Indiana Commercial Court Working Group's proposal focused on the staffing and funding requirements that will be necessary to run the program and publish opinions.<sup>217</sup> *Administrative Rule 20* states that the commercial court will publish opinions electronically on its "dispositive motions, trials, and other significant matters."<sup>218</sup> The Working Group has suggested that all commercial courts run on the Odyssey<sup>219</sup> case management system.<sup>220</sup> With all of the judges using the same system, electronic filing through Odyssey should be the most effective pathway for publication.<sup>221</sup> The Commercial Court Working Group anticipates that all Indiana commercial court venues will utilize Odyssey and have e-filing as an option before the commercial court docket is initiated.<sup>222</sup>

One of the only areas that the Working Group did not unanimously agree upon was the procedure that outlines the appointment of commercial court masters.<sup>223</sup> A commercial court master is an "attorney, a senior judge, or a non-attorney agreed upon by the Commercial Docket Judge ... who has special skills or training appropriate to undertake to perform the tasks that may be required."<sup>224</sup> In contrast to Indiana Trial Rule 53(A), the Commercial Docket Judge will be able to appoint a master without obtaining the permission of the Indiana Supreme Court.<sup>225</sup> The debate involving the appointment of masters hinged on deciding whether the Commercial Docket Judge should have the sole discretion to appoint or have to get the consent of the parties before assigning the master.<sup>226</sup>

With a vote of 13-3, the Working Group proposed that the Commercial Docket Judge be required to obtain the express consent of the parties before \*416 assigning a master to the case and that consent as to the master's compensation must be obtained, as well.<sup>227</sup> One of the main reasons that the Working Group chose this route was that other states experienced concerns from

individuals and business entities regarding how much control they retained over litigation.<sup>228</sup> In an effort to relieve this concern, the Working Group chose to require the parties' consent and thus provided litigants with more input in the management of their cases.<sup>229</sup> Furthermore, filing within Indiana's commercial court docket will be *voluntary*, and in the interest of keeping this trend, consent of the parties must be obtained before filing in the business court as well as before appointing the master.<sup>230</sup>

A significant benefit of filing within the commercial court system is the ability to experience the precedent of the published motions and rulings.<sup>231</sup> To make this a reality, Commercial Docket Judges must have the available resources to hire full-time staff, including law clerks.<sup>232</sup> These law clerks are essential to providing promised efficiency, as they are expected to research a majority of the issues and draft opinions.<sup>233</sup> Finding the resources to hire law school graduate law clerks, and to establish the entire program, is an obstacle Indiana must face.<sup>234</sup> Although the Working Group is still collaborating with legislation to secure future funding, the initial funding for the Indiana Commercial Court pilot project will be found in the Indiana Supreme Court's budget.<sup>235</sup>

### **C. Education**

With the Indiana Commercial Court Pilot Project in rapid development, education and awareness regarding the program will be fundamental to its early successful adoption.<sup>236</sup> Indiana's Working Group will be partnering with the Indiana State Bar Association as well as the Indianapolis Bar Association.<sup>237</sup> Jointly, their pooled resources and contacts will be able to adequately educate Indiana about its new judicial resource in the commercial court.<sup>238</sup> This joint collaboration will be able to reach law firms, the Indiana community, and business entities alike.<sup>239</sup> The majority of the members in the Commercial Court \*417 Working Group also participate in other legal associations across the state, such as the Indiana Chamber of Commerce and the Indiana Business Law Survey Commission, solidifying the Group's influence across Indiana's legal community.<sup>240</sup>

### **D. Indiana's Current Position**

On October 29, 2015, Chief Justice Loretta H. Rush of the Indiana Supreme Court responded to the Indiana Commercial Court Working Group's initial report, rule draft, and future recommendations.<sup>241</sup> After analyzing the Working Group's submission, the Indiana Supreme Court unanimously decided to proceed with establishing a Commercial Court Pilot Project in Indiana.<sup>242</sup> On January 20, 2016, the Indiana Supreme Court issued an order officially establishing the Indiana Commercial Court Pilot Project in six counties.<sup>243</sup> The Pilot Project will last for three years as a test phase to determine the best procedures for the court and whether to extend the court to more counties.<sup>244</sup>

The following Indiana judges will be the inaugural Commercial Docket Judges: Judge Craig Bobay, Allen Superior Court--Civil Division; Judge Stephen Bowers, Elkhart Superior Court 2; Judge Richard D'Amour, Vanderburgh Superior Court; Judge Maria Granger, Floyd Superior Court 3; Judge John Sedia, Lake Superior Court; and Judge Heather Welch, Marion Superior Court--Civil Division 1.<sup>245</sup> These jurisdictions span the entire length of the state and the commercial courts established within them will provide a great judicial resource for Indiana's most concentrated business districts. The Indiana Supreme Court has also determined that it will provide funding for four law clerks.<sup>246</sup> The Commercial Court Working Group has suggested that Marion County be assigned one clerk, Floyd and Vanderburgh County share a clerk, and Lake, Elkhart, and Allen County share two clerks.<sup>247</sup> The Indiana Commercial Court Pilot Project became fully functional in these counties on June 1, 2016.<sup>248</sup>

## **CONCLUSION**

As the effect that corporations have on our economy increases, more states are following the trend of implementing business courts to handle the complex litigation that often follows large companies and their consumer interactions.<sup>249</sup> With judges trained in business disputes presiding over cases from beginning to \*418 end, business courts are providing states with efficiency, quality, common law predictability, and innovation.<sup>250</sup> By streamlining these complex disputes, a state's entire court system benefits by eliminating docket backups and leaving more resources to devote to the numerous other cases filed within

the state.<sup>251</sup> The common law predictability that business courts provide offers a great incentive for businesses to incorporate or complete transactions within a state that has established business courts.<sup>252</sup>

Though business courts are sometimes met with skepticism, these perceived negatives are often overstated and can be solved by the implementation of simple policies and procedures.<sup>253</sup> A state's fear that a business court fosters bias, negative public perception, and an isolation of elite judges is not supported by evidence and can be curbed by maintaining transparency within the court system.<sup>254</sup> Specifying routes of appeal, rotating business court judges, and using case criteria requirements that allow an individual's claim against a business reduce these perceived negatives.<sup>255</sup>

To remain successful, there are a wide array of decisions a state must make to mold the business court to its state's specific goals and aspirations.<sup>256</sup> Complex business courts, pure business courts, and complex civil courts are all options states have chosen in an effort to alleviate the pressures that large cases have on a courtroom's docket.<sup>257</sup> Factors such as the case types allowed to be filed within the business court will determine the court's perception and direction.<sup>258</sup> Filing fees, jury trials, location of the court, and the number of judges all must be made with the state's respective goals in mind.<sup>259</sup>

It is crucial for a state to implement a business court pilot program to "test the waters."<sup>260</sup> This allows a state to begin its business court on a small scale and make adjustments to fit the state's needs before opening the program statewide.<sup>261</sup> To rival the most successful business courts in the country, states must implement procedures that ensure efficiency and quality.<sup>262</sup> Mediation, case management programs, discovery rules, published opinions, and judicial training are all unique solutions various states have pursued to be competitive.<sup>263</sup> There is also a vast amount of resources available for states considering a business court to consult \*419 on how to make the court the most successful.<sup>264</sup>

Indiana's recent initiative to pursue a Commercial Court Pilot Project shows the state is dedicated to providing the best possible judicial resolution process available for all of its litigants.<sup>265</sup> The Commercial Court Working Group's draft of *Administrative Rule 20* displays the framework for a commercial court that is geared toward taking the most complex business disputes away from the general docket and placing them into a commercial court system that will have the resources to effectively resolve them.<sup>266</sup> On June 1, 2016, the Indiana Commercial Court Pilot Project became operational, and Indiana secured a great judicial advantage and resource for its legal community.<sup>267</sup> In conclusion, business courts' benefits far outweigh any negative effects, and by following the policies implemented by the most successful business courts in the nation, Indiana, and any other state, can establish a business court to overcome the hardships of complex business litigation within its jurisdiction.<sup>268</sup>

### Footnotes

a1 J.D. Candidate, 2017, Indiana University Robert H. McKinney School of Law; B.S., 2014, Indiana University's Kelley School of Business. A special thank you to Judge Heather Welch and Justice Steven David for their encouragement to pursue this topic and to Professor Frank Sullivan for his continued support and insight into the Commercial Court Working Group.

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- 202 *Id.*
- 203 *Id.* at 1-2.
- 204 *Id.* at 2.
- 205 *Id.* at 4.

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- 207 *Id.* at 2-3.
- 208 *Id.* at 3.
- 209 Roberts et al., *supra* note 2, at 33.
- 210 *Rule 20, supra* note 206, at 4.
- 211 Roberts et al., *supra* note 2, at 33.
- 212 *Rule 20, supra* note 206, at 4.
- 213 *Id.*
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- 216 *Id.* at 3-4.
- 217 *Id.* at 8.
- 218 *Id.*
- 219 Odyssey is Indiana's statewide case management system that categorizes its courts' chronological case summaries.
- 220 INITIAL REPORT, *supra* note 18, at 3.
- 221 *Id.*
- 222 Memorandum from Professor Frank Sullivan, Ind. Robert H. McKinney Sch. of Law, to the Ind. Commercial Court Working Grp., 1 (Jan. 21, 2016) (on file with author) [hereinafter *Memorandum*].
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- 224 *Id.*
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- 226 *Id.*
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- 230 *Id.*
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- 232 *Id.*
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- 237 *Id.* at 3.
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- 241 Letter, *supra* note 21.
- 242 *Id.*
- 243 Order, *supra* note 21, at 1.
- 244 *Id.*
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- 246 Memorandum, *supra* note 222, at 1.
- 247 *Id.*
- 248 Order, *supra* note 21, at 1.
- 249 Roberts et al., *supra* note 2, at 32.
- 250 *See generally* SULLIVAN & WESSEL, *supra* note 10.
- 251 Applebaum, *supra* note 6, at 17.
- 252 *See generally* SULLIVAN & WESSEL, *supra* note 10.
- 253 *See generally* Powell, *supra* note 14.
- 254 *See generally* Nees, *supra* note 1.
- 255 *Id.* at 496-97.
- 256 *See generally* Powell, *supra* note 14.
- 257 SULLIVAN & WESSEL, *supra* note 10, at 1.
- 258 Jackson, *supra* note 128.
- 259 *See generally* Nees, *supra* note 1.
- 260 SULLIVAN & WESSEL, *supra* note 10, at 13.
- 261 *Id.*
- 262 Nees, *supra* note 1, at 520-22.
- 263 *Id.*
- 264 *See generally* RENCK & THOMAS, *supra* note 4, at 3.
- 265 Letter, *supra* note 21.
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267 Order, *supra* note 21, at 1.

268 See generally Nees, *supra* note 1.

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