

CHIEF JUSTICE'S COMMISSION ON THE FUTURE OF THE NORTH CAROLINA BUSINESS COURT

FINAL REPORT AND RECOMMENDATION 28 OCTOBER 2004

INTRODUCTION

The North Carolina Business Court

In April 1994, Governor James B. Hunt established the North Carolina Commission on Business Laws and the Economy (NCCBLE). The NCCBLE was charged with recommending "any needed changes in existing statutes and regulations which affect the operation of businesses in North Carolina." Specifically, the Governor asked the NCCBLE to recommend statutory and regulatory changes to help create a legal environment that would attract businesses to the State of North Carolina and provide businesses the flexibility and support they need to operate successfully.

In January 1995, the NCCBLE issued a report recommending, among other things, the creation of the North Carolina Business Court. The NCCBLE noted the high esteem in which the Delaware Chancery Court is held by the national business community. While many states, including North Carolina, had amended their business laws to be more consistent with the Model Corporation Act, none had taken steps to make its court system as responsive and predictable as the Delaware Chancery Court in dealing with complex corporate issues.

To meet these specifications, the NCCBLE recommended that the North Carolina Supreme Court amend Rule 2.1 of the General Rules of Practice for the Superior and District Courts (the General Rules of Practice) to allow the Chief Justice to designate certain cases as complex business cases and adopt Rule 2.2 to allow the Chief Justice to designate one or more Special Superior Court Judges to hear such cases. The NCCBLE further recommended that Governor Hunt appoint at least one expert in corporate law to be so designated by the Chief Justice.

In the fall of 1995, the North Carolina General Assembly appropriated the funds for an additional Special Superior Court Judge for a five-year term, and the North Carolina Supreme Court amended Rule 2.1 and adopted Rule 2.2 to implement the NCCBLE recommendations. In January 1996, Governor Hunt appointed Ben F. Tennille as a Special Superior Court Judge, and Chief Justice Burley Mitchell designated him as North Carolina's first Special Superior Court Judge for Complex Business Cases. Judge Tennille was reappointed for a second five-year term in October 2000.

On 6 November 2003, the North Carolina Supreme Court created the Chief Justice's Commission on the Future of the North Carolina Business Court (the Commission). By order of the Court, the Commission was directed to study the functions and procedures of the North Carolina Business Court and compare them to those of other business courts. Under the terms of the Supreme Court's order, the Commission was directed to report its findings and issue recommendations to the Chief Justice and the North Carolina Judicial Council on or before 31 December 2004.

The Commission is composed of one Justice from the North Carolina Supreme Court, one Judge from the North Carolina Court of Appeals, and six Superior Court Judges; two administrative employees of the Administrative Office of the Courts; three members of the North Carolina Senate; three members of the North Carolina House of Representatives; two members of the Commission on Business Laws and the Economy; sixteen attorneys licensed to practice law in North Carolina; and three members of the general public who are not attorneys-at-law. A complete list of Commission members is attached to this report. This report is the culmination of the Commission's work over the past year.

National Trends

The creation of the North Carolina Business Court in 1995 placed North Carolina at the forefront of a growing national trend towards specialized adjudication of complex business cases. North Carolina was one of the first states to institute reforms in its administration of complex business litigation. It was certainly not the last. In 1997, an ad hoc committee of the American Bar Association recommended that all states consider adopting some form of business court, stating that "the movement toward specialized business courts" is "gaining strength," and that "there appears thus far to be no criticism in jurisdictions where business courts have been established." At present, specialized business courts, or business programs or

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divisions within existing trial courts, have been established in Florida, Illinois, Maryland, Massachusetts, New Jersey, New York, Nevada, Pennsylvania, and Rhode Island, as well as in North Carolina. The Minnesota and Oklahoma legislatures have studied the concept of a business court, and a pilot program has been initiated in Wisconsin. Finally, Georgia's Administrative Office of the Courts, with the support of Georgia's State Bar Association, has recommended the creation of a business court modeled closely on North Carolina's.

Successes of North Carolina Business Court

The North Carolina Business Court has been an unqualified success since its inception in 1995. For example, in a recent study entitled *Best Practices in U.S. Business Courts*, the authors highlighted the twelve most important "best practices" in the existing business and commercial courts in this country. The North Carolina Business Court was cited as a model in eleven of the twelve categories. Among the many benefits the Business Court has secured for the business community, the court system, and the public at large are the following:

- *Improved Case Management.* The North Carolina Constitution requires Resident Superior Court Judges to rotate among the various judicial districts within their divisions. While rotation has numerous benefits, it may cause deleterious effects in complex business cases. In addition, civil matters before a Superior Court sometimes lose their priority to criminal cases on both motion and trial calendars. A case designated as a "complex business case," in contrast, is handled exclusively by a single trial judge who controls the calendaring of cases on his or her own docket. Thus, the possibility of conflicting decisions on evidentiary and substantive matters is greatly reduced, and cases are promptly and efficiently administered. For example, of the 179 cases brought before the North Carolina Business Court from April 2002 to April 2003, 116 had closed by the end of that time period and only 63 remained open. Of the 116 cases that had been closed, 73 reached settlement prior to or during trial. Of the 63 cases that remained open in April 2003, 5 were on appeal, 3 had reached settlement, 2 were stayed, and 17 were extremely complex multi-party class action lawsuits.

- *Increased speed and flexibility.* In many complex business cases, particularly those involving changes in ownership or corporate governance issues, preliminary injunctive

relief is a critical issue. Often decisions need to be rendered before specific times such as shareholder meetings. Having a judge available to hear such cases on short notice is a significant benefit to the parties. Moreover, the cultivation of expertise in one or more Business Court Judges promotes the timely and efficient disposition of cases, thus enabling business leaders to focus on running their companies. In short, the speed and flexibility provided by the Business Court improves the administration of justice and meets many of the most pressing needs of the business community.

- *Advanced technology.* At its inception, the North Carolina Business Court was at the cutting edge of advanced courtroom technology. The Court's website, which boasted an average of 4,255 "hits" per weekday between 18 July 2003 and 18 February 2004, provides a searchable archive of all of the Court's prior decisions, as well as a court calendar and docket, local rules, information about the Court, important notices, useful links, and practice pointers for attorneys and business people. The website also features an advanced electronic filing system, which greatly enhances the efficiency of case management and dramatically reduces filing costs, in addition to eliminating errors caused by manual filing systems.

The courtroom is wired for video-conferencing and for the use of computer technologies at trial. Attorney rostrums are equipped with touch-screen computers by which attorneys can access exhibits and other materials stored on CD-ROM, videotape, and floppy disks. Such exhibits and materials can be displayed on all screens so that judge, attorneys, and witnesses may review them simultaneously. Witnesses may be allowed to use touch-screen computers to help illustrate their testimony by, for example, highlighting relevant portions of electronically displayed materials. The presiding judge has two computers, one used to run his or her own programs and the other to control all the technology in the courtroom. Based on the results of a technology survey conducted by the Business Court in February 2002, the Court made a training video available for free download on the court's website. In addition, over 500 people have attended the Court's free technology training sessions.

- *Specialization.* The need for judicial specialization in complex business litigation has been recognized by the American Bar Association, the North Carolina Commission on Business Laws and the Economy, and numerous other authorities. Because the Business Court hears only complex business disputes, the

presiding Business Court Judge, Judge Ben Tennille, has been able to build on his already significant knowledge of corporate law and related fields. Between April 2000 and April 2003, the Business Court has been assigned 463 cases, all of them complex business cases. In comparison, only 2 to 5% of the civil docket of a Wake County Superior Court Judge is composed of cases suitable for the Business Court.

- *Predictability.* All of the Business Court's decisions are posted on the Court's website. A search screen allows interested parties to search all of the Court's opinions for key words and phrases, thus creating a valuable online legal resource for all attorneys in this State. The creation of this large body of case law at the trial court level provides greater predictability for businesses, as well as helping to assure consistency in the Business Court's judgments and orders. Likewise, the concentration of all complex business cases into the dockets of one or a few Business Court Judges helps promote uniformity of legal decision.

- *Attracting Businesses to North Carolina.* Although it is impossible to quantify the number of new businesses attracted to this State by the creation of the Business Court, the available information is encouraging. For example, in 2001, *Site Selection* magazine chose North Carolina as the State with the best business climate in America. In addition, in its recommendation to create a business court modeled after North Carolina's, the Georgia State Bar observed that many attorneys, including attorneys from other states, actively seek assignment to the North Carolina Business Court.

The Need for Change

Although North Carolina was a pioneer in its establishment of the Business Court in 1995, our State has since fallen behind. Currently, no state other than North Carolina has a specialized business court with only one judge and one geographic location. Illinois, Massachusetts, Nevada, New York, and Pennsylvania, for example, have all expanded their business court programs by adding additional judges and/or moving into additional counties. As described in more detail below, the Business Court is substantially overburdened, and without additional funding and administrative reforms, it will be unable to meet the challenges of the future and remain competitive in attracting new business to the State. As North Carolina's business economy grows, so must its Business Court.

RECOMMENDATIONS OF THE COMMISSION

Geographic Expansion

At present, Judge Ben Tennille is the only Business Court Judge in our State. As noted above, no other state with a specialized business court has only one judge and one geographic location. Accordingly, expansion of our Business Court is critical to maintain North Carolina's competitive advantage in attracting new businesses to the State, a principal reason originally articulated for creation of the Business Court.¹ Furthermore, should Judge Tennille have a conflict of interest or otherwise be unable to preside over a particular complex business case, there is nowhere else to send that case except back to the Superior Court.

Perhaps most importantly, expansion is necessitated by the Business Court's pressing and ever-increasing caseload. As of 10 August 2004, there were 210 Rule 2.1(a) ("exceptional") and Rule 2.1(b) ("complex business") cases pending at various stages in the trial courts of North Carolina. Of those cases, 66 are assigned to Judge Tennille at the Business Court. Of the 66 pending cases, 4 are on appeal, 1 is stayed, and 4 have reached settlement. Stated succinctly, the Business Court handles roughly one-third of the exceptional/complex cases currently pending in the trial courts of our State.

Moreover, from April 2000 to April 2001, the Business Court adjudicated, in whole or part, 129 cases from 25 counties. From April 2001 to April 2002, that number increased to 155 cases from 25 counties. From April 2002 to April 2003, that number again grew to 179 cases from 33 counties. Based on these figures, the caseload of the Business Court increased by nearly 40% during the three years from April 2000 to April 2003. In sum, as the only Business Court Judge in our State, Judge Tennille is currently being taxed to the limit.

¹ A specialized tribunal for the adjudication of business disputes serves to promote economic development because of that Court's perceived expertise in resolving complex and time-sensitive cases. As with any legal tribunal, the Business Court applies the law uniformly and without regard to the identity or legal status of the parties.

It is also instructive to consider the statistics for Wake and Mecklenburg counties, two of the primary originating counties for complex business cases. As of 30 July 2004, there were 2,633 civil cases pending in Wake County Superior Court, 59 of which have been designated as "exceptional" or "complex business" and assigned to a specific judge under Rule 2.1. Of these 59 cases, 30 have been assigned to Judge Tennille at the Business Court. Thus, Judge Tennille is presiding over approximately one-half of the exceptional/complex business cases currently pending in Wake County, and roughly 45% of the Business Court docket consists of Wake County cases.

Judge Donald Stephens, Senior Resident Superior Court Judge and Case Manager for the Civil Docket in Wake County, is reluctant to request a Rule 2.1 designation for a Wake County case. Judge Stephens states, "Basically, I realize that the Business Court is at maximum capacity. I make sure that only the most complex business or exceptional cases go there." Judge Stephens also notes that under the current strategy, Rule 2.1 cases in Wake County constitute slightly more than 2% of the civil docket, but that it would be reasonable to designate as much as 5% of the docket as complex business cases. Judge Stephens also believes that Wake County could double the number of cases it sends to the Business Court over the next several years if current litigation trends continue. Judge Stephens concludes that "[i]t is very important for Wake County that the Business Court continue in existence. If it does not, Wake County may ultimately need an additional resident Superior Court Judge in the foreseeable future to preside over these cases that are no longer being sent to Judge Tennille."

The statistics for Mecklenburg County further support the need for geographic expansion of the Business Court. According to Judge Tennille, approximately one-third of the Business Court's caseload originates in Mecklenburg County. Since the Mecklenburg County Trial Court Administrator's Office commenced keeping records of complex business cases, there have been 87 cases so designated, 31 of which have been assigned to Judge Tennille. Of the remaining 56 cases, 35 were Speedway personal injury cases assigned to Judge W. Erwin Spainhour and three were Paw Creek personal injury cases assigned to Judges Marvin K. Gray and James E. Lanning. Thus, 36% of all complex business cases and 63% of all non-personal-injury complex business cases originating in Mecklenburg County have been assigned to Judge Tennille.

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Based on the statistics of past and current Business Court activity and in the interest of bringing North Carolina's Business Court back to the national forefront, the Commission recommends that the Business Court retain its Greensboro location and presiding judge while expanding into two additional locations, Wake and Mecklenburg Counties. The Commission further recommends that the Chief Justice designate two sitting Special Superior Court Judges to serve as the Business Court Judges at these new locations.

Although there will be no direct costs incurred in the assignment of sitting Special Superior Court Judges to the Business Court, the Business Court will incur costs associated with providing for courtroom space and other operating expenses. These costs, however, can be minimized. With the impending completion of the new courthouse in Mecklenburg County, for example, space will be available for a judge and law clerk, as well as a courtroom. Although the Wake County courthouse may not be able to accommodate a new Business Court, sufficient courtroom and office space could certainly be found in downtown Raleigh near the existing Wake County Courthouse or in nearby Research Triangle Park.

With three judges strategically located throughout the State in the areas where most complex business cases originate, the Business Court will be well positioned to dispose of the large and growing number of complex business cases in this State. Expanding the Business Court in this manner would also make a strong statement that North Carolina has the infrastructure to expeditiously resolve complex business disputes.

Assignment of Cases/Administrative Efficiency

Under the current version of Rule 2.1 of the General Rules of Practice, a case may be designated as a "complex business" case only by the Chief Justice of the North Carolina Supreme Court following a recommendation by the Senior Resident Superior Court Judge, Chief District Court Judge, or presiding Superior Court Judge. Judicial recommendation for "complex business" case designation may be made *ex mero motu* or on the motion of any party.

This procedure for the assignment of cases is becoming increasingly cumbersome as the number of complex business

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disputes in the State continues to increase. In addition, the requirement of a judicial recommendation to the Chief Justice for a "complex business" case designation creates a risk of inconsistent results, as some judges may be more inclined than others to view any given matter as meriting such a designation.

In light of these concerns, the Commission recommends a bifurcated system of "mandatory" and "discretionary" Business Court jurisdiction. Under this bifurcated system, "mandatory" complex business cases would be designated as such under the procedures of a proposed new Rule 2.1.1 set forth below and "discretionary" complex business cases would be those designated by the existing procedure under the current version of Rule 2.1.

"Mandatory" complex business cases would encompass specifically defined subject matters, such as state or federal securities and antitrust law; trademark and unfair competition law; law governing corporations, partnerships, and other specific business entities; intellectual property law; and legal issues concerning the Internet, electronic commerce, and biotechnology. In cases of "mandatory" Business Court jurisdiction, a party to a civil action would be permitted to designate a case as a "mandatory complex business case" by simultaneously filing a Notice of Designation in the Superior Court and with the Chief Justice of the North Carolina Supreme Court, and serving such notice on opposing parties and the Senior Business Court Judge. The process would be similar to the process of "removal" in federal court, whereby a party may automatically transfer a case by filing a proper motion to remove. As in the procedures for removal in federal court, a party objecting to the designation of a case as a mandatory complex business case would be permitted to file an opposition to such designation with the Business Court. The Business Court Judge would then determine whether the case should or should not be so designated, and either party could appeal the Business Court's decision to the Chief Justice of the North Carolina Supreme Court.

"Discretionary" complex business cases would encompass all cases that do not fall within the prescribed categories of proposed Rule 2.1.1. These cases could be designated as "complex business" cases only according to the existing procedures set forth in Rule 2.1. In other words, the designation would be made only by the Chief Justice upon recommendation of the Senior Resident Superior Court Judge, Chief District Court Judge, or presiding Superior Court Judge.

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The decision to recommend or not to recommend any given case for "complex business" case designation would be discretionary and non-appealable, as would the Chief Justice's final decision.

The text of the Commission's proposed Rule 2.1.1 is as follows:

Rule 2.1.1. Designation of Mandatory Complex Business Cases

(a) For purposes of this rule, a Mandatory Complex Business Case is an action that involves a material issue relating to:

1. Law governing corporations (except a charitable or religious corporation that is qualified as such under G.S. § 55A-1-40(4) on the ground of its religious purposes), partnerships, limited liability companies, and limited liability partnerships, including, but not limited to, issues concerning governance, involuntary dissolution of a corporation, mergers and acquisitions, breach of duty of directors, election or removal of directors, enforcement or interpretation of shareholder agreements, and derivative actions;
2. Securities law, including, but not limited to, proxy disputes and tender offer disputes;
3. Articles 3, 4, and 5 of Chapter 105 of the General Statutes of North Carolina;
4. Antitrust law, except claims based solely on unfair competition under G.S. § 75-1.1;
5. State trademark or unfair competition law, except such claims based solely on unfair competition under G.S. § 75-1.1;
6. Intellectual property law, including, but not limited to, software licensing disputes.
7. The Internet, electronic commerce, and biotechnology.

(b) Any party may designate a civil action as a Mandatory Complex Business Case pursuant to this rule by timely filing a Notice of Designation in the

Superior Court in which the civil action has been filed and simultaneously serving such designation on each opposing party or counsel and on the Special Superior Court Judge for Complex Business Cases ("Business Court Judge") who is then the senior Business Court Judge. A copy of the designation shall also be sent contemporaneously by email or fax to the Chief Justice of the Supreme Court for approval of the designation of the action as a Mandatory Complex Business Case and assignment to a specific Business Court Judge.

(c) The Notice of Designation shall succinctly state the basis of the designation and include a certificate by or on behalf of the designating party, in good faith and based on the information reasonably available, that such civil action meets the criteria for designation as a Mandatory Complex Business Case pursuant to subsection (a) above.

(d) The Notice of Designation shall be filed by the plaintiff or third-party plaintiff contemporaneously with the filing of the complaint or third-party complaint in the action. Such designation shall be filed by any intervenor at the time the intervenor filed the motion for permission to intervene in the action. Such designation shall be filed by any defendant or any other party within 30 days after receipt of service of the pleading seeking relief from such defendant or party.

(e) Within 30 days after service of the designation, any other party may in good faith file and serve an opposition to such designation of the action as a Mandatory Complex Business Case.

(f) Based on such opposition or *ex mero motu*, the Business Court Judge may make a determination that the action should not be designated as a Mandatory Complex Business Case. If any party disagrees with a decision of the Business Court Judge under this subsection (f), such party can appeal the decision to the Chief Justice.

(g) Once a designation is duly filed under subsection (d), and after preliminary approval by the Chief

Justice, it shall be designated and administered as a Complex Business Case, and all proceedings in such action shall be before the Business Court Judge to which it has been assigned by the Chief Justice, unless and until an Order is entered under subsection (f) determining that the case should not be designated as "Complex Business" or the Chief Justice otherwise revokes approval. After any final determination that an action should not be designated as a Mandatory Complex Business Case, the action will be treated as any other civil action unless it is designated as an Exceptional Civil Case or a Discretionary Complex Business Case pursuant to Rule 2.1.

In addition, the Commission recommends that Rule 2.2 be amended to read as follows:

Rule 2.2. Designation of Business Court Judge Presiding in the Business Court

The Chief Justice shall designate one or more special superior court judges as special judges to hear and decide complex business cases as provided in Rule 2.1. Any judge so designated shall be known as a Business Court Judge and shall preside in the Business Court. If there is more than one Business Court Judge, the Chief Justice may from time to time designate one of them as the Senior Business Court Judge, in the absence of which designation the Business Court Judge with the longest term of service as such will serve as the Senior Business Court Judge unless and until the Chief Justice shall appoint another judge to that position.

In the event the Supreme Court adopts the proposed rule and rule revision set out above, the Commission recommends that Rule 2.1.1 and revised Rule 2.2 be made effective 180 days after the date of their adoption. The purpose of a prospective effective date is to provide clerks of court, judges, private attorneys, and other interested persons adequate notice of and proper training in the procedures described in these rules. The Commission further recommends, however, that the Supreme Court delay its adoption of Rule 2.1.1 and revised Rule 2.2 to afford the General Assembly and the Governor the opportunity to consider the recommendations of the Commission and to evaluate an appropriate funding mechanism for ongoing operations of the

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Business Court.

Jurisdiction

Clarity and certainty in jurisdiction are essential to the efficient functioning of any court, including the Business Court. As noted above, dependence on individual Superior Court Judges to initiate assignments to the Business Court may produce inconsistent results, and the process may become unwieldy and slow as the Court's caseload continues to grow. These problems cannot be avoided by good case management alone. They must be addressed by the bifurcation of the process discussed above for designating "complex business" cases, as well as in the General Rules of Practice. Finally, the jurisdiction of the Business Court should continue to be statewide and nonexclusive and should not be limited by an amount in controversy requirement.

The Supreme Court has the authority under G.S. § 7A-34 to adopt and revise Rules 2.1 and 2.2 and the proposed new Rule 2.1.1, as discussed above, without any legislative action. These recommendations will define the jurisdiction of the Business Court more specifically. They will also officially denominate the Special Superior Court Judges designated to hear and decide complex business cases as Business Court Judges and the court in which they preside as the Business Court. The Commission recognizes that the concept of designating special judges to hear and decide complex cases may at some time in the future be expanded to cover other types of complex cases such as, for example, tax cases.

The Commission believes that the enactment of a statutory provision explicitly recognizing and confirming the concept of Business Court Judges deciding cases in the Business Court, although not necessary, will enhance the status of that arrangement and clarify its validity for persons not familiar with the constitutional and statutory structure of our judicial system.

In light of the above considerations, the Commission recommends that the General Assembly adopt the following jurisdictional statute for the Business Court:

G.S. § 7A-45.3. Superior Court Judges Designated for Special Classes of Complex Cases.

The Chief Justice of the Supreme Court may exercise the authority under rules of practice prescribed pursuant to G.S. § 7A-34 to designate one or more special superior court judges to hear and decide complex cases in one or more special classes of cases that may be described by the rules of practice.

Precedential Value of Business Court Decisions

Under existing law, the decisions of a North Carolina trial court do not have precedential value with respect to any other trial court in the State. To promote the desired stability and predictability in complex business disputes, however, the Commission recommends that the Supreme Court take measures to ensure the internal precedential value of decisions within the North Carolina Business Court. Accordingly, the Commission recommends that a Business Court opinion should constitute precedential authority in all subsequent complex business cases unless and until that opinion is legislatively overturned or reversed on appeal.

Judicial Tenure

Under current practice as authorized by the General Assembly in G.S. § 7A-45.1, the Business Court Judge is appointed by the Governor to serve a five-year term as a Special Superior Court Judge and designated by the Chief Justice of the North Carolina Supreme Court to hear and decide complex business cases during that time period. At the expiration of that term, a Business Court Judge may be reappointed/redesignated for additional five-year terms. Based upon a review of other states that have developed a reputation for excellence in the administration of complex business litigation, the Commission recommends that the initial term for a Business Court Judge remain five years, but that the term be lengthened to ten years on reappointment /redesignation. Longer terms are beneficial in that they promote stability and consistency within the Business Court and are more attractive to judges and lawyers who might be suitable for such an appointment. The nationally preeminent Delaware Court of Chancery, for example, provides for a twelve-year term for its judges. On the other hand, a shorter initial appointment/ designation period gives the General Assembly, Governor, Chief Justice, and interested parties in the business community an opportunity to evaluate the competence, demeanor and temperament, and character and integrity of a new Business Court Judge. The Commission believes that an initial five-year

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term followed by ten-year terms on reappointment/redesignation strikes an appropriate balance among these important considerations.

Appeals Process

Cases arising in the North Carolina Business Court typically present complex legal issues for which there is often little North Carolina precedent. In addition, very few complex business cases have been appealed to date. For example, between 1 January 2000 and 1 March 2004, only eighteen cases had been appealed from the Business Court, three of which were withdrawn or dismissed and two of which are still pending. Thus, the Court of Appeals currently handles an average of 4.3 appeals from the Business Court per year. Although few in number, these cases tend to be extremely complex, involving voluminous exhibits and difficult legal issues. The Commission believes that the development of a sound body of appellate jurisprudence in the business field will significantly enhance North Carolina's stature as a forum for the resolution of business disputes. Indeed, the Commission believes that North Carolina will be viewed as a preferred forum for the resolution of business disputes only if the special expertise being cultivated at the trial court level in the Business Court is complemented in the appellate division.

To encourage this result, the Commission recommends that the Chief Judge of the North Carolina Court of Appeals adopt the practice of assigning appeals from the Business Court to panels of appellate judges consisting of at least two Court of Appeals judges who have volunteered to receive special training in the substantive areas of law likely to arise in Business Court cases. In so recommending, however, the Commission does not propose any limitation on the authority or discretion of the Chief Judge under G.S. § 7A-16 to assign judges to a panel. The Chief Judge can and should make such determinations based on his or her assessment of the needs of each particular case.

The Commission further recommends that the Chief Judge of the North Carolina Court of Appeals identify at least six to eight appellate judges who will volunteer to receive specialized training. The Commission emphasizes that each judge's participation in this endeavor would be entirely voluntary, and a judge's "designation" to hear appeals from the Business Court would simply constitute a formal recognition of that judge's voluntary commitment to hear such cases and to receive

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specialized training. The substantive areas of law to be included in this training include, but are not necessarily limited to, the following:

- Claims arising under state and federal securities law
- Claims arising under the North Carolina statutes governing corporations, partnerships, and limited liability companies
- Corporate governance disputes
- The fiduciary duties of corporate officers and directors
- Antitrust laws
- Intellectual property law, including, but not limited to, software licensing disputes.
- The Internet, electronic commerce, and biotechnology.

Mindful of the budgetary constraints under which our court system operates, the Commission recommends that existing resources be utilized to provide the special training to the designated judges of the Court of Appeals. Continuing legal education (CLE) for volunteer appellate judges could be provided through various law school CLE programs and/or the North Carolina Bar Association's CLE program. Provided they are also open to other members of the North Carolina Bar, these programs could be made available to North Carolina judges at no personal expense.

The Commission considered whether to recommend modifications to the North Carolina Rules of Appellate Procedure to provide for the expedited appeal of decisions from the Business Court. The Commission concludes that existing rules, statutes, and case law in North Carolina provide sufficient authority for expediting appeals in those cases that require expedited treatment. For example, the Court of Appeals may accept interlocutory appeals that affect a "substantial right" pursuant to time-tested procedures set forth in G.S. § 7A-27(d). Pursuant to Rule 21, either appellate court may also issue a writ of certiorari to review judgments and orders of the trial court where the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists. In addition, Rules 22 and 23 provide for the issuance of extraordinary writs to compel or prohibit judicial action or stay the execution or enforcement of a judgment or order of the trial court pending appellate review. As a matter of operating procedure, the Court of Appeals

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convenes a "petitions panel" on each business day for the express purpose of evaluating petitions and applications for extraordinary writs. After an appeal has been docketed, there are several provisions in the Rules that are designed to permit the parties or the court to expedite an appeal, including provisions that permit the court to give an appeal a peremptory setting or otherwise vary the normal calendar. In addition, both courts of the appellate division retain broad authority under Rule 2 to suspend or vary the requirements or provisions of the Rules in order to expedite decision in the public interest. In light of this comprehensive scheme, the Commission does not believe it is necessary to establish special rules to expedite appeals of cases handled by the Business Court.

As a corollary to recommendations concerning the creation of a group of specially trained appellate judges to hear appeals from the Business Court, the Commission strongly recommends that all such appeals should be the subject of published opinions. When the General Assembly and Supreme Court established the Business Court, a leading objective was the development of a body of North Carolina law to which the practicing bar, the bench, and the public could look for guidance. Without publication of written appellate decisions, the bench, bar, and business community would be deprived of the stability and predictability that results from a well-developed body of precedent. The Commission recommends the procedures outlined above be implemented for a period of two years, at which time their utility will be reviewed by the Chief Judge or his or her designee.

The Commission's recommendations regarding the appeals process for complex business cases will help secure the fundamental goals of the North Carolina Business Court in several respects. First, the promotion of expertise at the appellate level will evidence a genuine commitment to the special concerns of the business community. Second, the recommended procedures will concentrate the delivery of Business Court cases to a smaller subset of judges, thereby expanding upon the expertise gained from specialized training. Third, the use of designated judges to hear Business Court appeals will promote prompt disposition of appeals while preserving needed flexibility for the Chief Judge in the assignment of appellate cases and in the overall management of the Court of Appeals' docket.

Alternative Dispute Resolution

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Alternative dispute resolution (ADR) has become an increasingly popular method of resolving business disputes. As a cost-effective and efficient alternative to litigation, the availability of ADR mechanisms focuses business executives on the risks, potential rewards, and time commitment involved in litigation before filing suit. It also serves to narrow contested issues and promote practical solutions to business disputes through negotiation and accommodation.

Court-sponsored mediation is currently the most popular, familiar, and effective ADR mechanism for resolving cases before the Business Court. Under the Business Court's Local Rule 17, all cases pending in the Business Court are "subject to the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions and such other Rules or Orders consistent therewith as may be established or entered by the Business Court." Rule 1C(2) of the Rules Implementing Statewide Mediated Settlement Conferences provides that mediation is the default ADR mechanism in all civil cases. The parties may, however, move for an alternative settlement procedure "as allowed by these rules or by local rule." Currently authorized alternative procedures include binding and non-binding arbitration, early neutral evaluations, and summary trials.

The Commission initially examined the practicality of expanding the Business Court to become a forum for and provider of ADR services. Constitutional "case or controversy" limitations, however, may prohibit this discretion. Accordingly, the Commission recommends that the Business Court become a repository of business expertise in providing ADR services only within the context of "cases" before the Business Court.

Having examined current practices and canvassed the views of North Carolina attorneys, the Commission believes that there is a general awareness of mediation procedures and that the current mediation program is successful and does not require improvement. There is currently no Business Court mechanism in place, however, to facilitate the use of alternative forms of dispute resolution which may be uniquely suited for business disputes, such as arbitration, early neutral evaluations, judicial arbitration, the use of retired judges, and summary trials. To foster awareness of these alternative methods and to facilitate their use, the Commission makes the following recommendations:

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- *Roster of Neutrals and Retired Judges.* The Business Court should maintain a roster of neutrals and retired judges with relevant experience in complex business matters who may be available to serve as arbitrators, mediators, early evaluation neutrals, judicial arbitrators, or facilitators. The list should indicate which neutrals are trained and certified in their respective fields and which retired judges have experience in complex business litigation. The Business Court may wish to partner with ADR providers or the North Carolina Bar Association in compiling such a list. The Business Court may also wish to partner with CLE providers to offer training in non-mediation ADR mechanisms for neutrals. Finally, the Commission recommends that the Business Court reach out to educate the North Carolina Bar on the range of ADR alternatives available for business disputes.

- *Judicial Arbitration as Delineated in Rule 12.0 of the Local Rules for the Eighteenth Judicial District.* Prior to the institution of court-ordered mediation, Judge James M. Long employed an ad hoc procedure for judicial arbitration that permitted the parties and their attorneys to sign a stipulation allowing him to arbitrate cases in a summary fashion. Each party was given a set time, e.g., two hours, to present its side of the case. Because of the summary nature of this form of ADR, the Rules of Evidence were suspended, and evidence could be narrated by counsel in summary form. At the end of the allotted period, Judge Long would render a judgment. The stipulation included a waiver of the right to appeal the judgment. This procedure is explained in Rule 12.0 of the Local Rules of Court for the 18th Judicial District.

- *Early presentation of ADR alternatives.* When a case management report is tendered to the Business Court, the parties should inform the Business Court of any ADR mechanisms utilized before the action was filed. The parties should also advise the Business Court as to which ADR mechanisms would, in their view, best suit that particular case. The full range of ADR alternatives should be made available and explained to litigants before discovery and as early as possible in litigation. Early presentation of various ADR alternatives will help foster resolution of disputes before litigation positions become fixed, thus avoiding unnecessary litigation costs.

Finally, the Business Court should require parties to report cases that are settled by means of ADR mechanisms.

- *Legislative consideration of ADR referrals.* Canon 5E of the Judicial Code of Conduct prohibits Business Court Judges from acting as arbitrators. In light of this prohibition, the Commission recommends that the General Assembly examine the utility of allowing parties to convert or submit arbitration claims to the Business Court for referral to neutrals or retired judges for arbitration or other forms of ADR. Although the Delaware Court of Chancery currently allows its judges to mediate, the Commission believes this option may not be practical in North Carolina, given the limited number of Business Court judges and the parties' rights to judicial review of arbitral judgments.

Revenue/Funding

In conjunction with Judge Tennille of the North Carolina Business Court and the North Carolina Administrative Office of the Courts (AOC), the Commission has compiled estimates for the costs of the recommended geographic expansion and technological modernization of the North Carolina Business Court. Itemized cost estimates, which reflect both initial "start-up" and recurring costs for each business court installation, are compiled in the table below. These estimates also reflect the costs of acquiring additional technology to enable the Greensboro installation to serve as the primary data collection and distribution point for all three Business Courts.

The Commission firmly believes that these costs are reasonable in light of the substantial gains to North Carolina that would result from an expansion of its Business Court program into Wake and Mecklenburg Counties and the long-overdue upgrade of its existing technologies. Accordingly, the Commission recommends that the General Assembly allocate funds in these amounts to allow the Business Court to meet the demands of its ever-increasing docket and to keep North Carolina competitive in its efforts to attract business and industry to the State.

Notably, the Commission believes that the recommended expansion of the Business Court into Wake and Mecklenburg Counties will not require any increase in funds allotted for judicial salaries in North Carolina. Given the large number of

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cases that can and should be designated as "complex business cases," two judges currently serving at Superior Court can be "transferred" to the Business Court without adversely affecting the case flow in the Superior Courts. In other words, the number of cases that can and should be designated as "complex business cases" more than justifies the allocation of three trial court judges to the Business Court program. Indeed, Judge Stephens believes that one specially trained Business Court Judge can accomplish nearly *double* the disposition rate of a hypothetical Superior Court Judge whose docket consisted solely of complex business matters. Thus, the "transfer" of two Special Superior Court Judges to the Business Court will improve administrative efficiency in the court system without necessitating the hiring of new judges. These cost savings should be borne in mind alongside the expenses necessitated by geographical expansion.

Absent from the estimated costs of expansion is the cost of renting courtroom and office space in each of the three locations. The Greensboro location of the Business Court formerly belonged to the United States Bankruptcy Court for the Middle District of North Carolina and is ideal for its present purposes. The Commission recommends that the existing lease for that facility be renewed as needed. With the pending completion of a new courthouse in Mecklenburg County, there will be courtroom and office space available for use by the Business Court without any additional expense. Because of space limitations in the Wake County Courthouse, however, expansion into Wake County will likely necessitate the renting of office and courtroom space in downtown Raleigh or nearby Research Triangle Park. Because the cost of renting such a space is highly contingent on fluctuations in the real estate market, the Commission has not included such a cost in its itemized estimate. The necessity of incurring such costs should be considered, however, against the significant advantages that expansion into Wake County would bring.

Following is an itemization of the anticipated costs of the expansion and upgrade of the North Carolina Business Court, not including the costs of renting courtroom and office space in Wake County.

General Expenses

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	Initial Cost	Recurring Cost ²
Training video	20,000.00	0.00
Total:	\$20,000.00	\$0.00

Greensboro Upgrade³

	Initial Cost	Recurring Cost
Server (Windows 2003)	10,000.00	0.00
Database Server (Windows 2000 with MS-Sql Server)	11,000.00	0.00
Wireless Laptop or Desktop Computers	10,500.00	0.00
Printer (color laser)	2,600.00	supplies only
Scanners	2,500.00	supplies only
Wireless Routers with Additional Gain Antennas	1,500.00	0.00
CXn Case Management Licensing	0.00	0.00
Software Maintenance Agreement ⁴	20,000.00	20,000.00

² Recurring costs are annual estimates of maintaining systems. Estimates exclude T&E.

³ This proposal covers upgrading the aging existing equipment of the North Carolina Business Court and acquiring the additional equipment needed to enable the Greensboro installation to serve as the primary data collection and distribution point for all three Business Courts.

⁴ Software maintenance covers general telephone technical support for all CXn systems users and e-filers and should be considered a recurring cost of maintaining the court system.

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Hardware Maintenance Agreement ⁵	0.00	10,000.00
Telco (T1 Access with web access) ⁶	10,000.00	10,000.00
Total:	\$68,100.00	\$40,000.00

Wake County Installation⁷

	Initial Cost	Recurring Cost
Server (Windows 2003)	10,000.00	0.00
Wireless Laptop or Desktop Computers	10,500.00	0.00
Printer (color laser)	2,600.00	supplies only
Scanners	2,500.00	supplies only
CXn Case Management Licensing	0.00	0.00
Software Maintenance Agreement	20,000.00	20,000.00
Telco (T1 Access with web access)	0.00	10,000.00

⁵ Hardware maintenance covers the routine maintenance of new equipment and should be considered a recurring cost of maintaining the court's computer systems. Hardware maintenance includes travel and on-site support. The Greensboro location is currently under contract. This estimate assumes AOC maintenance at the Wake and Mecklenburg sites.

⁶ The Greensboro site is currently under contract for web services and Internet access. Expansion of bandwidth is required due to increases in the number and size of electronic filings. The recurring cost listed replaces the costs of the current contract. This estimate assumes AOC provision of bandwidth to the Wake County and Mecklenburg sites.

⁷ Cost estimates include and reflect installation charges.

Research Assistant Salary ⁸	0.00	39,000.00
Staff Training ⁹	2,500.00	0.00
Total:	\$48,100.00	\$69,000.00

⁸ The services of a law clerk are indispensable for proper functioning of a Business Court installation. Due to the extremely complex and technical nature of complex business litigation, it is not possible for a single judge to manage a caseload similar to that managed by Judge Tennille without the assistance of a qualified research assistant.

⁹ This estimate reflects projected costs for the training all courtroom staff, including judge and law clerk, over the first two years of the new installation's operation.

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Mecklenburg County Installation¹⁰

	Initial Cost	Recurring Cost
Server (Windows 2003)	10,000.00	0.00
Wireless Laptop or Desktop Computers	10,500.00	0.00
Printer (color laser)	2,600.00	supplies only
Scanners	2,500.00	supplies only
CXn Case Management Licensing	0.00	0.00
Software Maintenance Agreement	20,000.00	20,000.00
Research Assistant Salary ¹¹	0.00	39,000.00
Staff Training ¹²	2,500.00	0.00
Total:	\$48,100.00	\$59,000.00

¹⁰ Cost estimates include and reflect installation charges.

¹¹ The services of a law clerk are indispensable for proper functioning of the Business Court. Due to the extremely complex and technical nature of complex business litigation, it is not possible for a single judge to manage a caseload comparable to that managed by Judge Tennille without the assistance of a qualified Research Assistant.

¹² This estimate reflects projected costs for the training all courtroom staff, including judge and law clerk, over the first two years of the new installation's operation.

Total Costs

	Initial Cost	Recurring Cost
Combined costs for Greensboro upgrade and Wake County and Mecklenburg County installations	\$184,300.00	\$168,000.00

Conclusion

Once a national leader in recognizing the importance of judicial specialization in matters of complex business litigation, North Carolina has, in recent years, begun to fall behind. Aging technology and geographic restrictions have impaired the ability of the North Carolina Business Court to meet the demands of the future, even as businesses increasingly turn to that Court as the preferred forum for the resolution of complex business disputes. Although the North Carolina Business Court has made remarkable strides in facilitating the efficient and timely disposition of business disputes, the Court's mounting caseload has made it virtually impossible for a single judge to continue to meet the statewide demands of North Carolina's growing economy. Faced with similar concerns, every other state with a specialized business court has expanded its program by appointing new judges and installing new branches in new counties. The proposed administrative changes will do much to improve the efficiency and efficacy of the Business Court. Ultimately, however, the future success of the Business Court depends upon a commitment to reasonable growth and expansion. If North Carolina is to remain competitive in attracting new business, it is imperative that the State demonstrate its ongoing commitment to maintaining its Business Court as one of the finest in the nation.

ATTACHMENT

**CHIEF JUSTICE'S COMMISSION ON THE FUTURE OF
THE NORTH CAROLINA BUSINESS COURT**

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Judge Robert P. Johnston	Don Cowan, Bar Liaison
W. Winburne King, III	Judge Ben F. Tennille, <i>Ex-Officio</i>