

**Mississippi Secretary of State
2008 Business Reform Committees
Minutes of Business Courts Study Group
May 20, 2008**

The first meeting of the Business Courts Study Group was called to order on Tuesday, May 20, 2008 at 11:30 A.M. at the Office of the Secretary of State, 700 North Street, Jackson, Mississippi.

A list of the persons who were present in person or by telephone is attached at Exhibit A.

Secretary Hosemann welcomed the group, thanked them for their attendance and recognized the legislators and judges who were present. He discussed the need for expedited, consistent judicial opinions for business cases to resolve disputes among businesses at the lowest cost. He also discussed the goals and mission of the Study Group:

He stated that this is an historic event and a giant step for Mississippi to establish a business court system. He also discussed that the goal of the Business Reform project was to make Mississippi the most business-friendly and competitive state. In keeping with that goal, the mission of the Study Group will be to make recommendations as to how to establish a business court system. Secretary Hosemann noted that some of the best minds in the State have been assembled to serve on the Study Group, including a cross-section of Mississippians, users of the court system, attorneys, judiciary and scholars.

Judge Ed Pittman, Chair, made introductory remarks concerning the goals of the committee, introduced the Committee Vice Chairs and announced the formation of four subcommittees: Jurisdiction and Venue; Judicial Selection; Procedure and Technology and Funding and Filing Fees. A list of the subcommittees, including the chairs for each, is attached at Exhibit B.

Judge Pittman stated that it would be the goal of the Study Group to make recommendations as to how to improve the judiciary. This would include creating a strong, desirable business court system. He noted that the judiciary recognizes there is a need and desire to improve the judicial system. He also stated Mississippi has prior experience with creating new court systems, including the Drug Court and the Court of Appeals. The Drug Court was created without requiring any new judges or courthouse space. The circuit courts in Mississippi are overburdened with criminal matters, which have created a backlog for civil cases as well. Judge Pittman stated that the Business Court Study Group would be a "thinking committee" with the Secretary of State staff assisting by doing legal research, legwork, and investigation as needed for the Study Group to make their recommendations.

Cheryn Baker introduced the Policy and Research Division staff. A list of Division staffing is attached at Exhibit C.

Cheryn Baker introduced Merrick (Rick) Gross who acted as the moderator of the call. Mr. Gross made introductions of the other panelists. Copies of the bios of the panelists are attached at Exhibit D. A copy of the ABA brochure on Establishing Business Courts (which was written by the panelists) is attached at Exhibit E.

Next, Lee Applebaum provided an update of the state of business courts/complex litigation courts in the United States and discussed the different types of business courts as follows:

He first explained the use of the terms “business court” and “commercial court” to connote the idea that modern “business courts” deal with both intra-corporate disputes or partnership disputes, of the kind typically associated with the Delaware Court of Chancery; and cases that involve commercial disputes between businesses. He also explained that these are not typically separate courts, but are programs or tracks within existing civil divisions in state trial courts; though they are sometimes divisions within a court. In the one case of the Delaware Court of Chancery, which has a jurisdiction limited, for the most part, to equity matters and not commercial disputes for money damages, it is a separate court.

He observed a distinction between the business court model and the pure complex litigation model, which is that the complex litigation courts hear cases based on whether they meet definitions of complexity, which may include non-business matters, as well as business and commercial disputes. Whereas in the business court model, judges hear only business disputes, which may be simple business disputes or could be considered to be complex litigation business disputes, depending on the model of business court established.

Mr. Applebaum noted that 14 states currently operate a business court in some fashion and that 4 states have pure complex litigation models. He stated that these business courts fall into four models. The first model is a court that has a jurisdiction of a laundry list of case types and if a case falls within this jurisdiction then it can be tried in the business court, so long as it meets the case type criteria and the minimum jurisdictional amount in dispute. The second model hears only complex business cases, no simple business litigation cases, usually along with a few mandatory categories of statutorily based disputes such as state antitrust or securities disputes. The judge or a judicial process plays more of a role in the determination of whether or not a case will be accepted into the complex business court. A third model hears complex tort cases in addition to complex business cases, in a two track system. Finally the fourth model, which would include the Delaware Court of Chancery as the leading example, but also the Circuit Court of Cook County Chancery Division as another example, hears only equity based business cases, such as intra-corporate disputes or employee restrictive covenant cases, and doesn't hear cases involving money damages, with very limited exceptions in Delaware's Chancery Court.

Mr. Gross then presented a series of questions to the panelists. The questions and a summary of the responses are included at Exhibit F.

Secretary Hosemann introduced Chief Justice Jim Smith who spoke to the group and stressed the need for an adoption of a business court in Mississippi, which would help everyone in the court system. He mentioned the existing backlog of cases due to the number of criminal cases on the dockets and that having the ability to get through court faster is enough reason to adopt a business court in Mississippi. Chief Justice Smith also pledged to provide support from the MS Supreme Court to the Study Group.

During the question and answer session Christopher Van Cleave commented that he understood that the threshold duty of the group was to determine whether a business court system is a good thing for Mississippi (and whether it will improve efficiency). He continued that he felt the group owed a duty to the taxpayers to answer this threshold question. He suggested that one means of determining this would be for the committee to be provided statistical information on business cases currently in the court system and on business cases in several of the busier circuit courts. He also requested documentation of the amount of time that taken up by the various types of cases on the dockets and what are the backlogs for various courts. Secretary Hosemann pledged to provide this information to the Committee.

Judge Pittman announced the committee assignments and Secretary Hosemann commented that each subcommittee will receive research on their topics. Judge Pittman also announced the upcoming meeting dates. A list of Study Group meeting dates is enclosed as Exhibit G. He commented that the Supreme Court can accomplish most of this business court project by rule. He noted that the drug court did not require new judges or courthouses, and that no new bureaucracy was needed when the court of appeals was created. Judge Pittman also stated that the legislature has funded the judiciary system in the past.

Cheryn Baker distributed copies of the Business Courts State Survey prepared by the Secretary of State's Office. A copy of the updated Survey with the addition of an Executive Summary is enclosed at Exhibit H. Ms. Baker also announced that copies of the meeting materials and minutes would be posted on the Secretary of State's website and sent to legislators.

There being no further business, the meeting was adjourned at 1:15 P.M.

Respectfully Submitted,

Cheryn Baker
Assistant Secretary of State
Policy and Research Division

EXHIBIT A

The following persons were present in person or by telephone:

Committee Members:

Ed Pittman
James Holland
Joey Diaz
Blake Wilson
Guff Abbott
BB Hosch
Joy Phillips
Brian Sanderson
Lex Taylor
James Threadgill
Chris Van Cleave
James Wyly
Cathy Beeding
Carolyn Boteler
Rick Calhoon
Henry Chatham
Dodds Dehmer
Larry Edwards
Christopher Graves
Malcolm Harrison
Joel Hill
Amanda Jones
Les Lampton
David Landrum
Shane Langston
John Laws
David Mockbee
William Painter
David Paradise
Dale Persons
Tom Rhoden
Charlie Ross
Dan Waring
Lawrence Warren
Kelley Williams

Legislators and Judges:

Chief Justice Smith
Justice Charles Easley
Rep. Gary Chism
Rep. Mark DuVall
Rep. Harvey Fillingane
Rep. Andy Gipson
Rep. Ted Mayhall
Rep. Jimmy Puckett
Rep. Greg Snowden
Sen. David Baria
Sen. Hillman Frazier
Sen. Vincent Davis

Secretary of State Staff:

Delbert Hosemann
Cory Wilson
Cheryn Baker
Doug Jennings
Pamela Weaver
Phillips Strickland
Amy Foster
Brian Bledsoe
Andy Thomas
Jeff Lee

Other persons present included:

David Krause
Aileen McNeill
Charlotte Puckett
Kirk Nelson
Jim Poole for Tom Grantham
Ms. Celie Edwards

EXHIBIT B
Business Court Study Group Sub-Committees

Judge Ed Pittman, Chair of Business Courts

Judicial Selection

Joey Diaz, Chair
Rick Barry
Larry Edwards
Malcolm Harrison
Les Lampton
James Mozingo
Dale Persons
Tom Rhoden
Robert Tatum
Dan Waring
Kelley Williams

Jurisdiction/Venue

James Holland, Chair
Guff Abbott
Henry Chatham
B.B. Hosch
Shane Langston
John Laws
David Mockbee
Bill Painter
George Simmerman
Lex Taylor

Procedure/Technology

Amanda Jones, Chair
Carolyn Boteler
Chris Graves
Joel Hill
Joy Phillips
Carlton Reeves
Charlie Ross
Christopher Van Cleave
James Wyly

Funding/Fees

Blake Wilson, Chair
Cathy Beeding
Rick Calhoon
Glenda Glover
Tom Grantham
David Landrum
David Paradise
Brian Sanderson
James Threadgill
Lawrence Warren

EXHIBIT C

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EXHIBIT D

Biographies of Panelists Business Courts Presentation May 20, 2008

Lee Applebaum is a commercial litigation partner at Fineman, Krekstein & Harris in Philadelphia. He is co-chair of the American Bar Association's Subcommittee on Business Courts and was its the long-standing vice-chair. He has written, advised and spoken extensively on business courts. He is the past chair of the Philadelphia Bar Association's Business Litigation Committee and will become chair of the Philadelphia Bar Association's Business Law Section in 2010. He has authored or co-authored over 30 articles or book chapters, and his 1987 law review article on securities arbitration was cited and quoted in a U. S. Supreme Court Opinion.

Mitchell L. Bach is a Member of the firm of Eckert Seamans Cherin & Mellott, LLC, and Chair of the firm's Commercial Litigation Division in Philadelphia. He was Chair of the Business Law Section of the Philadelphia Bar Association in 2005, and also formerly chaired the Association's Business Litigation Committee. Mr. Bach is the immediate past Chair of the ABA Section of Business Law's ("SBL") Committee on Corporate and Business Litigation, and the immediate past Chair of its Business Courts Subcommittee. Mr. Bach currently is a member of the Council of the SBL, and Co-Chair of the SBL's Ad Hoc Committee on Judges Initiative. Mr. Bach played a key role in the organization and development of the Commerce Case Management Program of the Philadelphia Court of Common Pleas in 1999; and is actively involved in the creation of other specialized business courts throughout the United States, a subject on which he writes and speaks about frequently.

Rick Gross is a shareholder with Akerman Senterfitt, resident in the firm's Miami office. He practices in the area of Business and Commercial Litigation. Mr. Gross is the co-chair of the ABA Section of Business Law Business Courts Subcommittee and has been active in the creation of Business Courts throughout the State of Florida and the United States having written and lectured frequently on the subject. He is also the current chair of The Florida Bar Business Law Section and the immediate Past President of the Dade County (Miami, Florida) Bar Association.

Robert L. Haig is a partner in the law firm of Kelley Drye & Warren LLP in New York City. His practice includes commercial, products liability, and other types of civil litigation. Mr. Haig co-chaired the Commercial Courts Task Force which New York's Chief Judge appointed to create and refine the Commercial Division of the New York State Supreme Court. He recently organized and conducted a series of focus groups on the Commercial Division at the request of New York's Chief Administrative Judge which involved Commercial Division Judges and in-house and outside counsel for corporations and contributed to a report on the focus groups proposing improvements to the Commercial Division and other New York Courts. He has also been active in efforts to create business courts in many other states and countries. Mr. Haig is the Editor-in-Chief

of two multi-volume treatises on business and commercial litigation and is the author of numerous articles and book chapters.

Cory E. Manning is a partner of Nelson, Mullins, Riley, and Scarborough LLP in Columbia, South Carolina. Mr. Manning's practice includes a variety of litigation, negotiation, and counseling services in both civil and criminal matters. In addition to representing clients in federal and state courts and other forums, Mr. Manning regularly advises public and private companies and their officers and directors on a broad range of issues regarding litigation risk-reduction strategies, commercial contracts, fiduciary duties, and corporate compliance matters. Mr. Manning has spoken and written on various legal topics, including specialized business courts, civil motion practices, legal ethics, negotiations, and Sarbanes-Oxley compliance. He currently serves as Vice-Chair of the ABA's Business Law Section's Subcommittee on Business Courts.

Judge Steven Platt is retired from the bench, but is the current President of the American College of Business Court Judges. He is also the acknowledged architect of the Maryland Business & Technology Case Management Program. Judge Platt is recalled in all Eight Circuits in Maryland to provide ADR and preside over Business and other Complex litigation. He also provides mediation and arbitration services privately through his company, The Platt Group, Inc.

Judge Ben Tennille started the North Carolina Business Court in 1996. He is now Chief Judge of a three judge court there. In establishing the court Judge Tennille designed a model paperless court, which employs a free electronic filing system using the Internet. It was one of the first successful e-filing systems in the country. The Court was one of the first to maintain a website where all the opinions were accessible as soon as they were filed and all pleadings were accessible on the website. Judge Tennille currently maintains his chambers and his courtroom in the new Elon University School of Law, the only trial court in the country to be housed in a law school. He is immediate past president of the American College of Business court Judges and currently the ABA Judicial Division Liaison to the Business Law Section.

EXHIBIT E
ABA BROCHURE

[TO BE PROVIDED BY SEPARATE DOCUMENT]

EXHIBIT F
QUESTIONS AND ANSWERS FROM PANEL DISCUSSION

1. How do you justify creating what can be perceived as an elitist institution within the judiciary that diverts much-needed resources from other areas of the court system? – Mitchell Bach and Lee Applebaum responded that there is nothing elitist about the idea of a business court. There are all kinds of specialized courts which aren't considered to be elitist, such as bankruptcy, family, drug court, youth courts, etc. The idea that resources are being diverted is just not accurate. Resources are not being diverted; rather they are being reallocated from existing systems to handle business cases more efficiently in a specialized forum. The reallocation thereby reduces the caseload of the existing court system, which results in fewer resources being needed for the existing court system.

2. How much in the way of additional resources needs to be expended in creating business courts? – Robert Haig responded that by additional resources you are referring to money then the answer is zero. This is good because state legislatures may not be inclined to appropriate new money for a new court system. Instead, existing sitting judges can be reassigned to hear business cases. There is no need to appoint new judges or to build new courthouses or add on new courthouse space. The only additional resources that might be needed would be to hire additional law clerks (or reassign them from existing courts) to work on the increased number of complex motions or to pay for new technology that isn't currently being used. Again, this reassignment of complex cases would result in a decreased caseload and workload for the existing court system.

3. Do you have to create new judgeships? - Lee Applebaum replied that in most jurisdictions new judges have not been appointed. Instead existing sitting appointed or elected judges were reassigned to the business court dockets.

4. Find new courthouse space? – Mitchell Bach replied that business courts have either used existing courthouse space or other facilities.

5. What impact have business courts actually had on the rest of the court system? – Ben Tennille responded that having a business court makes the rest of the system work better. The court systems have been able to more quickly dispose of cases with the reduced caseload. Business Courts have also acted as technology incubators for the other courts. Business Courts have implemented electronic filings and electronic courtrooms, which technologies have then been expanded to the rest of the court system.

6. What has been the reaction of the business community to the creation of business courts? – Cory Manning responded that in South Carolina the business community welcomed the business court after it became operational with open arms. Business people are excited about the business court because of the expertise and written opinions which will result in predictability.

7. What constituencies have opposed business courts and why? – Bob Haig discussed three possible opponents. He stated that most of the opposition experienced was due to miscommunications or a misunderstanding of the business courts. He said this could have been prevented by providing more education on the front end to all possible constituencies that might have objections.

These were plaintiff lawyers who were concerned that business lawyers and clients were getting special treatment; some rank and file judges who believed the business court judges were selected because they were “better” or more “special;” and in some states the chief justice of the state’s supreme court opposed the business court because of the “elitist” concern.

8. And how have you dealt with their concerns? – Bob Haig replied that they explained to the plaintiff lawyers that having a business court frees up the rest of the court system so their cases get handled more quickly and efficiently. The concerns of rank and file judges were alleviated by explaining to them that business court judges are not “better” or “more special”, rather they are judges who are interested in complex type litigation and willing to hear complex litigation cases that are often motion-intensive. Not all judges like to hear these types of cases. The opposition by some judges because of the elitist argument has not been evident in connection with establishing business courts in the past few years.

9. What empirical evidence or statistics can you cite to as evidence that business courts have improved commercial litigation? – All of the panelists who responded admitted that there is currently no empirical evidence that business courts have improved commercial litigation. Cory Manning and Steve Platt specifically responded that there weren’t many statistics available to provide actual evidence that business courts have improved litigation. However, there are many anecdotal stories in the various jurisdictions that business cases are being handled more quickly in the business court systems and there is a higher rate of settlement of cases because of the predictability of the business court systems (due in part to having written opinions). One panelist commented that to conduct a comprehensive statistical survey as to how business courts have improved commercial litigation would be cost-prohibitive.

10. We know that discovery in complex commercial matters can be very protracted and expensive. What has been the impact of business courts in terms of cutting down on the duration of discovery? – Ben Tennille responded that business courts have had a positive impact on the duration and costs of discovery. This is due in part to the improved management of business cases from beginning to end by the same judge who takes a hands-on approach to case management.

11. Are special case management procedures similar to Federal Rule of Civil Procedure Status Conferences used? – Cory Manning responded that procedures are similar to the Federal procedures and they have the same goals of intensive case management, especially in complex litigation cases.

12. What is it about business courts that have made them so successful?

- Mitchell Bach commented that in Pennsylvania the business court has revolutionized the way commercial litigators practice and has become the court of choice. While in the past litigators tried to stay out of state court (due to the uncertainty and lack of judicial expertise), now fewer parties are removing their cases to the federal courts. Some parties are even specifically including the Philadelphia Business Court as their choice of venue in their contracts for any contractual disputes. Cory Manning also mentioned that it is obvious that business courts are successful because all of them have grown beyond their original scope by expanding the number of cases they hear and by expanding the geographic jurisdictions to include a larger area.

13. Do they process and conclude business disputes quicker? -Lee Applebaum responded that business disputes are handled much more quickly in business courts, because of the case management process and other factors mentioned above.

14. How do business courts go about selecting judges? Is there a process? – Ben Tennille commented that most business court judges are first elected as judges of a larger court system and then selected by merit into the business court system by the chief judge of the system or some other similar process. He believes that this is the best combination, as opposed to single process of appointment or election. The combination process addresses the concerns from the pro-election/anti-appointment groups that using only an appointment process is the “camel sticking his nose under the tent” to lead to more appointed judges. It also addresses the concerns that a judge selected solely by election may not be qualified for the position.

16. Do business court judges need any specialized training? – Steve Platt responded that judges can obtain their specialized training while serving on the bench through various education programs designed specifically for business court judges and through experience. It is not necessary that they have specialized training before taking the position. The most important criteria are that business court judges need to be hard-working.

17. Does a business court judge need to have a background with business issues? - Lee Applebaum replied that while it is good for business court judges to have a business background, it is not a requirement. Many very effective business court judges did not have a business background when they took the bench.

18. Does working with the same types of cases on a frequent basis help judges who do not have a business background become better prepared to deal with the issues involved with business cases? – Mitchell Bach stated that business court judges who don't have prior business experience get better at hearing and deciding business cases due to the repetition.

19. What has been the reaction of the rank and file judges to business courts? What is the best way to respond to that reaction? – Ben Tennille remarked that in North Carolina the Supreme Court created the Business Court without getting any input from the rank and file judges. This caused the rank and file judges to not initially support the business court. He recommends that the entire judiciary be consulted in the process of planning for and creating a business court.

20. What is the most effective way to create a business court? –Bob Haig stressed that the most effective way to create a business court was “minimalist” and “incremental.” He stated that a state doesn’t have to spend a lot of time and effort to plan a business court. The most important part of establishing a business court is to find a good judge and then start assigning cases to that judge. Selecting the right judge is immensely important and is the key to the success of the program. The judge needs to be hands on and proactive with case management. Judge Platt agreed with these points and said to get the best person who enjoys the work and will do it well. In Maryland the program started as a legislative effort and then became a joint effort with the judicial branch. He also stated that you need to involve everyone in the planning process. This helps prevent detractors (who may have misconceptions about the project) because they will be educated about the project and have input into the process.

Final Comments. The panelists next gave their final comments to sum up the presentation. These comments included the need to start small, make the process inclusive, and to look at your culture to determine whether to create the business court by court rule or by legislative action. Other comments were to pick the right judge and focus on what you want to accomplish. For example one state’s priority was to have written opinions and establish a body of case law. The court should be set up to accomplish your state’s particular priorities. They also offered to answer any questions that people may have and to provide any additional help or assistance as needed to our committee.

Cheryn Baker then posed the following questions to the panel:

1. For cases to be eligible for business court should there be a minimum amount in controversy? How much? Mitchell Bach responded that Philadelphia only took new cases so it did not get inundated by a backlog of cases from the beginning. He stated that this issue is handled in different ways in different states. Having a minimum amount in controversy requirement acts as a gatekeeping function to prevent a backlog of cases in business court. It is a judgment call to decide what the cut off point is. He mentioned that in New York the amount is often adjusted as needed. Judge Platt stated that this was a very controversial issue in Maryland so they did not put in place a minimum amount requirement. He recommended that legislators be consulted about this because they may have specific opinions on this subject. Rick Gross mentioned that in Florida the business court used the federal amount as a basis, but it later raised this amount as a gatekeeping measure. Judge Tennille cautioned that when you have a jurisdictional amount you create more areas for the attorneys to argue about. It also might keep out small businesses whose cases involve lesser amounts in controversy. Small businesses need to be in

business court to get their cases resolved faster and at a lower cost. Therefore it might not be a wise idea to require a minimum amount in controversy.

2. We are considering adopting a rule to require the MS business court judges to defer to Delaware case law first if there is no MS case law on the subject. Rather than looking to case law in some other surrounding state or otherwise. Have any business courts adopted rules similar to this? Judge Platt stated that no state has done this by rule or statute. He is not sure this should be formally adopted because it is possibly injecting idealology into the court. Bob Haig responded that he was not sure this was a good idea because Delaware's statutory corporate law may not always correspond to the statutes in Mississippi. Judge Tennille objected to this concept. He said it would be hard to make this work unless the Mississippi statute is identical to the Delaware statute.

Secretary Hosemann asked the panel if the amount of the filing fee or court costs should be set in relation to the amount in controversy. Judge Platt remarked that this is an area of controversy. If the business court is going to include consumer cases then this can cause problems. He said to proceed with caution. Determine first what the jurisdiction will be, then make a decision on filing fees. Another panelist commented that you don't need additional filing fees if you are not using them to fund the court. In Florida, the legislature did raise filing fees, but it did it across the board. The panelists stated that no other courts use fees to fund their courts. The business courts that exist today are not distinct, self-sustaining money generating entities.

EXHIBIT G

Business Courts Committee

Meeting Schedule:

May 20th

June 11th

July 9th

July 23rd

August 6th

August 20th

September 3rd

All meetings will be held at the MS Secretary of State's Office located at 700 North Street, Jackson, MS in the 2nd floor conference room.

EXHIBIT H

SURVEY OF STRUCTURE OF BUSINESS COURTS

[TO BE PROVIDED IN SEPARATE DOCUMENT]