



June 14, 2010

Mr. Barry L. Howard, Co-chair  
Mr. Edward H. Pappas, Co-chair  
Members of the Judicial Crossroads Task Force

## **REPORT OF THE BUSINESS IMPACT COMMITTEE**

The Business Impact Committee was tasked to review the ways in which Michigan's court system serves the business community and to determine whether there are procedural or structural changes that would improve the system. Specifically, the goals of the committee are: (1) to methodically investigate and analyze how the structure and operations of our court system impact the financial viability of Michigan businesses; and (2) to propose to the Judicial Crossroads Task Force procedural or structural reforms that, if implemented, would serve to improve the judiciary while strengthening those businesses and, in turn, our state's economy. The Committee membership includes leaders from all segments of the legal and business community, including members of the plaintiffs' and defense bars, the business and labor communities, transactional attorneys, and corporate general counsels. Minutes of the Business Impact Committee meetings are included in Attachment I for reference.

In order to accomplish this mission, the Business Impact Committee met each month a total of seven times since November 2009 to perform its work. The committee conducted a survey of corporate and business attorneys for their feedback regarding issues concerning the interaction of their businesses or business clients with the Michigan's court system. Attachment II contains the results of the survey. The committee also held discussions with a number of experts in business courts, court management and ADR issues. In deliberating on the business docket proposal, the committee divided into four subcommittees and held numerous meetings and discussions via conference call. The committee also conducted research in the rules and implementation of business courts within the U.S.

As a result of this effort, the committee has completed its work and provided a recommendation for the implementation of a specialized business docket in Michigan that is outlined in significant detail in Attachment III. This recommendation is the primary work of this committee and we will be presenting this proposal on June 24, 2010 at the Task Force meeting. In addition, Attachment IV is another recommendation to consider changing the rules for out-of-state and foreign attorneys to more easily be able to practice in Michigan.

If you have any questions prior to the Task Force meeting on any of our activities or recommendations, please do not hesitate to call.

Sincerely,

The Business Impact Committee Co-Chairs:

Diane L. Akers, Bodman LLP, Co-Chair

Andrew S. Doctoroff, Honigman Miller Schwartz & Cohn LLP, Co-Chair

Members:

Peter M. Alter, Jaffe Raitt Heuer & Weiss PC

Charles E. Barbieri, Foster Swift Collins & Smith PC

Georgi-Ann Bargamian, International Union UAW

Steven M. Bieda, Elder & Disability Law Firm PLLC

Hon. Robert M. Bondy, 52-1 District Court

Rockwood W. Bullard III, Bullard Anderson PLC

Mark J. Burzych, Fahey Schultz Burzych Rhodes PLC

Lynn P. Chard, Institute of Continuing Legal Education

Francine Cullari, Michigan Family Business Center, U of M-Flint

Robert L. Katz, Federal-Mogul Corporation

Ronald D. Keefe, Kendricks Bordeau Adamini Chilman & Greenlee PC

Dennis C. Kolenda, Dickinson Wright PLLC

Robert S. LaBrant, Michigan Chamber of Commerce

Elvin C. Lashbrooke, Eli Broad College of Business MSU

David Graham Leitch, Ford Motor Co VP and General Counsel

Kathleen A. Lang, Dickinson Wright PLLC

Hon. Richard M. Pajtas, Chief Judge, 33rd Circuit Court

D. Andrew Portinga, Miller Johnson

Nicholas J. Stasevich, Butzel Long PC

Douglas A. Van Epps, Office of Dispute Resolution

Norman D. Tucker, Sommers Schwartz PC

Alan M. Valade, Honigman Miller Schwartz & Cohn LLP

Carl E. Ver Beek, Varnum LLP

Staff Liaisons

Clifford T. Flood, General Counsel, State Bar of Michigan

James C. Horsch, Director of Finance & Administration, State Bar of Michigan



## **Business Impact Committee Recommendation**

### ***Proposal for the Establishment of a Specialized Business Docket Pilot Program***

**June 14, 2010**

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## Executive Summary

The Business Impact Committee of the Judicial Crossroads Task Force has surveyed in-house counsel, interviewed business court and court improvement experts, and studied the experiences of other states that have implemented a specialized business docket-or “business court”. After much deliberation, the committee concluded that the Michigan court system has a significant opportunity to reduce the time it takes for businesses to resolve their legal disputes (especially in complex matters), improve the quality of the decisions rendered, reduce the cost incurred by businesses in getting their legal disputes resolved, and improve the attractiveness of Michigan’s court system to the business community. To address these issues, the committee is recommending that the Michigan Supreme Court establish a three year pilot program for a specialized business docket in two or three circuits (to include Wayne and Oakland counties). Creating and operating the business docket pilot program *would not* require additional funding, and it would employ *existing* judges who have been specially selected and are qualified to handle these specialized cases which are primarily business-to-business disputes for amounts of \$25,000 or greater. This specialized business docket pilot program would utilize procedures and rules that would expedite resolution of business disputes. The benefits of a specialized business docket pilot program could potentially be applied to the entire court system.

The proposal for the specialized business docket is outlined in this report. Appendix D contains frequently asked questions and answers concerning this proposal.

## **Overview and Goals for Establishing a Specialized Business Docket**

The vast majority of judges and lawyers in Michigan are conscientious, ethical, and competent. However, a perception exists among businesses that Michigan's present system prevents the timely, cost-effective, and proper resolution of legal disputes - a perception shared by many judges and attorneys handling business litigation. The perception has developed because of, among other things: (1) judges who may lack familiarity with complicated or technical factual issues that often arise in business disputes; and (2) judges whose sizeable dockets often prevent them from proactively and efficiently moving pending business litigation matters. These concerns have helped foster a widespread perception among businesses that Michigan's court system needs to be changed. In a recent survey conducted by the State Bar, a full 81 percent of in-house counsel and commercial litigators believe that our court system is average or worse compared to other states' court systems.

After consulting with judges, attorneys and those who have worked with state business courts, the Business Impact Committee of the State Bar Judicial Crossroads Task Force that the creation of a specialized business docket – referred to as a “business court” in some jurisdictions - would materially improve the resolution of business litigation and disputes. In proposing the creation of a business docket, which will be specifically described elsewhere, the committee endeavors to improve how business disputes are litigated in Michigan. Specifically, the creation of business dockets within circuit courts will lay the groundwork to ensure that business cases are resolved more expeditiously and less expensively. Just as importantly, a business docket, which would be comprised of judges who have both expertise and interest in commercial litigation, would increase the likelihood that business disputes are resolved in accordance with applicable legal standards. Such a result would make litigation less unpredictable and allow businesses to more reliably plan for the future. Finally, the committee believes that the creation of a specialized business docket would help create an environment more attractive to large and small businesses and would symbolize that Michigan is now committed to pursuing new strategies calculated to retain jobs and grow the state's economy.

There are several reasons why achieving these goals, particularly through establishing a business docket, is important. First, and most obviously, cost-effectiveness, timeliness, and principled dispute resolution are inherent goals that stand alone. If those goals can be achieved in any context, even a narrow one, then they should be pursued - the legal profession's obligations to the citizens of this state so dictate. Second, by adopting reforms calculated to improve the manner in which business disputes are resolved, the existence of a business docket would indirectly benefit the entire court system. Specifically, it would serve as an exemplar of reform; many of the policies successfully adopted by it could be exported to, and applied in, other cases that would not be part of the business docket. Of course, parties who would not appear in cases pending on the business docket are every bit as important as businesses. Thus, another imperative of the Business Impact Committee is ensuring that reform does not diminish the quality, efficiency, and effectiveness of the rest of the court system.

However, the committee does not view the creation of a business docket as a zero-sum endeavor. The reforms adopted with the creation of a business docket need not disadvantage other parts of Michigan's court system. On the contrary, committee members anticipate that reforms relating to the business docket ultimately could be embraced throughout the court system, thereby

elevating the quality of justice for all. Further, judges who do not preside over business docket cases would preside over a less diverse docket, thereby gaining expertise in other areas of the law.

It is likely, and it is hoped, that if a specialized business docket were established, businesses would view Michigan's court system more favorably. The State Bar poll establishes that sizeable majorities of respondents agree with many core features of a business docket, including assigning cases involving business issues to designated judges who have an expertise and interest in commercial litigation.

The Business Impact Committee recognizes that many stakeholders in our court system are skeptical about the need for or utility of a specialized business docket. However, jurisdictions in seventeen states have adopted business courts in one form or another (see Appendix A). No state that has adopted a specialized business docket has subsequently discontinued it. In the states in which these have been created, business dockets are popular and have been embraced not only by the business community, but also by both plaintiff and defense attorneys. In Michigan, a specialized business docket would be part of a decades-long evolution that has increasingly seen the creation of specialized courts to address specific areas of law like workers' compensation, probate matters, and family law matters.

In summary, the Business Impact Committee believes the business docket proposal will achieve the following goals, which will be closely evaluated during a pilot phase to ensure that the court performs as expected: (1) reducing the time it takes for businesses to resolve their legal disputes, especially in complex matters; (2) improving the quality of the decisions rendered; (3) reducing the cost incurred by businesses in getting their legal disputes resolved; (4) improving the attractiveness of Michigan's court system to the business community, thereby encouraging current businesses to remain in, and new businesses to locate to Michigan, and (5) developing a body of case law on business law issues at the trial court level that will be persuasive tools for other trial judges.

## Proposal for a Pilot Business Docket of the Circuit Court

### I. ESTABLISHING A PILOT BUSINESS DOCKET

A. Pilot circuits. Pilot business dockets will be established in Wayne and Oakland Circuit Courts because those circuits probably have significant business litigation and enough judges so that two or three could be designated as business court judges. The Supreme Court may establish a pilot business court in more than two circuits at its discretion.

B. Term. The initial term will be three years. At the end of that time, the pilot business courts will be evaluated by reviewing the number of cases and time of resolution in the business court compared to the general civil division.

C. User survey. Litigants, counsel, and judges will be surveyed to determine their satisfaction with the system and whether they think it has saved time and money during the three-year term.

D. Oversight and evaluation. An oversight body shall be appointed from members of the bench and bar to prepare written protocols to evaluate the success of the pilot specialized business docket. After the project begins, this committee shall annually present a written report of the pilot's progress.

### II. ASSIGNING CASES TO PILOT BUSINESS DOCKET

A. The Michigan Supreme Court should amend local rules in each pilot circuit court to include a local rule similar to MCR 8.117(A), Circuit Court Case Type Code List. The new local rule would include a subparagraph entitled *Business Docket*. (The Supreme Court could also amend MCR 8.117(B), the comparable district court provision, to add subparagraph (6) for a business docket in the district court.)

B. The Michigan Supreme Court should define which cases will be decided in the business docket. The committee's recommendations for eligible cases for the business docket are identified in section III below.

C. When a case is filed, the plaintiff identifies the case with business court code. A standard set of case type codes would be developed by the SCAO for the cases to be assigned to the business docket. Such codes should be as finely drawn as possible to obtain useful statistical information. The committee recommends that the types of cases eligible for assignment to the business docket would be in three categories discussed below: Category I (Categorically Assigned), Category II (Assigned by Agreement), and Category III (Excluded Cases). The categories and the cases recommended to be assigned to each follow. The case is then automatically assigned by lot to a business docket judge through a local rule similar to MCR 8.111. There is no additional fee for filing a case that goes into the business docket.

D. The defendant could be required to confirm in its answer that the case meets the criteria for the business court or this could be jurisdictional to ensure that only real business docket cases get into the business docket. There would be no cost to this kind of check on the plaintiff's designation.

E. At the initial status conference, suitability for business court resolution will be

reviewed with removal, if appropriate, to the general civil division thereafter. There is no additional cost to this kind of check.

F. Either party may file a motion to remove a case from the business docket to the general civil division on the ground that the case does not meet the criteria for the business docket. The moving party pays the normal motion fee.

### III. CASES ELIGIBLE FOR A BUSINESS DOCKET

A. The amount in controversy should be the same as the circuit court, presently \$25,000.

B. Case Types

1. Category I (Categorically Assigned). The following types of cases, whether qualifying by complaint, counter-claim, cross-claim, or third-party complaint (see MCR 2.111(B)), *shall* be assigned to the business docket and identified as “Category I.” However, any case assigned to the business docket as a mandatory business case shall be subject to removal to the general civil docket by the business docket judge for good cause, by motion of a party, or *sua sponte*.

- (a) Business governance/internal affairs, including shareholder derivative and oppression suits.
- (b) Business torts (with business plaintiff and business defendants).
- (c) Antitrust law
- (d) Intellectual property.
- (e) Trade secrets between businesses.
- (f) Securities laws.
- (g) Commercial real estate cases between businesses.
- (h) Business-to-business disputes (including contracts, construction disputes, and employment matters).
- (i) State tax commission appeals.
- (j) Environmental law (with business plaintiff or business defendant).
- (k) Environmental insurance.
- (l) Matters subject to compulsory arbitration if involving Category I subject.

2. Category II (Assigned by Agreement). The following types of cases *may* be accepted to the business docket by mutual agreement of the parties and are identified as “Category II.” (These types of cases may be thought of as “opt-in” matters.) These cases could be assigned if there is room on the docket and if the parties on both sides agree to assignment to the business docket.

- (a) Collection of professional fees.
- (b) Commercial insurance indemnification claims.
- (c) Malpractice claims brought by businesses against attorneys, accountants, architects, or other nonmedical professionals.

- (d) Commercial insurance coverage disputes.
- (e) Commercial insurance declaratory judgments.
- (f) Employment law matters, including employer/employee noncompetition, nondisclosure, nonsolicitation agreements, discrimination claims, and wrongful termination.
- (g) Matters subject to compulsory arbitration if involving Category II subject.
- (h) Nonviolent business - related felony matters (“white - collar crime”) on petition of either party.
- (i) Individual business owner versus non individual- owned business.

3. Category III (Excluded Cases). All other cases are *excluded* from the business docket by way of example only, and not limited to:

- (a) Products liability
- (b) Personal injury and wrongful death
- (c) Medical malpractice
- (d) Commercial landlord versus consumer tenant
- (e) Noncommercial real estate matters
- (f) Actions by consumers against businesses and businesses against consumers
- (g) Matters subject to compulsory arbitration if involving category III subject
- (h) Occupational health and safety matters
- (i) Commercial class actions, proceedings to enforce a judgment

#### IV. PILOT BUSINESS DOCKET JUDGES

A. Selection. The Michigan Supreme Court will select the pilot business docket judge(s) in each circuit court selected for a pilot business docket. Current or elected judges would volunteer for assignment to the pilot business docket. The number of business docket judges would depend on the size of the circuit; it should be small enough to ensure some predictability and uniformity in the decisions but large enough to preserve the idea of assignment by lot under MCR 8.111(B).

For example, there may be two or three business docket judges in Wayne or Oakland County. However, this determination should be made after a more careful review of the anticipated volume of cases that would meet the criteria.

B. Criteria. Criteria would include the judge’s interest in serving on the business docket, case management skills, and knowledge and expertise in business issues. This proposal assumes there would be enough qualified volunteers to appoint two or three business docket judges in the pilot circuits. If not, the Supreme Court should identify desirable candidates, who should be asked to serve for three years. A judge should not be required to serve as a business docket judge over his or her objection.

C. Overall docket control. MCR 8.111 should also be amended to give the chief judge the ability to reassign cases to correct docket control problems that result from assigning cases to the business docket, similar to the chief judge’s power under MCR 8.111(D)(4). That way, business

docket judges would start with normal dockets, which could be reduced as their business dockets increase. It would ensure that all judges in the circuit have a fair share of the caseload.

When assigning cases to control the docket, the chief judge should take into consideration the nature of the duties of the business docket judge, including increased requirements for court conferences, written opinions, speedy hearings outside the normal motion process, and other matters that may increase the actual workload of the business docket judge, regardless of the number of cases actually logged or pending on the business docket.

D. Term. Assignment as a business docket judge would last until the judge's term expires or the judge resigns or is removed. Assignment would not rotate among judges.

E. Training. The American College of Business Court Judges provides free education for business docket or business court judges. This is generally done on the East Coast, however, so, if the state wants the business docket judges to participate in training, it would incur the travel and lodging expenses for the business docket judges.

## V. OPERATING THE PILOT BUSINESS DOCKETS

Discretion will be given to the business docket judges to tailor procedures to each case. Following are suggestions for expedited case management that may be incorporated into the business docket. See also Business Docket Procedural Mechanisms, in section VI.

A. Initial pretrial disclosures. The parties will make initial pretrial disclosures within 28 days after pleadings are concluded (i.e., answers to third-party complaints and counter complaints, if any, are filed). This will include information disclosed in federal rules; production of key documents; identity of witnesses; calculation of damages; issues likely to be resolved on motion; issues ready for resolution, if any; key case law; and prior decisions from the business court applicable to the case, if any.

B. Joint pretrial report. Counsel have 28 days to review each other's disclosures and are jointly responsible for preparing and submitting a pretrial report. Contents include:

1. Description of claims and defenses, including the facts that constitute them, not just the labels. The parties can identify witnesses and attach key documents for the judge's review.
2. Discovery necessary. Although not binding, each side should state the general nature of its anticipated discovery and how long it will take.
3. Issues with initial disclosures, if any.
4. Case law the parties would like the judge to consider.
5. Issues the parties believe are ready for resolution. In many business cases, the facts are not in dispute and the only issue is how the law will be applied to those facts. An early legal ruling by the business docket judge may allow the parties to end their dispute.
6. Prior settlement discussions and current status; existence of arbitration and mediation agreements, if any; ADR possibilities considered and proposed; and barriers to resolution, financial and otherwise.
7. Technological capabilities of counsel and client to participate in teleconferences with the court, and location of clients and ability to appear for court conferences.
8. Whether a court-appointed expert would assist resolution.

C. Initial court conference. Forty-two days after pleadings are concluded, the court will hold an initial conference attended by counsel only, although clients may attend at their option. Matters addressed will include:

1. Whether the case has been properly assigned to the business court.
2. Whether some type of ADR is suitable and, if so, when and what type should be employed.
3. Issues that are ready for resolution by the court.
4. Anything raised in the joint pretrial report.
5. Whether a meeting with the judge attended by clients would be appropriate.
6. Schedule for the litigation.
7. Discovery issues and the necessity of any protective orders.
8. Use of technology, consent to service by email, and motion hearings and court conferences via conference call or video conference
9. When counsel expect to be able to report back to court regarding progress on resolving/litigating case.
10. Whether parties will consent to expedited motion hearing time (which court can order for good cause in any event under MCR 2.119).
11. Prior business court decisions the parties should be aware of.

D. Case management plan. Business docket judge prepares detailed case management plan based on initial court conference and issues to parties. This includes requirements for interim pretrial reports by counsel and status conference(s) with the court, possibly attended by clients. Also includes issues or claims/defenses that can be eliminated from the case at various points.

E. Use of technology. Electronic filing and service will be encouraged whenever possible. Clients who are unable to appear for court proceedings will be permitted to participate from remote locations through technological means. Technology will be used to enhance efficiency.

F. Trial. Jury trial right is preserved and, if demanded, proceeds in the same fashion as in the general civil division, as does a bench trial.

G. Appeal. Appeal is to the Court of Appeals, as with any other circuit court case.

## VI. BUSINESS DOCKET PROCEDURAL MECHANISMS

In addition to section V above, the committee recommends the following procedures for the business docket:

A. The Michigan Supreme Court should promulgate written rules for the business docket.

B. The business docket's rules should apply only to cases pending before the business docket during the pilot period. The business docket rules should be flexible and confirm the authority of the business docket judges to craft creative and innovative procedures, policies, and plans to effectively manage, expedite, and resolve business disputes in Michigan.

C. The business docket rules should supplement the MCRs, including specifically the MCRs dealing with case management and ADR. See MCRs 2.401, 2.403, 2.404, 2.410, and 2.411. In cases of conflict between the MCRs and the business docket rules, the business docket rules should govern for cases in the business docket.

D. The parties should have the constitutional right to jury trials.

E. The business docket rules should allow (but not require) the business docket judges to experiment and create different “tracks” for “complex” and “non-complex” cases. For example, the business docket rules should empower judges to limit discovery and time periods in less complex business cases, while permitting more discovery and longer time periods to resolve complex business cases or cases involving large sums of money (for example, cases in which a party is seeking more than \$1 million in damages).

F. The business docket rules should require early (for example, within 30 to 45 days of the filing of the answer to a complaint) and frequent judicial intervention (via scheduling, status, and settlement conferences) in all cases filed during the pilot period.

G. Business docket judges should be required to use case management orders to effectively and creatively manage all “complex” and “non-complex” Category I and Category II cases filed with the business docket.

H. Business docket case management orders should, inter alia, address (1) discovery, including the number of lay and expert witness depositions, the number of interrogatories and requests for admissions, and the production of electronic documents and allowing disputed discovery motions to be decided by telephonic hearings and conferences without legal briefs; (2) use of voluntary and mandatory ADR procedures; (3) use of frequent scheduling, status, and settlement conferences with the judges (and not with the judges’ clerks or staff); (4) early resolution of dispositive motions; (5) early bench and jury trials; and (6) the use of telephonic conferences, the Internet, and other technologies to expedite and effectively manage business cases.

I. The business docket rules will provide that detailed written opinions will be expected in all non-jury Category I and Category II cases. All written business court opinions should be published and made available to the public.

J. During the pilot period, written business docket opinions should not be required in cases resolved by jury trials, but any jury verdicts, including a brief description of the verdict and the court’s written instructions to the jury, should be published and made available to the public.

K. During the pilot period, given the value of predictability and efficiency, the trial judges are required to issue detailed written or oral opinions on summary dispositions, final judgments, or other significant issues in the case. The oral opinions shall be transcribed immediately at court expense. All written or transcribed opinions as set forth above are to be publicly available so that those opinions can be used as persuasive tools in future cases.

Note: The procedural mechanism recommendations for ADR, special procedural rules, and written opinions, are primarily based on a review of (1) the business court rules from other states (particularly Georgia, Maryland, North Carolina and New York); (2) the short-lived Michigan Cyber Court; (3) the local rules of the United States District Courts for the Eastern and Western Districts of Michigan; (4) Oakland County’s *Civil Early Intervention Conference Program*; (5) the rules applicable to administrative proceedings before the Michigan Public Service Commission; and (6) the Michigan Court Rules (“MCRs”), particularly Rules 2.401 (pretrial procedures), 2.403 (case evaluation), 2.404 (selection of case evaluators), 2.410 (ADR), and 2.411 (mediation).

## VII. BUSINESS DOCKET FUNDING UNDER THIS PROPOSAL

A. Revenue. This proposal does not generate any direct revenue.

B. Cost.

1. This proposal does not generate any hard cost except the cost of transcribing certain court proceedings. It merely reallocates cases that would otherwise exist among judges that would hold office and decide cases anyway. The six chief judges in each pilot county would have the ability to adjust dockets among judges so that the business docket would not impose undue burdens on any judge.

2. If a circuit court were to send one or more of its business docket judges to a training program sponsored by the American College of Business Court Judges, it would incur travel and lodging costs. However, this proposal does not require additional training of judges.

3. This proposal calls for the Michigan Supreme Court to write certain amendments to the Michigan Court Rules. Someone will have to perform that work, and that could be considered a cost of this proposal.

4. Tasks will be added to the duties of various individuals at certain stages of a case. For example, the chief judge in each pilot county would have to consider whether the business docket is creating undue burdens on various dockets. If a business docket judge holds more frequent status conferences than in other cases, a court clerk may have to input data and print and mail a notice to the parties more frequently than in other cases. Requiring a clerk to send an additional notice could be considered a cost.

However, those theoretical costs must also be balanced against the savings of having cases off the court docket sooner. The same clerk who must send an additional notice of status conference early in a case may not have to send the trial notice that gets sent in other cases.

5. This proposal calls for an evaluation of the pilot program during and at the end of the three years. This could be considered a cost.

6. This proposal, in part, depends on the interest and willingness of business court judges to perform possibly increased duties without increased compensation if the requirement of written opinions is imposed. If increased law clerk support is provided, that would be a hard cost.

At the same time, current business docket judges like it and want to continue doing it, extra duties notwithstanding.

7. This proposal calls for the use of existing technology requiring no additional cost.

## VIII. PHASED IMPLEMENTATION

A. The business docket would be phased in and no pending cases would be reassigned to a business docket judge.

B. When new cases are filed, business docket cases would be assigned to the business docket judge(s), who would also have other cases assigned to them so that each judge would have a full docket.

C. Gradually, the mix of business docket cases for each business docket judge would grow until the business docket judge has only business cases.

D. An analysis showing the estimated cases that could be eligible for a business docket is shown in Appendix B.

IX. WHY BUSINESSES SHOULD SUPPORT THIS PILOT BUSINESS DOCKET PROPOSAL

- A. No increased cost to them to be in the business docket.
- B. Most likely to be acceptable to others because it has no cost.
- C. Business cases would be decided by a judge who has interest in business cases, case management skills, and knowledge of business issues. Therefore, businesses will have increased accuracy, predictability, and reliability in decisions in their business cases as well as confidence that their cases will be handled in accordance with the rules and philosophy of the business docket.
- D. Rules require both sides' lawyers and the judge to get very involved in facts of the case early so the case cannot languish.
- E. Parties and judge are encouraged to eliminate issues early, explore early ADR, limit discovery, streamline procedures and deadlines, involve the client whenever possible, and ensure the earliest possible resolution at lowest cost to parties and court system.

Note: A minority of committee members felt that the committee's recommendation should be to implement a pilot "standalone" business court instead of a pilot business docket of the circuit court. The committee did not adopt this proposal, but provides it for reference in Appendix C, as it could be a model for expansion after the successful completion of the recommended pilot program.

## Appendix A

### States with a Business Court of Specialized Business Docket

Based on the committee's research, there are business and/or commercial courts, divisions, or dockets in the following 17 states:

Delaware  
Florida  
Georgia  
Illinois (Chicago)  
Maine  
Maryland  
Massachusetts  
Nevada (Reno and Las Vegas)  
New Hampshire  
New Jersey  
New York  
North Carolina  
Ohio  
Oregon (Eugene)  
Pennsylvania  
Rhode Island  
South Carolina

Efforts to study a business or commercial specialty court have occurred in the following states:

California  
Colorado  
Michigan  
Mississippi  
Wisconsin

Therefore, 34 percent of the states have implemented some form of a commercial and business court specialized docket, and a total of at least 44 percent of the states have either implemented or studied it as a possibility.

## Appendix B

### Estimate of the Number of Business Docket Cases to be Handled

#### How business cases eligible for the business docket would be assigned to the judges

The number of business cases that would be heard in a business docket and how they would be handled by the business docket judges in a circuit court is illustrated below:

Assume a circuit court has ten judges, including two business docket judges.

Day 1. Twenty cases are filed. None is a business court case. Each judge gets two cases assigned at random.

Day 2. Twenty cases are filed. Six are business court cases, three each to the business court judges. The business court judges each have five cases; the other fourteen cases are divided among the remaining eight judges, who have either three or four cases each.

Day 3. Twenty cases are filed. Two are business court cases. Each business court judge gets one, so each now has six cases. The other eighteen cases are divided among the remaining judges, who have either six or seven cases total.

In other words, the business docket judges would be the only ones to handle the eligible business cases, and if there were not enough business cases to handle, the business docket judges would handle other general cases, so there would be no adverse impact on the caseload management.

#### Potential Estimated Case Impact for a Business Docket in the 3rd and 6th Circuit Courts (Wayne and Oakland Counties)

Case Filings in 2008 for AA (Agency), CB (Business Claims), CE (Environmental), CH (Housing and Real Estate), CK (Contracts), CP (Antitrust, Franchising, Trade Regulation), CR (Corporate Receivership), CZ (General Civil), and NZ (Other Damage Suits):

##### Total case filings for these case codes - 6<sup>th</sup> Circuit - Oakland County

AA	CB	CE	CH	CK	CP	CR	CZ	NZ	Total
39	43	12	948	3,142	18	8	1,466	171	5,847

##### Business-to-Business case filings - 6<sup>th</sup> Circuit - Oakland County (included in the above)

AA	CB	CE	CH	CK	CP	CR	CZ	NZ	Total
7	20	8	588	1,550	0	6	530	27	2,736

The percentage of business-to-business cases filed as a percentage of all applicable cases filed is approximately 47 percent, and this line would be more likely to represent the number of cases that could be heard by a business court. Furthermore, the complexity of cases could be estimated by the number of days from the time the case is filed until the case is disposed. Below is an analysis for all CK cases disposed of in 2009 in the 6<sup>th</sup> Circuit:

##### Time from case filing to final disposition (6<sup>th</sup> Circuit – All CK cases disposed of in 2009)

700 days or greater	500 days or greater	300 days or greater	100 days or greater
0.6%	2.8%	21.4%	66.8%

Since the more complex cases take longer, the actual number of cases heard in a business docket could likely be lower than the 2,736 noted above. For example, the more complex cases (300 days or longer) may

represent only about 1,250 cases that might be heard in a business docket. An extrapolation of this data applied to the total case filings for Wayne County is shown below.

**Total case filings for these case codes – 3<sup>rd</sup> Circuit - Wayne County**

AA	CB	CE	CH	CK	CP	CR	CZ	NZ	Total
110	25	5	1,256	3,315	16	4	1,079	361	6,180

Using a factor of 47 percent that would approximate the number of business-to-business cases of this total, the number of potential business docket cases would approximate 2,904. Using the percentage (21.4 percent) of the elapsed time for 300 days or greater for the total number of CK cases disposed of in 2009 from the 6<sup>th</sup> Circuit study (that could represent the more complex cases), would result in an estimated caseload of approximately 1,322 cases.

Using this information above, and comparing it to the number of judges and cases in both Oakland and Wayne counties, the following business docket caseload as a percentage of total applicable caseload is estimated:

**Estimated caseload impact - 6<sup>th</sup> Circuit – Oakland County:**

Twelve judges in Civil/Criminal Division

Criminal and civil cases - new filings (2008); 13,966 including 7,909 civil case filings (does not include domestic relations, adult PPOs, juvenile, adoption, or misc. family)

New filings (2008) that could potentially have some probability of fitting into the business case definition – estimated from 1,250 to 2,736 cases

Average new civil and criminal filings per judge: 1,164

Average potential new business docket cases per judge: 104 to 228

**Estimated caseload impact - 3<sup>rd</sup> Circuit – Wayne County:**

Fourteen judges in Civil Division (does not include Criminal Division, Family Division -Juvenile or Family Division - Domestic)

Civil cases - new filings (2008) - 14,705  
(does not include domestic relations, adult PPOs, juvenile, adoption, or misc. family)

New filings (2008) that could potentially have some probability of fitting into the business case definition – Estimated from 1,322 to 2,904 cases

Average new civil filings per judge: 1,050

Average potential new business docket cases per judge: 94 to 207

Because neither the total number of business docket cases nor the length of cases for the business docket under expedited rules can be known in advance, the purpose of the pilot would be to gather conclusive data on the business docket caseload and related statistics. It would appear that two business docket judges from the 3<sup>rd</sup> and 6<sup>th</sup> Circuit would be an appropriate starting point for the start of the pilot program.

## Appendix C

### **Minority Opinion Favoring a “Standalone” Business Court instead of a Pilot Business Court as a Docket or Division of Circuit Court**

1. The Supreme Court will designate what types of cases are subject to assignment to the Michigan Business Court (MBC). Should consider including some complex commercial criminal prosecutions. The former should be limited to cases involving sizeable damages (no less than \$100,000 or, maybe, higher) or unique complexities or impact.
2. The Supreme Court to designate three to five circuits, not necessarily three to five counties, to participate in MBC-Pilot Project. Circuits should be selected for volume and diversity of business-type cases, political diversity and clout, and geographic diversity.
3. The Supreme Court to name at least five judges, active and/or retired (with a preference for active judges), from any trial level court (circuit, probate, or district) anywhere in the state, to constitute the MBC. It should solicit applications from judges and recommendations from the bench, the bar, and the public. Judges are to be chosen for their knowledge of business and business law, case management abilities, and interest in handling business cases. Active judges will remain assigned to their courts with adjustments to their caseloads to accommodate their MBC workload.
4. Unless the legislature provides otherwise, active judges assigned to the MBC will not receive extra compensation, but will be reimbursed for mileage and expenses attendant to out-of-town MBC proceedings. Retired judges assigned to the MBC shall be paid the per diem allowed by current law, as well as expenses.
5. The Supreme Court shall designate one of the MBC’s judges as its chief judge. The chief judge shall immediately convene the MBC’s judges to make recommendations to the Supreme Court on policies and procedures for the MBC, and thereafter shall convene regular meetings of the judges to monitor and coordinate the work of the MBC and make further recommendations to the Supreme Court.
6. The Supreme Court will designate a person in the State Court Administrative Office (SCAO) as the clerk of the MBC. That person will maintain an office in the Hall of Justice in Lansing to be known as the Michigan Business Court Administrative Office (MBCAO). The MBC clerk shall borrow necessary support staff from SCAO. A separate office shall be maintained with distinctive markings, a phone answered “Michigan Business Court,” MBC stationery, etc.
7. The costs of the MBC and MBCAO will be the responsibility of the Supreme Court, most likely from the SCAO budget. Parties to MBC cases shall not be assessed extra fees.
8. A plaintiff filing a complaint in any Michigan circuit court believed to qualify for assignment to the MBC shall note this on the complaint. The plaintiff shall also state the phone number for the MBCAO, inform the defendant(s) that a call to that number will elicit the identity of the MBC judge assigned to the case, and state that a copy of any answer or other initial responsive

pleading is to be sent to the MBCAO. A copy of the complaint shall be sent by the plaintiff(s) to the MBCAO upon its filing.

9. Upon receipt of a complaint, the MBCAO shall assign the case by lot to an MBC judge and promptly notify the plaintiff, the clerk of the Circuit Court where the case was filed, and the assigned judge of his or her assignment. Upon receipt of copy of an answer, the MBCAO shall notify defense counsel of the case's assignment to the MBC and the identity of the assigned judge.
10. If a plaintiff does not designate a case as an MBC case and the defendant believes that it should be so designated, the defendant shall state this on the answer in a format similar to that required of the plaintiff and shall send a copy of the answer to the MBCAO. The MBCAO shall assign the case to an MBC judge and notify the parties of the assignment. The SCAO shall assign the judge to the circuit court where the case was filed.
11. All fees required by the MCR or other law will be paid to and retained by the circuit court where the case was originally filed, unless venue is changed. Fees will be transferred as specified by the rules governing changes of venue.
12. If a party disagrees with another party's designation of a case as an MBC case, that party may file a motion with the assigned MBC judge to cancel the MBC assignment. If such a motion is granted, the case is to be returned to the circuit court in which it was originally filed for all future proceedings, which are to be conducted by the judge assigned to that court in accordance with the MCR.
13. When a case is sent to the MBCAO, an MBC docket number shall be assigned to the case and all subsequent filings shall bear that number and the docket number assigned by the circuit court where filed.
14. Cases sent to the MBC shall remain pending in the circuit court where filed, unless venue is changed in accordance with any applicable rule. If venue be changed from one county to another, the case shall remained assigned to the originally designated MBC judge, although all future proceedings are to occur in the court to which venue was changed.
15. The originals of all pleadings in an MBC case shall be filed with the circuit court in which the case was originally filed. Copies are to be sent to the MBCAO and to the assigned judge. Electronic filing of copies is to be encouraged. The date of filing with the circuit court will determine compliance with any applicable deadlines.
16. As soon as a response is filed, the MBC judge shall schedule and conduct a telephone conference with counsel for the parties to discuss management of the case unless the judge is satisfied upon reviewing the initial pleadings or deems that a face-to-face conference is necessary from what is learned during the conference Proximity of the parties to the judges shall be a factor in considering whether such a conference is necessary.
17. Unless agreed otherwise by the parties or directed otherwise by the assigned judge, proceedings in MBC cases, except trial and case evaluation, should be conducted by means of telephone or

video conference. Such conferences shall be recorded by a stenographer, recorder, etc. All in-court proceedings shall be conducted where the case was filed. The assigned MBC judge will travel there.

18. The scheduling of proceedings shall be done by counsel directly with the assigned MBC judge. The judges shall keep the MBCAO advised of all scheduling, so it can maintain a calendar of docket entries.
19. Assignment of a case to the MBC will not alter the parties' respective constitutional rights to jury and non-jury trials.
20. All proceedings in the MBC shall be governed by the MCR and the MRE, except as the Supreme Court directs otherwise. The judges assigned to the MBC are to be encouraged to aggressively use MCR 2.401 to schedule discovery motions, etc.
21. Case evaluations shall be managed by the MBCAO using a list of evaluators compiled by it with emphasis on the selection of individuals with experience and skills useful for evaluating business cases. The selection of evaluators for a particular case shall consider the proximity of the evaluators to the circuit court of a case's origin, but proximity shall not be dispositive. Only the usual fees shall be charged to the parties. The evaluators will be reimbursed the expenses of any needed travel.
22. The judges assigned to the MBC are to be instructed that written opinions are preferred for all rulings, except the most mundane, but that oral opinions from the bench are acceptable as long as they are detailed and inclusive of supporting authority and routinely transcribed.
23. Jury instructions given in MBC cases, except routine instructions, shall also be routinely transcribed.
24. The MBCAO shall maintain a website containing the MBC's rules and procedures, all opinions issued by its judges, including all transcribed oral opinions delivered from the bench, and all transcribed jury instructions given in MBC cases.
25. The assignment of a case to an MBC judge shall continue for any post-judgment proceedings in the trial court.
26. Appeals from decisions of the MBC shall be to the Court of Appeals in accordance with MCR without assignment to any special panels of that Court.
27. If the MBC judge assigned to a case is unavailable, even by phone, for any reason, the MBCAO is to assign the case by lot to an available MBC judge to act during the unavailability of the originally assigned judge, but only to handle matters which, in the judgment of that judge, cannot wait the availability of the originally assigned judge. If no MBC judge is available, the case is to be handled temporarily by the judge of the circuit court to whom the case is assigned.

## Appendix D

### Business Docket Frequently Asked Questions

The Business Impact Committee of the Judicial Crossroads Task Force proposes that the Michigan Supreme Court designate two or three circuits for a three-year pilot business docket program in which disputes between businesses would be assigned to a business court judge. Following are some commonly asked questions about this pilot business docket and similar business courts, along with general answers.

#### **1. Why should business cases be treated differently from other circuit court cases?**

Generally, lawsuits between businesses, especially large disputes, are different from other civil cases that get filed in circuit court: (1) business litigants may have already engaged in fairly extensive fact-finding in an effort to avoid filing suit; (2) business litigants may already have participated in some kind of formal or informal dispute resolution process, with or without partial success, either voluntarily or because their contract required some kind of pre-suit proceeding; (3) commercial disputes are litigated to verdict and through appeal so rarely that reported opinions on relevant principles of business law are sparse; (4) business cases, especially large ones, often involve multiple parties and very extensive motion practice, particularly on legal and technical issues; (5) cases between fictitious entities are more likely to raise unique problems related to locating individuals and electronic discovery, for example, so expenses can be staggering and ordinary time limits may or may not make sense; and (6) business litigants may want to continue to do business with each other, assuming the litigation process itself does not destroy the relationship.

The result is that business cases often require early and significant judicial intervention, and may be ready for ADR much earlier than other cases. Therefore, they have the potential for early resolution and are particularly amenable to creative case management techniques.

Business cases are also more likely to take an inordinate amount of the judge's time and attention. They often involve numerous legal issues, some novel, and the multiple motion hearings and briefs place significant demands on the court's resources. Ironically, the dearth of reported Michigan case law on business issues increases the burden on trial courts, which have to rely on out-of-state cases, treatises, etc. to resolve the myriad legal issues raised in business cases. Often, neither the litigants nor the court can look to any local decisions on principles of business law that are accurate, consistent, and predictable.

#### **2. How would assignment to a specialized business docket address those issues?**

The committee proposes that disputes between businesses, as defined in the proposal, be assigned by lot to one of two or three business court judges in each of the designated pilot circuits. The business court judge would focus on: (1) very early, pro-active case management; (2) frequent judicial intervention and consideration of ADR; (3) written opinions on significant issues, which are published and available as persuasive tools in future cases; and (4) use of technology to enhance efficiency.

Business cases would be assigned to judges who have particular interest and expertise in both case management and business issues. Judges would engage in early and frequent intervention

with the goal of crafting a specialized plan for each case, evaluating ADR possibilities, resolving issues, and moving the case toward conclusion. Judges would prepare written opinions, which would be published and available as persuasive tools, not just for that court, but for others as well.

Removing business cases from the general docket also frees other judges from the burdens of the unwieldy commercial cases that clog the docket and divert resources from other cases.

**3. How would cases be assigned to a business docket judge?** Assignment to the business docket may be mandatory or voluntary, depending on the nature of the dispute. A case on the business docket will be assigned to a business judge by lot. The pilot business dockets will be phased in, so each business judge will continue to carry a full case load throughout the pilot period.

**4. How much would the pilot business docket cost?** The focus of the business docket is reallocating existing cases among existing judgeships; it does not require any new judicial position or new funding. The only cost in the proposal is the cost of transcribing significant decisions to make them available to the public.

**5. Will the pilot business docket project be evaluated?** The committee is proposing that the pilot project be evaluated on an ongoing basis, with a comprehensive report at the end of the pilot period.

**6. What do businesses think of business courts?** Nationally, general counsel and business lawyers overwhelmingly support the formation of some form of business court or docket. The State Bar of Michigan recently conducted a survey with similar results.

Establishing a business docket may not, in itself, persuade a business to locate or remain in Michigan. However, it is one way to demonstrate to the business community that Michigan is sensitive to the interests of its constituents, including businesses.

**7. How will the business docket affect the rest of the judicial system?** Assigning business cases to a business docket will not just improve resolution of those cases. The entire judicial system will benefit. The cumbersome commercial case that otherwise clogs a judge's docket can be reassigned to the business docket, freeing the judge to handle perhaps several other matters in place of that one. The business judge will be encouraged to experiment with a variety of case management techniques that may ultimately prove useful in other cases. Business issues will certainly arise in cases not assigned to the business docket. Other judges will be able to consult a body of trial court opinions when deciding those issues.

**8. Why is \$25,000 the recommendation for the jurisdictional threshold for the business docket?** There was considerable debate within the Business Impact Committee on the issue of the jurisdictional amount required for cases to be assigned to the business court. There was a division of opinion on a low versus high jurisdictional minimum. The discussion aligned along two lines. While there were other concerns, those favoring a low jurisdictional amount were primarily concerned with (1) access to the business court, (2) business elitism, and (3) forum shopping.

On the other hand, those favoring a high jurisdictional amount were mainly concerned with (1)

overburdening a business court with too many cases if the amount were set to low, (2) maintaining a business rather than consumer focus of the court, and (3) dilution of the seriousness purpose for the court.

A strong majority of the committee favored recommending that the jurisdictional amount in controversy be the same as the circuit court, which is presently \$25,000.



## **Business Impact Committee Proposal**

### ***Changes to the Rules for Licensing Attorneys From other States and Countries***

The Business Impact Committee has been charged with making recommendations relating to the desirability and effectiveness of Michigan Courts regarding business disputes. Although part of the "audience" is the current business community of Michigan, another increasingly important part of the "audience" are businesses located in other jurisdictions *and* in the global economy. Most jurisdictions, including Michigan, have not comprehensively addressed the full potential of sanctioning and facilitating the multi-jurisdictional practice of law by lawyers representing outstate businesses and multinational corporations.

The rules and policies that regulate attorney licensing for attorneys from other states and countries need to be streamlined. The red tape for licensure needs to be reduced to allow easier entry for out-of-state and out-of-country attorneys with significant experience who are seeking to practice law in Michigan on behalf of their business employers.

There are two classes of lawyers for which rule changes are needed.

- 1) Rule changes for lawyers who are licensed in states other than Michigan but who are working for business firms doing business in Michigan.

Currently, a lawyer in this situation can practice in Michigan for a limited number of occurrences within a one-year period under the *pro hac vice* rules codified in MCR 8.126. In addition, a lawyer in these circumstances may be admitted as an active member of the State Bar of Michigan through the procedures provided in Rule 5 of the Board of Law Examiners, which codifies MCL 600.946 and which provides for a "special certificate" that allows an outstate attorney to practice law in Michigan as long as the attorney's only client is his or her employer. The certificate is good only for as long as the attorney-employee stays with that employer. What is needed is a change to the current rules to allow attorneys with special certificates to change employers without significant additional paperwork. Implementation must also facilitate the issuance of special certificates to non-Michigan attorneys who transfer to Michigan to hold in-house positions. The procedure should be made easy when the lawyer will limit activity only to work for that employer and without court

appearances. Such admission could be facilitated after a criminal and ethics verification of the applicant.

A more dramatic approach would be to broadly open admission to the Bar to any lawyer working in Michigan for a corporation, provided the lawyer is already properly licensed in any other state of the United States and so long as the lawyer's practice is limited to work as an attorney on behalf of his or her employer. There could also be consideration of a requirement that the attorney and the attorney's employer maintain an appropriate level of liability insurance.

- 2) Rule changes for lawyers who are licensed from countries other than the United States who are working for firms doing business in Michigan.

A foreign lawyer can be admitted as an active member of the State Bar of Michigan through Rule 5 of the Board of Law Examiners as a "Special Legal Consultant", which allows the attorney to render professional legal advice on the law of the foreign country where the legal consultant is admitted. There is, however, ample room for streamlining of the licensing process. Moreover, currently there is no *pro hac vice* rule applicable to lawyers who are not licensed in the United States or, stated otherwise, who are licensed in jurisdictions outside of the United States. One is needed that is that is applicable to an international attorney working for an international company doing business in Michigan, so long as the attorney's only client is his or her employer.

### **Recommendation**

The Committee recommends that Rule 5 of the Rules of the Board of Law Examiners be revised to accommodate outstate and foreign lawyers working for corporations in Michigan. In today's day and age, when corporations are increasingly involved in national and multinational enterprises that readily and seamlessly cross state lines and the borders of countries, it makes sense to reconsider current licensing paradigms that are outdated and based on models that existed before the age of the Internet and overnight express mail.