

**ATTORNEY RICHARD G. NIESS**  
1802 Monroe Street, #407  
Madison, Wisconsin 53711  
madniess@aol.com

September 9, 2024

**RECEIVED**

SEP 09 2024

CLERK OF SUPREME COURT  
OF WISCONSIN

Clerk of the Wisconsin Supreme Court  
110 E. Main Street, Suite 215  
Madison, WI 53703

HAND-DELIVERED

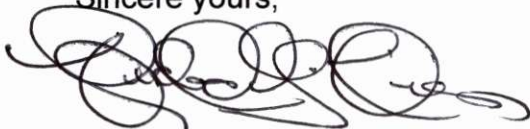
**Re: *Opposition to Rules Petition 16-05E and the Business Court "Pilot Project"***

Dear Sir or Madam:

Enclosed for filing are a signed original and nine copies of "Opposition to Rules Petition 16-05E and the Business Court 'Pilot Project'" from retired Wisconsin Circuit Court Judges John Markson and Richard Niess. An unsigned copy will be emailed to your office and to petitioner Attorney Laura Brenner today.

Thank you.

Sincere yours,

A handwritten signature in black ink, appearing to be "Richard G. Niess", written in a cursive style.

Attorney Richard G. Niess  
SBN 1005460

cc: Attorney Laura Brenner (by email only)

**To:** The Honorable Chief Justice and Associate Justices of the Wisconsin Supreme Court

**From:** Circuit Judge Richard G. Niess, (Ret.) and Circuit Judge John W. Markson, (Ret.)

**Re:** ***Opposition to Rules Petition 16-05E and the Business Court "Pilot Project"***

## INTRODUCTION

May it please the Court:

The untimely and otherwise deficient Petition 16-05E filed by Attorney Laura Brenner, Chair of the Business Court Advisory Committee, should be rejected by this court. The failed business court "pilot project", born in the shadows and patiently indulged by this court on a split vote for years, should never have been implemented in the first place. Its inherent, insurmountable flaws at the outset have only become more glaring in the intervening eight years, thus warranting its termination at long last.

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 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.

Since then, 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.

Meanwhile, with its skewed process for appointing business court judges and drafting business court rules, the business court "pilot project" has materially compromised judicial independence in Wisconsin, violated the fundamental principle that all persons/entities stand as equals before our courts, transferred substantial control over business litigation from our democratically elected judges into the hands of the very business interests whose cases are being adjudicated, and imposed unfunded administrative burdens on our already underfunded court system.

The business court thus embodies more than just the perception of impropriety. The seemingly never-ending "pilot project" creates a unique, privileged status for big business in our court system, contrary to Wisconsin's constitutional and statutory design and based purely on false pretenses. The result? A two-tiered system of justice, one for big business, and one for everybody else.



No other cases are handled this way in Wisconsin.

### THE FLAWED PETITION 16-05E

The Business Court Advisory Committee's data-bereft, shallow petition to perpetuate this court for yet another two years contains only unavailing excuses for its many past shortcomings, dismissive references to its failures to carry out Supreme Court directives, and hollow promises to do better. What the petition does not contain is any demonstration that the court accomplishes anything worthwhile—not a single cogent reason why this eight-year old “pilot project” should continue at all, let alone for another two years.

A brief bit of history.

By order of April 11, 2017, the Supreme Court established 2020 as the expiration date for the “pilot project”, later extended to July, 2022. On February 11, 2022, however, the Business Court Advisory Committee filed formal Rule Petition 16-05D to extend the “pilot project” for another two years. The petition drew substantial opposition from the bench, bar and citizens of this state for many of the same reasons detailed herein. Nonetheless, by a 4-3 vote, the Supreme Court granted the petition on June 29, 2022 extending the “pilot project” until July 30, 2024. It did so, however, expressly conditioned upon two unambiguous orders to the Business Court Advisory Committee.

First, this court ordered the Committee to file a formal petition or recommendation by July 1, 2023. Second, the filing was to be either a formal petition asking this court to adopt a permanent business court or a written recommendation that the court permit the “pilot project” to expire.

The Business Court Advisory Committee brushed off both orders, just like it has ignored other Supreme Court orders in the past (the requirement for annual reports, for example.)

In particular, the pending petition was filed May 30, 2024, eleven months late. The Committee's sole excuse for its impressive untimeliness is relegated to a footnote alleging an “oversight”— that all members of the committee repeatedly “misread” the date even though the date was expressly stated twice in the order, once by the majority and once by the dissent. Such inexcusable neglect would gain no traction in any civil case litigated in a Wisconsin court, nor should it here.

Moreover, contrary to this court's June 29, 2022 order, Petition 16-05E makes no request to adopt a permanent business court (indeed, it seeks the exact opposite) nor does it make a recommendation that the court permit the “pilot project” to expire (which was the only other option remaining under the court order.) Instead, the Business Court Advisory Committee seeks one more two-year extension of the “pilot project” so the Committee can supposedly accomplish what it has promised but inexplicably failed to do since 2016—gather data justifying its existence.

The grounds for this extension are, once again, flimsy at best.

Indeed, Petition 16-05E's most substantial affront is the sheer dearth of any legitimate justification for perpetuating this court for one more day, let alone two years. After working for eight years restructuring our court system to favor big business, the Committee musters only a scant three pages of unsubstantiated generalizations, beside-the-point arguments, factually unsupported assertions and overall flawed rationale to promote its request that this controversial "pilot project" be extended for another two years.

In particular, the Committee provides no data nor evidence of any kind supporting the bald assertions that (1) "there is already good evidence that Wisconsin's commercial docket likewise will be successful", (2) "[t]he Project has been repeatedly reviewed for effective judicial resolution of disputes", or that (3) "[t]he lawyers who have employed Wisconsin's commercial dockets have expressed appreciation for the effective dispute resolution that has been provided".

Instead, we are apparently supposed to take it on faith that there is "good cause to permit the Project to continue for at least a final two-year period". This was not even true two years ago, and the Committee offers no evidence whatsoever that "it took time to overcome numerous challenges to get the Project off the ground." The Petition doesn't even identify the supposed "challenges" that have required eight years to master, except for unspecified "technological challenges" at the outset. The Committee provides no specifics about the claimed challenges of "battling misperceptions", "coding methods", "collecting data", and "informing practitioners," all of which supposedly impeded its work.<sup>1</sup>

The petition reiterates the irrelevant argument that 25 states maintain commercial dockets of some form or another, once again without detailing an apples-to-apples comparison to Wisconsin's business court. It provides no evidence that a single one of these foreign business courts is structured in a manner analogous to Wisconsin's where big business lawyers, through their dominance on the Advisory Committee, have collaborated with the Chief Justice to select a small and exclusive number of judges to handle their large commercial cases.

The petition claims that "most [of these 25 states] have found great success" with business courts, but provides no supporting evidence, no explanation of how "success"

---

<sup>1</sup> The Committee's revelation that "[r]eplacing retired commercial court judges also took some time" is unsurprising because, at least in Dane County, the judiciary has largely balked at treating the selection of business court judges any differently from any other civil case. With the exception of three judges in the last four years, all Dane County judges—more than 20— have refused to cooperate with big business' appropriation of its court structure. Theirs is essentially a fundamental objection to the business court itself, which the Committee has usually ignored but now seizes upon as excusing its failure to carry out this court's orders regarding the "pilot project."



is measured nor, tellingly, any details on why some of the 25 have not found “great success”.<sup>2</sup>

Moving on, the Petition then devotes half a page to what it proposes to accomplish if the two-year extension is granted, all of which could have been done in the eight years the “pilot project” has existed, and most of which has been promised by the Committee from the beginning.

Worse yet, the Committee’s meager proposals are completely insufficient to assist this court in evaluating either the need or efficacy of this “pilot project”.

For example, while looking to solicit information from lawyers and judges who have participated in the project, the Committee continues to ignore those lawyers and judges who have not participated in the “pilot project” but who handle the majority of commercial cases in Wisconsin. If we are truly interested in whether the “pilot project” offers an improvement for handling commercial cases, don’t we need to compare it with the experience of those still representing clients in the circuit court structure that has pre-existed the business court for over a century? The Petition sets forth no proposal to gather these data, nor did the original flawed petition filed in 2016.

And why does it take another two years, for a total of 10, to hold CLE programs directed at informing attorneys about the business court, especially when sponsors of CLE programs are constantly mining the Bar for programming ideas?

It is simply not credible to suggest, as the Committee does, that any Wisconsin lawyer handling large commercial cases has been ignorant of the business court “pilot project” for eight years. A more logical explanation for their substantial failure to participate in the “pilot project” is their recognition that the “pilot project” offers no demonstrable advantages for their clients. Further, circuit court judges have been reluctant to refer cases to the business court in recognition that it fundamentally corrupts the constitutional and statutory structure for our circuit courts.

---

<sup>2</sup> One of these 25 states is surely Delaware, where its people enshrined a model Court of Chancery in the state constitution over 230 years ago. The Delaware experience is a far cry from the birth of Wisconsin’s business court—midwived, as it was, by business lawyers hastily appointed by then-Chief Justice Roggensack to a secretly created Business Court Advisory Committee eight years ago—in violation, by the way, of Supreme Court Internal Operating Procedures, Section IV “Appointment Process”, which sets forth a detailed procedure adopted by this court to create an open, fair and balanced committees to further the court’s business in a manner that avoids the very messes exemplified by this “pilot project”. See <https://www.wicourts.gov/sc/iop/DisplayDocument.pdf?content=pdf&seqNo=18538>. Constructed rapidly behind closed doors, the business court emerged within weeks pretty much a done deal, without the participation of either the public or other stakeholders in the Wisconsin court system.

Why not follow Delaware’s lead and proceed by constitutional amendment instead of another two year extension for this failed “pilot project”? The Advisory Committee would undoubtedly recoil at the thought, and for good reason—the citizens of Wisconsin would overwhelmingly reject this “pilot project” along with any other attempt by special interests to warp our court system to their advantage.



Once again, the Committee proposes a final and complete report in 2026, with no acknowledgement that it was under order by this court in 2017 to provide annual reports, a directive the Committee failed to follow. In 2020, its report contained incomplete data and other insufficient information for a proper evaluation of the “pilot project.” As was said by a prescient objector in 2022, give them two more years, and the Committee still won’t gather the necessary data.

This court would be justified to summarily reject the Petition 16-05E based solely on the filing’s insubstantial content and unjustified disregard of this court’s orders. One gets the sense that the Committee is just going through the motions rather than making a serious attempt to defend the fundamental degradation to our court structure occasioned by the business court that many judges, lawyers, and citizens in Wisconsin have opposed for years.

Perhaps the Petition’s shortcomings are a tacit concession by the Committee that the “pilot project” is indefensible in the face of the many cogent reasons that have been advanced opposing the business court for years (briefly detailed in the next section.) These objections are as compelling today as they were when this business court “pilot project” was secretly hatched by business interests eight years ago and then rapidly foisted upon an unsuspecting court system.

#### REASONS WHY THIS BUSINESS COURT HAS ALWAYS BEEN A BAD IDEA

The following is a brief synopsis of the arguments that, from the beginning, have exposed the flawed business court “pilot project” as unnecessary and ill-advised for our court system. The arguments remain unrebutted and continue to checkmate the “pilot project” on the merits still today.

Because these reasons and others against the business court have been presented to this court in substantial detail for years, we will simply reiterate them briefly below and direct the court to the extensive past filings should the court desire further exposition. See particularly the January 19, 2017 and April 8, 2022 comments from Judge Lisa Stark, April 6, 2022 comments from Judge John Markson, (Ret.), and April 8, 2022 comments from Attorney Richard G. Niess. The dissenting opinion by Justices Shirley Abrahamson and Ann Walsh Bradley to the April 11, 2017 Supreme Court Order 16-05, and the dissenting opinion by Justice Ann Walsh Bradley to the June 29, 2022 Supreme Court Order 16-05D (joined by Justices Rebecca Dallet and Jill Karofsky) are also must reading. See also all 74 objections attached to the April 8, 2022 email from Laura Brenner to the Supreme Court Clerk, representing 92 judges, lawyers and citizens.

(1) No study, evidence-based or otherwise, was conducted demonstrating any deficiencies in the handling of commercial cases by any Wisconsin circuit court prior to the “pilot project”. No problem with the efficiency or quality of our circuit courts’ longtime handling of business cases has ever been identified, let alone any requiring a

fundamental restructuring of our court system like the business court. After eight years, the data simply do not exist.

(2) No study, evidence-based or otherwise, has ever been conducted demonstrating that the business court “pilot project” improves the quality, timeliness, or efficiency in the disposition of commercial cases in Wisconsin circuit courts whatsoever. After eight years, the data simply do not exist.

(3) No study, evidence-based or otherwise, has ever been conducted demonstrating that the limited number of business court judges hand-selected by the Chief Justice with input from business interests are any better at handling commercial cases than the rest of the Wisconsin circuit court judges. After eight years, the data simply do not exist.

Indeed, no criteria for selecting and evaluating these business court judges have even been developed by the Business Court Advisory Committee, although this shortcoming was first identified over seven years ago by Judge Lisa Stark. Yet the “pilot project”, by its very existence, promotes the destructive fiction that only a tiny number of Wisconsin circuit judges (18 out of 261, or less than seven percent) are qualified to handle a commercial docket by experience, aptitude or both.

(4) Without baseline data on the efficiency and quality of traditional Wisconsin circuit court handling of commercial litigation before the “pilot project”, or comparative data over the last eight years on how these traditional circuit courts continue to process business cases, there will never be any competent evidence establishing whether or not the business court model offers anything of value to large or small commercial litigation. Yet we already know it has harmed the court system’s standing with the public. Accordingly there is no reason to continue the court to collect data, as the petition requests.

(5) It is pure myth, flavored with a pinch of some business lawyers’ conceit, to suggest that business cases are more difficult for circuit judges to resolve than countless other civil cases that populate their dockets, let alone so demanding that most trial court judges should be prohibited from adjudicating them altogether. More arduous than medical malpractice, constitutional litigation, prisoner litigation, administrative agency reviews, child custody disputes, service contracts, warranties, legal malpractice with its “case within a case,” insurance coverage, insurance bad faith, landlord-tenant disputes, product liability, wrongful death, tax litigation, home construction cases, real property disputes, will contests, class actions, mass torts, environmental cleanups, anti-trust, eminent domain, on and on?

Please.

And even if it were true that business courts are demonstrably more effective, efficient, and consistently fair than other circuit courts (it is not), why is big business more worthy of its own special courts than all of the other parties litigating civil cases in



Wisconsin? Shouldn't this court instead bolster all the processes already in place for all civil cases?

How many docket-specific courts should we create?

(6) By disingenuously casting the business court as just another specialized court in the mold of Wisconsin's treatment courts (such as drug courts and OWI courts), the Business Court Advisory Committee apparently hopes that, by dint of this false association, some of the legitimate shine from these already-existing treatment courts will distract the public and this court from appreciating the structural corruption and other shortcomings embodied in the business court.

But there is a world of difference between a treatment court and this "pilot project" business court. Unlike the business court, treatment courts do not adjudicate disputes and are based upon a tremendous amount of rigorous research demonstrating their value. What's more, treatment courts do not permit litigants and their lawyers to influence the selection of judges who preside over their cases.

(7) In response to Petition 16-05D—the last request for an extension of the "pilot project" in 2022—substantial opposition was received by this court from attorneys, judges and citizens who recognize the business court's negative influence over our court system and, more importantly, the raw deal it represents for the people of our state. Seventy-four comments objecting to the business court—representing ninety-two judges, attorneys, and members of the public—were emailed to the Supreme Court Clerk on April 8, 2022 by petitioner herein, Attorney Laura Brenner.

Some of these objections even came from business lawyers, attorneys who not only saw no need for this special court but recognized the deleterious effect it had on the public's perception of equal justice in our court system. On the other hand, we find no supporters for this "pilot project" other than some business interests and their lawyers who, unsurprisingly, adore the cachet of having their very own business courts and judges. The opinions of these supporters do not, in any way, prove that the business court is either needed by our court system or welcome by anyone other than the limited number of business interests it privileges.

Indeed, the sparse data that do exist reveal that most business cases in the "pilot project" are settled by direct negotiation and mediation rather than by any substantial involvement of the assigned circuit judge—the same situation that prevailed for decades before the "pilot project" was adopted.

(8) Publishing "pilot project" business court decisions on the Supreme Court website exalts these decisions to undeserved prestige and is overall a terrible idea. See <https://www.wicourts.gov/services/attorney/comcourtpilot.htm>. These circuit court business decisions have not been reviewed by appellate courts, may very well be wrong, and should never be cited as precedent. At the same time, their publication on



the official court website signals to counsel and the general public that they have been approved in some fashion by this court. Thus, unreviewed error is likely perpetuated, as is the general sense that not only is big business privileged to have its own special courts and judges, but has even found a way to make its own law by sidestepping the appellate process altogether.

There is a reason why we have appellate courts with published precedent, which the “pilot project” ignores with this shadowy bank of unreviewed business court decisions.

(9) Automatic judicial substitution rights, guaranteed in all other civil cases under section 801.58, Stats., are materially compromised in the “pilot project.” A party whose case is pending in the business court by mandatory assignment is stuck with a business court judge hand-selected by the Chief Justice, either by original assignment of the judge or upon a substitution request. There is no escape for a litigant who justifiably views the business court as rigged in favor of the very business interests that created it.

An unavoidable, negative corollary is this. Individual litigants in many counties are now forced to litigate before hand-selected judges who do not even reside in the litigant’s own circuit as contemplated by Wisconsin law, but hail from several counties away.

(10) The business court increases opportunities for judge-shopping in cases that are eligible to participate in the commercial docket but are not required to do so. The case may be filed in the usual venue, but if the judge assigned (either on the original filing or by substitution) is unsatisfactory to the parties, the case may then be voluntarily removed to the business court so that a known judge more acceptable to the parties will be assigned.

(11) The business court “pilot project” sacrifices both equal treatment of litigants and judicial independence in a misguided quest to privilege business interests.

As background, the Wisconsin Constitution grants circuit courts in Wisconsin general jurisdiction over all matters civil and criminal, including commercial cases. Article VII, Section 8, Wisconsin Constitution. Circuit judges are elected by the voters in each county to carry out this mission within their own counties including the handling of all commercial disputes. See section 753.03, Stats. To eliminate the perception that any litigant might achieve an unfair advantage over other litigants through judicial assignment, civil cases in counties with multiple branches are randomly assigned among experienced civil division judges. This process includes commercial cases.

Additionally, automatic substitution rights resulting in a second random assignment are available by statute as a last resort for all litigants who still may have concerns about the judges assigned to their cases, see section 801.58, Stats., (as discussed above, a right materially compromised in the business court.).

These institutional protections for our court system are essential to the perception that litigants are getting a fair shake from an unbiased judge. Such perceived fairness has always been recognized by our court system as essential to the delivery of justice.

The business court, however, destroys the perception.

### CONCLUSION

The "pilot project" is a Trojan Horse offering from special business interests and their allies that should alarm anyone concerned about judicial independence and equal access to justice in Wisconsin courts. If for no other reason, a court so at odds with our judicial system's fundamental integrity is unworthy of the public's trust. It greases a slippery slope to a Pandora's box full of potential dedicated courts unfairly influenced by special-interests rather than, more appropriately, controlled by Wisconsin voters. Even ignoring its ethical warts and the undeniable image problem they create for our court system, the "pilot project" creates no demonstrated advantages to businesses litigating commercial cases nor, equally important, any value to the court system as a whole. In fact, it diminishes the public's respect for our court system.

The time to end this devil's bargain "pilot project" is thus long past. Petition 16-05E should be denied, and the eight-year business court "pilot project" dismantled once and for all.

Respectfully submitted this 9th day of September, 2024.



Dane County Circuit Court Judge Richard G. Niess (retired)  
1802 Monroe Street, #407  
Madison WI 53711



Dane County Circuit Court Judge John W. Markson (retired)  
4109 North Farwell Avenue  
Shorewood WI 53211

### **POST SCRIPT:**

Since completing the above submission, we have been furnished a copy of Judge Jim Morrison's August 15, 2024 email to the state's 15 current business court judges seeking to drum up support for Petition 16-05E. Written on behalf of the Business Court Advisory Committee, Judge Morrison advances several



rationales for granting the petition, none of which is persuasive. In fact, scratching beneath the surface of his email reveals more compelling arguments to end the “pilot project”, especially if these arguments are the best the Committee can muster.

After acknowledging the current “deficiencies” of the “pilot project”, Judge Morrison argues that the “pilot project” should nonetheless be extended for two years “to allow the committee to assemble data and evaluate whether the project should continue in its current form or whether changes might be made.”

Judge Morrison elides several key points.

First, his email reveals a bias against a fair evaluation of whether the “pilot project” should be continued at all. Instead, he explicitly supports the petition only to determine whether the business court should continue as is or in some changed manner. Worded differently, he confirms observations raised repeatedly by opponents of the business court—that the “pilot project” has never been about objectively assessing whether Wisconsin should implement a business court in the first place, but only about what form it should take as a permanent Court structure.

Second, the Business Court Advisory Committee has been promising to assemble data—in fact, under order by this court to do so— since they achieved adoption of the “pilot project” in 2016. They reiterated the promise in 2022 to seduce this court into another extension. Yet here we are two years later with zero data and zero explanation detailing any efforts by the Committee to even attempt to gather these data.

Judge Morrison’s excuse? He avers that, for the last eight years, the business court “has not really had a fair test because of circumstances totally unrelated to the project. Covid was probably the most substantial along with a lack of resources to study the project has been a significant hindrance as well” (sic).

Not true.

As for Covid, the Committee has proffered no evidence nor data to support the speculation that the “pilot project” was affected whatsoever by Covid’s temporary burden on court operations, let alone disproportionately to other civil courts. Covid was unquestionably a temporary blow to the court system as a whole, but most, if not all courts continued full civil case operations online and with Zoom by the fall of 2020 (except jury trials). All courts were open for in-person proceedings by the summer of 2021, three years ago. What has the

Business Court Advisory Committee been doing to “study the project” for the past three years? What was it doing for the three years that preceded Covid?

Throughout the Covid mess, CCAP remained available for processing all cases, including those in the “pilot project.” Setting aside jury trials (which have largely been absent in the business court for eight years anyway), telephone or Zoom proceedings involving all aspect of civil cases were ongoing during the physical shutdown of the courthouses. Where was the Committee’s hypothesized Covid hindrance?

Moving on, Judge Morrison again speculates, with no accompanying data nor other evidence, that “lack of resources to study the project has been a significant hindrance as well.” However, if we accept this unsupported hypothesis as true, it only serves to underscore that the petition should be denied due to an immutable flaw that has plagued this “pilot project” since 2016.

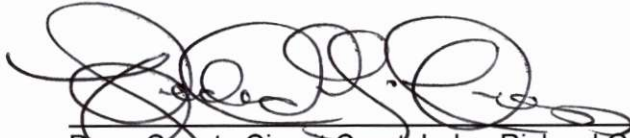
To illustrate, if the Committee’s petition is granted, the necessary consequence of Judge Morrison’s “resources” argument is this. Either the lack of resources will continue for two more years, thus perpetuating the data-gathering hindrance Judge Morrison avers, which would effectively doom any worthwhile study of the “pilot project” in 2026. Or, for at least the next two years, the court will have to re-allocate some of its already-inadequate budget from more needy and worthy endeavors to subsidize this unnecessary sop to big business.

Why would this court do this? Business interests are the last litigants requiring special accommodations in our court system to protect their interests, with their facile access to \$500/hour lawyers, bloated litigation budgets and already-existing ability to contractually force some cases into their own private court system (arbitration).

Judge Morrison’s email offers no valid reason to continue the “pilot project” at all, let alone for two more years. Petition 16-05E remains meritless. It should be denied now so that this eight-year stain on our court system is erased before it becomes indelible.



Respectfully submitted this 9th day of September, 2024.

A handwritten signature in black ink, appearing to read "Richard G. Niess", written over a horizontal line.

Dane County Circuit Court Judge Richard G. Niess, (Ret.)  
1802 Monroe Street, #407  
Madison WI 53711

A handwritten signature in blue ink, appearing to read "John W. Markson", written over a horizontal line.

Dane County Circuit Court Judge John W. Markson, (Ret.)  
4109 North Farwell Avenue  
Shorewood WI 53211