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January 30, 2017

VIA HAND DELIVERY

Clerk of Supreme Court
Wisconsin Supreme Court
Attn: Carrie Janto--Rules
Tenney Building
Suite 215
100 E. Main Street
Madison, WI
53701

RECEIVED

JAN 30 2017

CLERK OF SUPREME COURT
OF WISCONSIN

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.

Dear Clerk and Ms. Janto:

Pursuant to the letter issued by Supreme Court Commissioner Julie Ann Rich, dated December 19, 2016, allowing the petitioner of the above Petition to file a response to any comments offered on the above Petition, I, on behalf of the Petitioner, hereby offer the following.

Response to the Comments of the Wisconsin Bankers Association. The WBA favors the establishment of a dedicated commercial court docket for business and commercial cases. The WBA asks, however, that the definition of "business organization" be supplemented to include expressly banks, state banks, savings banks, savings and loan associations, universal banks and trust company banks. It further asks that the scope of cases designated for the commercial court docket be broadened to include expressly cases involving the governance or internal affairs of these various banks (including claims by employees involving governance or internal affairs of banks). The goal of the Petitioner was not to exclude such entities or matters. Thus, Petitioner has no objection to these requested amendments. As for the WBA's request to add a third location for a commercial court docket pilot plan (Dane County), the Petitioner leaves this request to the Court's determination. The Committee of the Petitioner concluded that two locations (with one of them being an administrative judicial district) afforded sufficient coverage

to obtain and develop helpful data while at the same time minimizing the effort needed to undertake the pilot plan.

Response to the Comments of the Business Law Section of the Wisconsin State Bar. The Wisconsin State Bar is in favor of the Petition. The Petitioner seconds the comments of the State Bar.

Response to the comments of the Honorable Lisa K. Stark, Presiding Judge, Wisconsin Court of Appeals, District III. Judge Stark comments are grouped in three sections. The first section makes inquiry in to the basis and value of a commercial court docket that would be answered or assisted by evidence and data. The second group of comments focuses on evaluations of the project. And third group asks about the judicial selection and staffing of the commercial court docket.

Regarding Judge Stark's first inquiry, the seven person committee of the Petitioner embraced the benefits of data collection and evidence. And that is why the Committee settled upon, and unanimously agreed upon (for the proposal to this Court), a limited *pilot plan* of one county and one administrative judicial district tailored specifically to seek out that experiential data by which this Court can render reasoned judgments going forward on whether the concept is worthwhile of further investigation and/or modification or extension to more judicial districts and/or the entire state. What Judge Stark posits is a chicken/egg problem. The Petitioner believes the best way to solve the issue is by commissioning a pilot plan.

In the meantime, the committee of the Petitioner strongly believes this Court (and State) are well justified in commissioning a pilot plan for Wisconsin based upon the growing acceptance of business courts throughout this country. Fully 26 states have already added or instituted some form of specialized docket or procedure in their respective jurisdictions to handle complex business cases. The reports from their governing commissions and courts overwhelmingly sing the praises of the development. Anecdotal evidence the committee was able to obtain corroborates the same result. As part of the Petitioner's work, member Judge Michael Aprahamian solicited non-Wisconsin judges to report their reactions and experiences to the programs in their states. Response were limited. Nonetheless, all the responses he obtained support the concept. A good summation comes from a judge who sits on North Carolina's business court:

"Business litigators and their clients report that having a specialized business court, staffed by seasoned judges with significant business litigation experience and business law expertise who exercise active case management throughout the life of a case and render thoughtful and well-reasoned written opinions on matters in dispute, is helpful in maintaining North Carolina's attractive business climate and an important advantage for North Carolina when compared to other states particularly those in the southeastern United States."

Business courts are mainstream today. Not taking advantage of these judicial benefits is the outlier.

Not surprisingly, business, banking and commercial sectors of Wisconsin equally support this Court's adoption of a pilot business court plan for Wisconsin. Attached is a copy of a letter sent to the Governor of Wisconsin this month in which twenty (20) major business organizations and interest groups memorialized their support for a business docket in Wisconsin. The supporting organizations include the Wisconsin Manufacturers & Commerce, the Wisconsin Paper Council, the Dairy Business Association, the Wisconsin Hospital Association, the Wisconsin Independent Businesses, Inc., Metropolitan Milwaukee Association of Commerce, the Associated General Contractors and the Wisconsin Petroleum Council. Copy of letter attached.

Judge Stark's second observation concerns evaluating the results of the pilot plan. The Petition submitted by the Committee offered means by which it believed evaluations could be obtained for this Court. The committee leaves it in the hands of the Court to determine if those suggested starting means are sufficient or whether the Court wishes to add other means or pursue other sources or devices.

Finally, Judge Stark raises staffing issues for the pilot court. Without diminishing the importance of staffing, since several of the committee members practice in Milwaukee County which already has 47 separate branches of the circuit court, which branches are divided into five different specialized dockets (felony, family, children's, misdemeanors, and civil), with additional sub-divisions thereof (probate, small claims), it would seem that the process of judicial assignments is a matter that the judicial system already has experience with, and successfully handles. Petitioner sees no reason why a commercial court docket would pose any new or insuperable hurdle.

Thank you for the opportunity to respond to the above submissions and comments.

Very truly yours,


John A. Rothstein

January 3, 2017

The Honorable Scott Walker
Governor of Wisconsin
Room 115 East, State Capitol
Madison, Wisconsin

Dear Governor Walker,

We are writing to request your support for including additional funding for judicial pay in your compensation. We appreciate your thoughtful consideration of our request.

As you know, businesses need a stable and predictable legal climate in which to operate. You have been a national leader with reforms that promote fairness and transparency and transparency in Wisconsin's legal system, as evidenced by the considerable progress our state has made in national legal climate rankings. We thank you for that leadership.

Our organizations believe that competent and highly-skilled judges are a key ingredient to ensure a fair and predictable court system. We also believe that Wisconsin is more likely to attract competent and highly-skilled judges if they are compensated at a level commensurate to their skill. As such, we would support additional funding for judicial compensation that would place Wisconsin judges more in line with their counterparts in other states.

We also support the Business Court pilot project that is currently under development through the leadership of Chief Justice Patience Roggensack as proposed in Rule Petition 16-05. We believe that a Business Court with specialized competencies in the areas of law impacting business will save time and resources for all parties involved. In order to attract attorneys with the requisite business law expertise to the Business Court, Wisconsin must be able to offer competitive compensation. An increase in judicial pay in your compensation plan will assist in this regard.

We thank you for your continued leadership on legal reforms, and would greatly appreciate your support for this request.

Sincerely,

Kurt R. Bauer
Wisconsin Manufacturers & Commerce

Brandon Scholz
Wisconsin Grocers Association

Mike Theo
Wisconsin Realtors Association

Brad Boycks
Wisconsin Builders Association

Rose Oswald Poels
Wisconsin Bankers Association

Nick George
Midwest Food Processors Association

Erin Roth
Wisconsin Petroleum Council

Pat Goss
Wisconsin Transportation Builders Association

Bob Barker
Associated General Contractors

Joel Frank
Wisconsin Wine & Spirit Institute

Jeff Landin
Wisconsin Paper Council

John Holevoet
Dairy Business Association

Bill Smith
NFIB Wisconsin

Ed Lump
Wisconsin Restaurant Association

Brian Dake
Wisconsin Independent Businesses, Inc.

Emma Shultz
Wisconsin Propane Gas Association

Andy Franken
Wisconsin Insurance Alliance

Matt Hauser
Wisconsin Petroleum Marketers & Convenience
Store Association

Tim Sheehy
Metropolitan Milwaukee Association of
Commerce

Eric Borgerding
Wisconsin Hospital Association

NORTH CAROLINA BUSINESS COURT
RESPONSES TO WISCONSIN INQUIRIES

1. What are the benefits to the Court, the business community and the community at large you can identify from having a business court? Please include your own thoughts, as well as any thoughts the litigants have shared with you.
 - a. Business litigators and their clients report that having a specialized business court, staffed by seasoned judges with significant business litigation experience and business law expertise who exercise active case management throughout the life of a case and render thoughtful and well-reasoned written opinions on matters in dispute, is helpful in maintaining North Carolina's attractive business climate and an important advantage for North Carolina when compared to other states, particularly those in the southeastern United States.
 - b. Specific advantages cited include: one judge for the life of the case; judge-managed docket; active case management; workable, effective Business Court Rules (developed through collaborative efforts of Business Court judges and 60 experienced North Carolina business litigators and approved by the North Carolina Supreme Court); judges experienced in complex business litigation and substantive business law; substantial court resources (dedicated courtrooms, legally educated law clerks, judicial assistants); enhanced courtroom technology (capacity for paperless trials; audio- and videoconferencing); electronic filing and public access through the internet to case filings, orders, and opinions; electronic case, docket, and document access and management; and statutorily-required, written, reasoned judicial opinions.
 - c. Specific benefits cited include: increased efficiency; reduced costs; enhanced responsiveness; increased speed; improved flexibility in case management; nuanced and thoughtful decision-making; consistency and predictability in decision-making; and the development of a substantial body of case law addressing complex business issues.
 - d. Local county court personnel value and appreciate the North Carolina Business Court because the Court provides a specialized forum which is operated separately from the regular Superior Court civil docket and allows local court officials to avoid the delay and complication complex business cases would otherwise impose on their dockets.

- e. A primary purpose in creating our Business Court and in requiring the Business Court judges to write reasoned opinions was to aid in the development and interpretation of the laws most directly affecting North Carolina businesses, including, in particular, the North Carolina laws governing business organizations, securities, antitrust, trade practices, intellectual property, trade secrets, and tax. Through the issuance of over 750 opinions to date, all of which are published on LEXIS and Westlaw and are the subject of various blog postings, newsletters, and other North Carolina-based publications, we believe we have been successful in helping to develop a body of case law on complex business issues that provides greater predictability for business decision-making in North Carolina.
2. Please identify the statute or rule creating the jurisdiction of the business court and the cases eligible for assignment to it. What types of cases predominate your docket? Are there some cases currently assigned to the business court that, based on your experience, you think should not be? Why? Are there some cases currently not assigned to the business court that you think should be?
 - a. As an initial matter, it may be helpful to explain the structure of the Business Court within North Carolina's unified court system and to give a little history of our now twenty-year old Business Court.

The Business Court was established by our Supreme Court in 1996 as an administrative division of the Superior Court division of the North Carolina General Court of Justice, which is the higher level of our two trial court divisions. The Superior Court trial bench consists of both resident Superior Court judges, who are elected in specific judicial districts, and special Superior Court judges, who formerly were appointed by the Governor and now are nominated by the Governor and confirmed by the legislature. In general, resident and special Superior Court judges are assigned to trial calendars rather than to individual cases, with the result that the various matters requiring judicial determination in a typical case may be heard by multiple judges before the case is finally resolved.

Before the Business Court was established, our Supreme Court implemented an administrative rule which permitted a resident Superior Court judge to request that a particular case be designated as "exceptional" and then assigned to a single judge for all matters through final disposition. Then and now, the Chief Justice is authorized to assign such cases to any resident or special Superior Court judge.

The implementing rules for the Business Court added a separate category of cases – complex business cases – that could be assigned to a single judge, but these cases could only be assigned to a special Superior Court judge who, at that time, had been appointed by the Governor and specifically designated by the Chief Justice to hear complex business cases. From the Business Court's creation in 1996 until 2006, there was only one such designated judge.

In these initial years, the cases properly assigned to the Business Court were not specifically identified in the Court's implementing rules; instead, all such cases were assigned in the discretion of the Chief Justice, most often upon the request of a resident Superior Court judge. To facilitate the designation process, the Chief Justice prepared a guidance memorandum, and the Business Court established local rules, each describing factors that would generally be considered to determine whether a case should be designated as a complex business case. The Business Court operated under this structure for its first ten years.

After the Business Court had been in operation for several years, a special committee undertook a comprehensive review of the Business Court's activities and made certain recommendations, which led to the passage of N.C. Gen. Stat. § 7A-45.4 in 2006. This statute expanded the Court from one judge in Greensboro to a total of three judges, one each in Charlotte, Raleigh, and Greensboro. The statute also created specific requirements for the designation of a case as a complex business case. Also, while the Chief Justice retained final authority to designate a case, and resident Superior Court judges retained authority to request the Chief Justice to designate a case, the statute provided that a party could designate a case as a complex business case as a matter of right if the case fell within certain specified statutory categories. Cases falling within these statutory cases were described as "mandatory cases," although the label was somewhat misleading in that a party had the unilateral right to request designation but did not have the obligation to do so.

Subsequently, in 2015, N.C. Gen. Stat. §7A-45.4 was amended with three major modifications. First, the process for selecting judges to hear complex business cases was changed so that a judge is selected with input from each of the three branches of government, including legislative confirmation. Second, the categories permitting designation were amended. Finally, a new "mandatory mandatory"

category was added for cases that were properly designated under a statutory category but involved an amount in controversy greater than \$5 million.

Thus, the Court's current docket includes: (i) "mandatory mandatory" cases, which are required to be designated to the Business Court); (ii) "mandatory" cases, which may be designated upon the request of a party if a case falls within specific statutory categories; and (iii) "discretionary" cases, which do not fall within a statutory category but which the Chief Justice may designate to the Business Court in his discretion.

- b. Cases that may be designated to the Business Court under N.C. Gen. Stat. §7A-45.4 include disputes involving the law governing business organizations (corporations, LLCs, partnerships), state securities law, state antitrust law, state trademark law, intellectual property, trade secrets, and contract claims of \$1 million or more between business entities.
- c. Cases that must be designated to the Business Court N.C. Gen. Stat. §7A-45.4 include judicial review of a contested state tax case, a constitutional challenge to a state tax statute, and Business Court-eligible cases, other than contract cases, that have at least \$5 million in controversy.
- d. Although we have a wide variety of business disputes before the Court at any given time, disputes involving the law governing business organizations and the misappropriation of trade secrets are the most frequent types of cases on our docket.
- e. We believe the cases designated to the Business Court through the current statute are appropriate for our adjudication. For several years, however, the Business Court was required to handle pole attachment proceedings, usually involving local utilities. The Business Court and the state legislature recognized that these matters were more properly heard by the North Carolina Utilities Commission, and the legislature recently withdrew these cases from Business Court designation.
- f. We are in the process of considering whether our docket should be expanded. During the first ten years of the Court's existence, cases could be designated to the Business Court in the Chief Justice's discretion, based on a party's contentions concerning the suitability

of a case for adjudication in the Business Court. Discretionary designation is still available to the Chief Justice through a separate rule (Rule 2.1 of the North Carolina General Rules of Practice for the Superior and District Courts), but not through the specific state statute governing designation of complex business cases. We are considering whether to recommend to the legislature that a discretionary category be added as an express part of the designation statute. We are also considering whether to recommend to the legislature that certain class action cases, not otherwise covered by the existing statute, be made available for designation to the Business Court.

3. Are there any established guidelines for timely disposition of business court cases? For example, is there a goal to have cases resolved within 1 year or some other time frame? What key practices are encompassed in your case management to achieve your disposition objectives?
 - a. The legislature requires the Business Court to submit semi-annual reports which list the cases that have been pending for more than three years and motions that have been pending for more than six months. These are similar criteria to those used by federal courts, except that the federal system tracks the age of unresolved motions from the date the motion is fully ripe, and our statute measures the age from the date the motion is first filed. Our Court has been asked to make recommendations for the modification of the objective criteria used to track the Court's activities.
 - b. We maintain internal statistics that track, both for each judge and for the Business Court as a whole, the total number of cases on our docket (separated into two categories: active and inactive/on appeal), the total number of cases assigned and closed (compared to prior year), the average and median ages of all cases and all active cases (compared to prior year), the average and median ages of all cases closed (compared to prior year), and the total number of opinions published (compared to prior year). Our goal is to increase each year the number of cases assigned and closed and the number of opinions filed, and to continually decrease the average and median ages of cases in all categories.
 - c. Our Business Court Rules require an early case management process – an attorneys' meeting, a resulting joint case management report, and a subsequent case management conference with the Court – which we use to explore with the parties early mediation and settlement, phased discovery, early motion practice, and other case management and

dispute resolution techniques to help move the case forward to resolution or to a more cost-efficient litigation plan. After the case management conference, we continue to monitor the progress of each case, holding hearings and status conferences as appropriate, to advance the adjudication of the case. Hearings and status conferences may be conducted either in court, by teleconference, or by videoconference, increasing efficiency for out-of-town/state attorneys.

4. To what extent is mediation encompassed in your case management? Is it mandatory? Based upon your experience, at what stage of the litigation does mediation most effectively lead to a resolution? Who generally acts as a mediator in your business court cases?
 - a. Mediation is a critical feature of our active case management and is required in nearly every case. North Carolina with few exceptions requires mediation in all Superior Court cases. Business Court cases are subject to those rules as well as such additional requirements a Business Court judge may incorporate into the case management order for a particular case.
 - b. The parties often suggest that mediation should occur after discovery is completed but before dispositive motions are due. We often aggressively explore with the parties whether an earlier mediation could be helpful and make this discussion an important aspect of the case management conference. In our collective experience, mediation is most effective when the parties have sufficient information to evaluate their respective risk. We attempt to explore with counsel at the case management conference when that knowledge will be in hand – sometimes the parties know what they need to know to engage in meaningful settlement discussions at the time the case is filed; other times at least an initial round of discovery (such as document production, limited interrogatories, and/or a limited number of depositions) is needed; in other cases, legal issues must be decided before settlement discussions can be productive. We attempt to impose mediation deadlines that are consistent with our assessment of when settlement discussions are most likely to be productive, based on our assessment of the case, considering the views of counsel. We have, on occasion, entered orders requiring more than one mediation, although generally only with the consent of all parties.
 - c. Parties are instructed to try to select the mediator for a particular case by agreement. This nearly always occurs. On rare occasions, however,

the Court is asked to recommend a mediator to the parties. Although seldom used, the Court has authority to appoint a mediator.

- d. There are over 1,000 certified mediators in North Carolina. Nevertheless, there are approximately 10—15 mediators around the State that have developed strong reputations for mediating complex business disputes, and we estimate that this subset of mediators handles over half of the Business Court mediations.
5. How are your business court judges selected? What factors are considered in that selection? Do the business court judges have a docket in addition to business court cases? Is there any expectation or practice regarding judicial training for business court judges?
- a. A Business Court judge is first nominated as a special Superior Court judge by the Governor and thereafter confirmed by majority vote of both the North Carolina House of Representatives and the North Carolina Senate (the two houses of our state legislature). After legislative confirmation of the Governor's nominee, the Chief Justice of the North Carolina Supreme Court will designate the special Superior Court judge as a "special Superior Court judge for complex business cases," or, in more common parlance, a "Business Court judge."
 - b. The hope and expectation is that Business Court judges will have substantial experience and expertise in the litigation of complex business disputes. The statutory scheme for Business Court judge selection provides that "[p]rior to submitting a nominee for the [Business Court] judgeship . . . the Governor shall consult with the Chief Justice [of the North Carolina Supreme Court] to ensure that the person nominated to fill this judgeship has the requisite expertise and experience to be designated . . . as a business court judge." The Governor, the legislature, and the Chief Justice have taken the selection of Business Court judges very seriously, to the substantial benefit of the Court.
 - c. Our Business Court judges do not have a docket in addition to Business Court cases, although on occasion, usually in response to scheduling complications with regular Superior Court judges, we will be asked by the North Carolina Administrative Office of the Courts to preside over a regular session of Superior Court, typically hearing civil motions or presiding over civil jury trials. In addition, we will occasionally be asked by the Chief Justice to preside over complicated civil actions that do not

qualify for designation to the Business Court. Such cases, however, are typically a very small part of our docket.

6. Are decisions issued by the business court published in any way for easy reference? If so, what "weight" is given to such decisions? Are they considered precedential or binding on other business court judges? Other trial court judges?
 - a. N.C. Gen. Stat. § 7A-45.3 requires Business Court judges to issue written opinions in connection with any order granting or denying a motion under Rule 12, 56, 59, or 60 of the North Carolina Rules of Civil Procedure, or any order finally disposing of a complex business case, other than an order effecting a settlement agreement or a jury verdict. We also issue written opinions on motions that the issuing Business Court judge, in his or her discretion, reasonably determines are of interest to the bar or the business community.
 - b. We publish all of our Business Court opinions (as opposed to orders) for the preceding twelve months on the landing page of the North Carolina Business Court website (www.ncbusinesscourt.net). We also have a link on the landing page to a page with links to every Business Court opinion we have published since the Court's inception in 1996. In addition, all Business Court opinions are published by LEXIS, where they are styled "NCBC LEXIS," and by Westlaw. Also, starting in 2015, LEXIS also began publishing many of our substantive orders that we elected not to publish as opinions; these are styled "N.C. Super. LEXIS."
 - c. Our opinions are not binding on any other court, and one Business Court judge's decisions are not binding on any other Business Court judge. Business Court judges, however, do tend to show deference to each other's decisions.
 - d. Although our decisions are not binding, our North Carolina appellate courts have begun to cite our decisions from time to time, as have federal appellate, district, magistrate, and bankruptcy courts when applying North Carolina law. It has also been reported to us that litigants frequently cite our opinions as persuasive authority to other North Carolina state court trial judges.

Rothstein, John A. (MKE x1351)

From: Michael Aprahamian <Michael.Aprahamian@wicourts.gov>
Sent: Friday, January 27, 2017 8:23 AM
To: Rothstein, John A. (MKE x1351)
Subject: Fwd: RE: Business Court "Survey" for Wisconsin Pilot Project
Attachments: Wisconsin questionsvFINAL.docx

Michael J. Aprahamian

>>> "Bledsoe, Louis A." <Louis.A.Bledsoe@ncbusinesscourt.net> 1/17/2017 3:39 PM >>>

Mike, attached are our responses to your inquiries. We're more than happy to discuss as you and your colleagues wish. Good luck with this process. We think our Business Court has been a very good thing for North Carolina! Best wishes. Louis

From: Michael Aprahamian [mailto:Michael.Aprahamian@wicourts.gov]
Sent: Friday, January 13, 2017 7:11 PM
To: Bledsoe, Louis A.
Subject: Re: Business Court "Survey" for Wisconsin Pilot Project

Thanks so much for the help! I look forward to receiving it. Best, Mike

Sent from my iPad

On Jan 13, 2017, at 2:41 PM, Bledsoe, Louis A. <Louis.A.Bledsoe@ncbusinesscourt.net> wrote:

Mike, we are circulating our draft responses among the judges of our court, and I hope to get our final version of these back to you later today or on Monday. Sorry for the delay. Thanks. Hope you and your family enjoyed the holidays. Best wishes. Louis

From: Bledsoe, Louis A.
Sent: Wednesday, December 14, 2016 4:07 PM
To: Michael Aprahamian
Subject: RE: Business Court "Survey" for Wisconsin Pilot Project

Thanks Mike. I will circulate this email to my colleagues, and we will provide you our answers in a timely fashion. Great to see you again in Atlanta! Best wishes. Louis

From: Michael Aprahamian [mailto:Michael.Aprahamian@wicourts.gov]
Sent: Wednesday, December 14, 2016 3:48 PM
To: Bledsoe, Louis A.
Subject: Business Court "Survey" for Wisconsin Pilot Project

Louis,

It was great to see you in Atlanta, and to discuss how our lives have changed since Wilmington! As I mentioned, the Wisconsin Supreme Court is considering a pilot project to institute a business court in two jurisdictions in the State. There is a public hearing on the proposal in February 2017, and if approved, the plan is to have the business courts go "live" on July 1, 2017. To that end, it would be extremely helpful for us to gain some insights and experience from you and your colleagues as we embark upon this journey. We would appreciate it immensely if you and your colleagues could answer the following questions within the next month, so that we might be able to reference some of the information, if appropriate, at the public hearing in February. Of course, if you have any questions, please do not hesitate to contact me. Thanks in advance for your help, and I look forward to more when and if the project is approved! Best, Mike Aprahamian

1. What are the benefits to the Court, the business community and the community at large you can identify from having a business court? Please include your own thoughts, as well as any thoughts the litigants have shared with you.
2. Please identify the statute or rule creating the jurisdiction of the business court and the cases eligible for assignment to it. What types of cases predominate your docket? Are there some cases currently assigned to the business court that, based on your experience, you think should not be? Why? Are there some cases currently not assigned to the business court that you think should be?
3. Are there any established guidelines for timely disposition of business court cases? For example, is there a goal to have cases resolved within 1 year or some other time frame? What key practices are encompassed in your case management to achieve your disposition objectives?
4. To what extent is mediation encompassed in your case management? Is it mandatory? Based upon your experience, at what stage of the litigation does mediation most effectively lead to a resolution? Who generally acts as a mediator in your business court cases?
5. How are your business court judges selected? What factors are considered in that selection? Do the business court judges have a docket in addition to business court cases? Is there any expectation or practice regarding judicial training for business court judges?
6. Are decisions issued by the business court published in any way for easy reference? If so, what "weight" is given to such decisions? Are they considered precedential or binding on other business court judges? Other trial court judges?

Michael J. Aprahamian

E-mail correspondence to and from this address may be subject to the North Carolina public records laws and if so, may be disclosed.

E-mail correspondence to and from this address may be subject to the North Carolina public records laws and if so, may be disclosed.

To: Judge Michael J. Aprahamian
From: Judge Richard B. McNamara
Re: NH Business Court
Date: 12/16/2016

MEMORANDUM

This memorandum will respond to the questions you sent by email about my experience with the New Hampshire Business and Commercial Dispute Docket ("BCDD"), our business court.

Question 1. What are the benefits to the Court, the business community and the community at large you can identify from having a business court? Please include your own thoughts, as well as any thoughts the litigants have shared with you.

Answer 1.

The New Hampshire Business and Commercial Dispute Docket was created by statute in 2009. The judicial branch believed that consolidating business cases before one judge who had experience in those cases would be likely to eliminate delay and expedite litigation. The New Hampshire Superior Court is the court of general jurisdiction, and is the only court in New Hampshire that handles jury trials. About 50% of its jurisdiction is criminal in nature, and virtually all of the judges have substantial experience in criminal law. Most have little experience in commercial litigation. The Judiciary believed that there would be a system wide advantage to consolidating such cases before a judge with commercial litigation experience who would be able to expedite them.

N.B. Judge McNamara is the business court judge for the State of New Hampshire who was appointed in 2009. (This note added by J. Rothstein).

The Bar was eager to have a business court created for similar reasons. The New Hampshire Bar Association Business Litigation section was very active in planning for, and supporting legislation for the court. The business community was quite interested in creation of a business court as well. One of the key provisions of the business court was the understanding that business cases would be given precedence on the business and commercial dispute docket. The Business and Industry Association of New Hampshire was active in planning for the business court because it believed that a forum for prompt resolution of business disputes would provide a better economic environment in the State

Question 2. Please identify the statute or rule creating the jurisdiction of the business court and the cases eligible for assignment to it. What types of cases predominate on your docket? Are there some cases currently assigned to the business court that, based on your experience, you think should not be? Why? Are there some cases currently not assigned to the business court that you think should be?

Answer 2. The statute creating the business court is RSA 491:7-a. § VI of the statute enumerates the type of cases which can be assigned to the business court, and essentially permits virtually any business dispute to be submitted to the docket. RSA 491:7-a establishes the criteria for cases to proceed in the business court. To be eligible to proceeding in the business court, the case must involve more than \$50,000 in damages; one party must be a business entity; and no party may be in

consumer. "Business entity" and "consumer" are defined by statute. As a practical matter, the cases in the business court generally involve far more than \$50,000.

The statute defining the types of cases permitted in the court is extremely broad and includes contract claims, surety claims, franchise claims, malpractice claims of nonmedical professionals in connection with rendering services to a business, shareholder derivative actions, UCC cases, commercial class actions, commercial bank transactions, actions relating to the internal affairs or governance of corporations and LLCs and "other complex disputes of a business or commercial nature. I see a variety of cases involving failed business transactions, corporate governance, noncompetition agreements, trade secrets, and construction.

The New Hampshire BCDD is a voluntary court. In order to proceed in the business court, both parties must agree. By agreeing to proceed in the business court, both parties waive venue. However, if a party seeks preliminary injunctive relief is not necessary to obtain agreement before filing suit. In such cases, the party bringing suit may file in the BCDD; if the defendant objects, the case proceeds to the non-BCDD docket. This procedure is frequently utilized and parties rarely object to proceeding in the business court.

Superior Court Rule 207 outlines these procedures. Superior Court rule 207 V (d) provides that even if the parties agree to proceed in the business court the presiding Justice of the BCDD may decline to accept the case if the judge determines that the case does not meet the requirements for BCDD jurisdiction.

New Hampshire only has 21 Superior Court judges. The business docket takes up one half of the time of one judge. It is located in Concord, New Hamp-

shire, the State Capitol, which is geographically accessible to the rest of the State. I do not think the business community is underserved and I believe there are no cases not assigned to the business court that should be assigned to it.

The BCDD has succeeded in New Hampshire as a voluntary court, because lawyers perceive that it is performing as hoped.

Question 3. Are there any established guidelines for timely disposition of business court cases? For example, is there a goal to have cases resolved within one year or some other time frame? What key practices are encompassed in your case management to achieve your disposition objectives?

There are no formal guidelines for timely disposition of business court cases. However, the goal is to have business court cases move more expeditiously than they would in a nonbusiness docket. My approach is to let the lawyers guide the disposition of the case; when the case comes into the court I have a conference with the lawyers at which we discuss a discovery plan, whether or not there are key motions that could advance the litigation if they were decided, at what point mediation is appropriate and other issues of that nature. Because the business court is a voluntary court, I have created Standing Orders; the Standing Orders did not need to go through the rulemaking process.

In my experience, delay in business and commercial cases is usually due to discovery issues. The goal of the Standing Orders is to avoid cases being bogged down by discovery disputes. For example, one Standing Order provides that a party may request a status conference at any time. Another Standing Order allows parties to send letter briefs on discovery issues, which are not permitted un-

der the Superior Court Rules. If I receive a letter brief, I will generally hold a teleconference and determine whether or not the dispute can be resolved by agreement. If it cannot be resolved by agreement, I then give the parties the option of having me decide the case on the letter briefs and argument, or as full briefing on the issue. In my experience that this saves a great deal of time.

4. To what extent is mediation encompassed in your case management? Is it mandatory? Based on your experience at what stage of the litigation is mediation most effectively lead to a resolution? Who generally acts as a mediator in your business court cases ?

Answer. Few things are mandatory in the business court. Most lawyers in the business court are very sophisticated and experienced. They recognize that most cases are going to settle and in my view, how they go about getting the case settled is up to them. While encouraging lawyers to mediate, I am comfortable allowing them to decide whether early mediation or mediation after discovery is concluded is appropriate. While we have neutral mediators who are volunteer lawyers who serve at no expense to the parties, it is my experience both as a business court judge and practitioner that cases are usually resolved by professional mediators who can devote the substantial time it takes to resolve complex case.

Question 5. How are your business court judges selected? What factors are considered in selection? Do the business court judges have a docket in addition to

business court cases? Is there any expectation or practice regarding judicial training for business court judges?

Answer 5. In New Hampshire judges are appointed to serve until age 70 and are not elected. To become a Superior Court judge, one would apply to the Judicial Selection Commission¹ which would submit 3 names to the Governor; the Governor will interview the candidates and select one of them or tell the Judicial Selection Commission none of them are acceptable and tell it to provide 3 more selections. Once the Governor makes his or her choice, a public hearing is held before the five-member executive Council which must confirm the appointment.

I was the first business court judge, and applied for that position and was interviewed by the Judicial Selection Commission, and the Governor and was questioned by the Executive Council about my interest and experience in business cases. I expect my successor will be appointed in the same way. Because New Hampshire does not require a full-time business court judge, half of my docket is business cases and half of my docket is that of any other Superior Court judge.

Question 6. Are decisions issued by the business court published anyway for easy reference? If so, what "weight" is given to such decisions? Are they considered precedential or binding on business court judges? Other trial court judges?

¹ While the appointment of judges until age 70 by the Governor and Council is a matter of New Hampshire constitutional law, the Judicial Selection Commission was created by executive order, and could be eliminated by a Governor although I know of no plan to do so.

Answer. When I was appointed in 2009, I met with the Business Litigation section of the Bar and asked for suggestions. One of the things they asked was that business court decisions be made publicly available; New Hampshire has no intermediate appellate court. Because the New Hampshire Supreme Court must handle appeals from the probate, district, family and Superior Court, there are relatively few reported commercial litigation decisions. Accordingly, we created BCDD page on the Superior Court webpage and significant business court cases are published. It is my understanding that LEXIS and Westlaw pick up the cases, and publish them. BCDD decisions do not bind other Superior Court judges or anyone else, but they are generally regarded as persuasive authority.

Rothstein, John A. (MKE x1351)

From: Michael Aprahamian <Michael.Aprahamian@wicourts.gov>
Sent: Friday, January 27, 2017 8:23 AM
To: Rothstein, John A. (MKE x1351)
Subject: Fwd: Business Court Survey for Wisconsin
Attachments: Memo to Mike Aprahamian.pdf

Michael J. Aprahamian

>>> "Hon. Richard B. McNamara" <RMcNamara@courts.state.nh.us> 12/16/2016 8:39 AM >>>

Hi Mike:

It was great to meet you in Atlanta. I hope your business court project works out. I have responded to your questions in the attached memo. If I can be of further help, let me know. Best of luck.

Rich

N.B. Email from the Honorable Richard Licht, Superior Court Judge,
State of Rhode Island. (This note added by J. Rothstein).

Rothstein, John A. (MKE x1351)

From: Michael Aprahamian <Michael.Aprahamian@wicourts.gov>
Sent: Friday, January 27, 2017 8:22 AM
To: Rothstein, John A. (MKE x1351)
Subject: Fwd: RE: Business Court "Survey" for Wisconsin Pilot Project
Attachments: 2011-10 Business Calendar.pdf

Michael J. Aprahamian

>>> "Licht, Richard" <rlicht@courts.ri.gov> 1/17/2017 10:42 AM >>>

Michael

My colleague Brian Stern, whom you may have met in Atlanta, was the principal drafter of these responses to your questions which are set out in red below.

We do not have a business court but just a business calendar started over 15 years ago by Judge Michael Silverstein who still presides over it today. I assist him in Providence County(basically handling conflicts or matters when he is away or busy working on other matters.

Judge Silverstein handles nothing else and he is quite busy. I have another civil calendar which is my principal responsibility. Judge Stern handles the business calendars for all other counties and he has other trial responsibilities.

As an aside we have only five counties and there only function these days is to determine venue in the Superior Court. We have no county government whatsoever.

Good luck and keep in touch.

1. What are the benefits to the Court, the business community and the community at large you can identify from having a business court? Please include your own thoughts, as well as any thoughts the litigants have shared with you.
 - a. Predictability. As opposed to the most other cases filed in Superior Court, the Business Calendar has a "single judge" assignment system. This way the litigants know the Judge who will hear the case from Complaint through Trial and will have consistent case management
 - b. Written Decisions. The Business Court is encouraged to issue written published Decisions in certain cases, in particular where there is no controlling Supreme Court authority. These written Decisions give litigants guidance and can provide a basis for resolving cases quickly and efficiently.
2. Please identify the statute or rule creating the jurisdiction of the business court and the cases eligible for assignment to it. What types of cases predominate your docket? Are there some cases currently assigned to the business court that, based on your experience, you think should not be? Why? Are there some cases currently not assigned to the business court that you think should be?
 - a. Administrative Order 2011-10 (attached)
 - b. The categories are fairly broad, which provides a good deal of discretion to the Business Court Justice.
3. Are there any established guidelines for timely disposition of business court cases? For example, is there a goal to have cases resolved within 1 year or some other time frame? What key practices are encompassed in your case management to achieve your disposition objectives?

- a. No guidelines for disposition at this time.
 - b. Key Practices. Early and active management of the case by the Court. This includes a conference before the matter is placed on the calendar, a formal scheduling order and staging certain complex cases to resolve certain material issues that may lead to resolution.
4. To what extent is mediation encompassed in your case management? Is it mandatory? Based upon your experience, at what stage of the litigation does mediation most effectively lead to a resolution? Who generally acts as a mediator in your business court cases?
- a. Mediation is specifically included in the Administrative Order. The Court has the ability with or without the Consent of the parties to Order Mediation.
 - b. The stage is very much case specific. With that said, it is my experience that until there is some exchange of information, formally or informally, it is very difficult to have an effective and efficient Mediation.
 - c. The Court generally appoints attorneys and former Judges with mediation experience. In financial or valuation disputes, an accountant or forensic accountant has been appointed.
5. How are your business court judges selected? What factors are considered in that selection? Do the business court judges have a docket in addition to business court cases? Is there any expectation or practice regarding judicial training for business court judges?
- a. The Business Court Judge is assigned to the Calendar by the Presiding Justice from the active Superior Court Justices.
 - b. This is the Presiding Justices decision, however historically the Judges assigned have had substantial experience with business litigation.
6. Are decisions issued by the business court published in any way for easy reference? If so, what "weight" is given to such decisions? Are they considered precedential or binding on other business court judges? Other trial court judges?
- a. Whether to publish is left to the discretion of the individual Business Court Justice. All published Decisions are available on the Court's website and are published by Lexis and Westlaw.
 - b. The Decisions are not binding on other Business Court Justices, but they are persuasive, as are any decisions issued by a Superior Court Justice.

From: Michael Aprahamian [mailto:Michael.Aprahamian@wicourts.gov]
Sent: Wednesday, January 04, 2017 1:42 PM
To: Licht, Richard
Subject: Re: Business Court "Survey" for Wisconsin Pilot Project

Happy New Year! Here it is again. Thanks for your help!

Michael J. Aprahamian

>>> Michael Aprahamian 12/14/2016 3:23 PM >>>

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

ADMINISTRATIVE ORDER NO. 2011-10

RE: BUSINESS CALENDAR

There is hereby established a Statewide Business Calendar for the Counties of Providence and Bristol, Kent, Washington and Newport ("Business Calendar.")

I. Civil actions in which the principal claim or claims involve the following are appropriate matters to be assigned to the Business Calendar for all purposes, including motion practice, discovery disputes, injunctive relief and hearing on the merits (with or without a jury);

- (a) Breach of contract or fiduciary duties, fraud, misrepresentation, business tort or statutory violations arising out of business dealings and/or transactions;
- (b) Transactions governed by the provisions of the Uniform Commercial Code;
- (c) Complicated transactions involving commercial real property;
- (d) Shareholder derivative actions;
- (e) Commercial class actions;
- (f) Business transactions involving or arising out of dealings with commercial banks and other financial institutions;

(g) Matters affecting the internal affairs or governance of business organizations or entities;

(h) Business insolvencies and receiverships.

II. Simple collection matters, declaratory judgment proceedings with respect to insurance coverage, confirmation or vacation of arbitration awards, and general landlord and tenant issues shall not be assigned to the Business Calendar.

III. New matters shall be assigned to the Business Calendar at the request of either party and with the assent of a Justice assigned to the Business Calendar. The party moving to have the case assigned to the Business Calendar shall schedule, as soon as practicable, a chambers conference with a Justice assigned to said calendar.

IV. In connection with a case presently pending, but not yet assigned to the general civil trial calendar, either party may request assignment to the Business Calendar with the assent of a Justice assigned to the Business Calendar, such assent procured at a chambers conference as previously described.

V. It is the intent of the Superior Court to process matters on the Business Calendar in as expeditious a manner as possible. To that end, the Justice(s) assigned to the Calendar are vested with the power to require mandatory submission of the dispute to non-binding mediation. Failure to comply with an Order to that effect may be sanctionable.

VI. The Justice(s) assigned to the Business Calendar may establish generally, or in a particular case, informal procedures not inconsistent with law which he/she believes will be helpful in achieving prompt resolution of discovery disputes or other preliminary matters.

VII. In the event of the absence of the Justice(s) assigned to the Business Calendar, any application or motions with respect to matters on the Business Calendar shall be taken up with any other Justice assigned to the Business Calendar.

VIII. The Presiding Justice shall assign an Associate Justice or Justices as deemed necessary to the Business Calendar.

IX. Administrative Order 2001-09 is hereby rescinded and replaced with this Administrative Order.

BY ORDER OF,

**ALICE B. GIBNEY
PRESIDING JUSTICE**

DATED: July 29, 2011