



E.D.G.E. Regulatory Environment Expert Team

Final Report

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THE REGULATORY ENVIRONMENT: DEFINING THE PROBLEM

What rules govern business in Oklahoma? Because of their scope they cannot be effectively summarized, but they can be quantified. The seven bound volumes of the Oklahoma Statutes comprise 12,068 pages. The Oklahoma Administrative Code, which sets forth the administrative elaboration of these laws, has 14,045 pages of its own. Although no single business is subject to all of these rules, every business in Oklahoma is significantly affected by at least a substantial portion of them. The challenge for the Regulatory Environment Expert Team was to identify how these rules or their application and enforcement could be changed to create the kind of environment for business that Oklahoma needs.

To help identify these reforms, the Team sent questionnaires to a wide variety of industry groups asking them to describe what regulatory obstacles they have encountered. We received several very thoughtful responses. In reviewing these responses, it became clear that if we were to improve Oklahoma's regulatory *environment*, we could not limit our efforts to identifying individual regulations that affect specific industries. Instead we would need to identify structural reforms that would benefit all of the state's businesses. These reforms would need to create institutional changes which would ensure continued benefits to Oklahoma's business climate well after the completion of the E.D.G.E. process. The Team therefore recommends two separate initiatives -- the creation of a business and technology court and the establishment of a permanent, gubernatorial office of regulatory reform.

A BUSINESS AND TECHNOLOGY COURT FOR OKLAHOMA

In 1907 Oklahoma County had 55,000 residents. Only American citizens were permitted to own land. Contracts could not be signed on Sundays. All legal questions -- whether relating to adoption, theft, murder, the capacity of a person to manage his own affairs, a personal injury

lawsuit, a trademark dispute, or an action for breach of contract – were heard by the same county judge. In 2003 all of these things have changed except one. The overwhelming majority of cases, whether civil or criminal, domestic or commercial, large or small, are heard in the same courtrooms, pursuant to the same procedural rules, by the same corps of generalist judges. If we are to enter the Twenty-First Century with the same boundless potential that we entered the Twentieth, this must change.

In the course of commercial dealings disputes will inevitably arise. It is in the interest of both sides that these disputes be resolved quickly, inexpensively, evenly, and in accordance with law. A court system which embodies these attributes will provide firms with an efficient resolution of their disputes which will permit them to confidently plan their affairs before the dispute arises, efficiently resolve the dispute once it has arisen, and quickly return their focus to their business after it has been resolved. Our traditional court system is falling short of providing firms with these advantages in large part because the system seeks to be all things to all cases. It is for this reason that the Regulatory Environment Expert Team recommends the creation of an Oklahoma business and technology court.

The Experience of Other States

Specialized business courts currently exist in eleven states, ranging from Maine to California. Some are quite new, like Maryland's unique business and technology court. Other business courts, like Delaware's Chancery Court, have existed for over a century. Although the jurisdiction and procedural practices of these courts vary, the reception given to such courts in the states in which they have been establishing has been, almost without exception, overwhelmingly enthusiastic. The business and legal communities in these states have praised the expertise, efficiency, and predictability they bring to commercial disputes. Although the

economic effect of the adoption of such courts is difficult to quantify, the effect they have on litigation costs and quality of judicial decision-making is clear.

One of the central advantages of a business and technology court is expertise. When business become embroiled in a dispute over, for example, the obligations the Uniform Commercial Code places on the dealings between a manufacturer and its supplier, they will almost without exception turn for legal advice to practitioners who specialize in that particular area. An attorney with expertise in a specific substantive area of law can typically give more accurate advice than a general practitioner and with less need for research and consultation. The result is a superior outcome for less money. The same is true for judges. Judges who routinely hear the same class of cases will as a general matter be able to make their rulings with less need for research or extensive briefing. The decisions they do make will be more likely to be in accord with existing governing law.

In addition to judicial expertise, business courts can provide a variety of procedural features which are specifically tailored to commercial and technology based disputes. Some states require that all of the court's final decisions be made in the form of formal, published opinions. This not only serves to discipline the path of judicial reasoning, it will help to develop a body of case law which clarifies what the law is so that subsequent disputes may be resolved more quickly. Other procedural refinements include a requirement in some states that in cases brought before business courts the losing party pay the prevailing party's attorneys fees. It is also possible to develop rules regarding discovery procedures that may make sense in cases that only involve relatively large disputes between businesses. Business courts also frequently focus particular attention on court-annexed alternative dispute resolution to facilitate and encourage the rapid settlement of cases. Indeed, the State of New York's business court has brought about an 85% increase in the number of cases settled before trial and a 36% reduction

in the time cases spend on the docket. Business courts are also ideal places to introduce state of the art technology into case management. Some states have made participation in business courts voluntary for those classes of cases that fall under their jurisdiction. However, some members of the Team felt that some of the advantages of the court would be lost if a litigant could choose not to participate. ✓

Specialized courts, such as a business and technology court, need not require additional resources nor must their creation result in the removal of resources from other forms of litigation. The patent and trademark court has not siphoned away necessary resources from federal district courts, nor have drug and mental health courts deprived the average litigant in Oklahoma of appropriate funding of state district courts. Indeed the experience in New York state has been that the creation of a business court has mean that the resolution of commercial disputes can be achieved with 25% fewer resources. Thus, if prior to the establishment of the court, the resolution of business disputes took the equivalent of four full time judges, after the creation of a business court the same disputes could be handled with only four judges. The creation of the business court thus freed up the equivalent of one judge, one courtroom, and associated support services that can be used for other judicial business.

The business and technology court works best when it is restricted to those classes of cases for which it is intended. It should be limited to commercial disputes, such as breach of contract, and commercial torts and technology related litigation, such as software licensing disputes. Furthermore the jurisdiction of the court should be limited to cases between legal entities. Cases involving individuals would not be permitted. A minimum amount in controversy requirement could also be established if the decision were made to have the court focus only on larger commercial disputes.

Potential Objections

In many jurisdictions there is initial opposition to the idea of a specialized commercial court because of the fear that these courts will drain resources from the handling of other cases. The evidence is to the contrary. As has been noted, the efficiencies associated with business courts have, in other jurisdictions, resulted in increased resources being available for the handling of other classes of cases. Second there is a concern that these courts will somehow be unfairly biased in favor of business. However, since the only cases that are to be assigned to a business court are genuine commercial disputes between businesses, there is no danger of such a bias. Finally, there can be a sense that the business courts are intended to provide a better sort of justice for their white-collar clientele. Yet no one would argue that drug courts are designed to show favoritism towards drug defendants or that mental health courts are somehow calculated to curry favor with the mentally ill. Rather, these specialized courts have been established in order to bring expertise and customized procedures to a particular class of cases. This benefits not only business but also other litigants in the general court system by removing complex, time consuming commercial disputes from the dockets of most district judges.

Implementing a Business and Technology Court

Implementation of a business court can be done rapidly and relatively inexpensively. The Legislature has already authorized an interim study on the issue. This study is currently in progress. In the 2004 legislative session the Legislature should direct the Supreme Court to determine what changes are necessary to best accommodate the development of a business and technology court. Sufficient appropriation to support such a study should be provided as well. The study would have a deadline for completion of December 1, 2004, to permit its recommendations to be enacted in the following legislative session.

A GOVERNOR'S OFFICE OF REGULATORY REFORM

In announcing the launching of the E.D.G.E. project, Governor Henry drew attention to the repeated studies and task forces, some successful some not, that had been commissioned in the past to develop a statewide economic strategy. If we are serious about creating a regulatory environment in Oklahoma which is indeed conducive to business, we cannot simply examine government regulation every few years, make recommendations, and then hope everyone involved will do better. Instead we must continually reexamine both the content and the enforcement of government regulation, identify the reforms needed, and implement those reforms. The best way to do so is create a permanent entity within the Governor's office with the specific duty of improving government regulation.

Regulation is accomplished in Oklahoma largely through agencies governed by appointed boards and commissions. The intent of this system is to disperse power and ensure a degree of independence from political influence. It would be extremely difficult to create an office with command and control authority to oversee and overrule this sprawling bureaucracy. However, the authority to do much of what an office of regulatory of regulatory reform would be tasked with already resides with the Governor. It is therefore the Team's recommendation that rather than create a "super agency" with the power to dictate to other state agencies how to run their operations, instead an office of regulatory reform should be created within the Office of the Governor. This office would be able to take advantage of the legal and moral authority of the Governor on these issues without creating an additional layer of bureaucracy.

The Experience of Other States

Several other states are pursuing regulatory reform efforts. Texas has a standing Regulatory Reform Task Force that acts as a purely advisory body charged with studying the regulatory system generally and providing recommendations to the state comptroller. In

contrast to Texas' task force, Arizona's Governor's Regulatory Review Council focuses on a review of agency rules as they are promulgated. The six-person Council is appointed by the governor, reviews proposed rules, and must approve them before the rules take effect. New York has adopted perhaps the most extensive effort so far in the establishment of its Office of Regulatory Reform. As is the case in Arizona, the office must approve any rule before it takes effect. However, in New York the office acts as an ombudsman for individuals and regulated entities in their dealings with government agencies. The office puts the savings realized as a result of its streamlining efforts at three billion dollars annually. We are proposing that Oklahoma go a step further than any of these states and create an Governor's Office of Regulatory Reform which would take a truly holistic approach to the review and reform of the regulatory process.

Functions of the Governor's Office of Regulatory Reform

Ombudsman and Inspector General

The first function of an Office of Regulatory Reform would be to monitor the application of government regulation. Even if the content of government regulation is reasonable, its application may not be. The State of Oklahoma has 35,000 employees in 129 executive branch agencies. Yet there is no person or office tasked with the responsibility of assessing and improving the manner in which the public is able to gain access to that vast edifice. State officials, agency heads, legislators, attorneys and consultants understand the make up of the agencies with which they deal and have contacts which ensure that their concerns are rapidly addressed. They will often be unaware of the difficulties that those without these advantages have in dealing with state agencies. It is therefore critical that there be an entity specifically tasked with assessing such difficulties. By serving as an ombudsman the Office can, in addition to assisting the public, gather information regarding specific instances in which regulatory

agencies can improve the application of regulations. The Office can also, more systematically, assess such aspects of regulatory administration as the processing of complaints, the wait times for licenses and permits, and the online availability of agency rules and forms.

Review of Proposed Agency Rules

The second role of an Office of Regulatory Reform would be to scrutinize agency rules as they are sent to the Governor for his approval. Although the Governor's General Counsel currently reviews all rules before they are approved, the volume of permanent rules submitted at the close of the legislative session makes careful review very difficult. A staffed office would permit the review of the rules to begin when they are submitted to the Legislature for approval. This would allow time for a more searching evaluation of rules and the opportunity for more penetrating discussions with the agencies promulgating rules. In addition to the advantages offered by this increased manpower, there is a synergy that would develop if proposed rules were reviewed by the same office that has acted as an ombudsman for citizens dealings with state agencies and that has reviewed agency operations.

Ongoing Reform

Finally, a Office of Regulatory Reform could be tasked with continually reviewing the content of existing statutes and administrative rules to identify duplicative, unnecessary or unduly burdensome features. In furtherance of this, the Office would every year identify the one or two most pressing reforms for inclusion in the Governor's legislative agenda. The Office would thus become, in effect, a continuing E.D.G.E. task force. While the Regulatory Environment's Expert Team felt it necessary to avoid recommending specific regulatory changes that would perhaps affect only a single industry, the Office of Administrative Rules could, year in and year out, highlight those specific regulatory changes which will, collectively, make a difference for Oklahoma's economy.

Implementing the Governor's Office of Regulatory Reform

If the creation of an Office of Regulatory Reform is to be more than simply a ceremonial expression of the importance placed on streamlining government regulation, it will require resources. At a minimum an appropriation should be sought additional for two additional staff members. (Arizona's council has seven; New York's has forty). In addition, those existing employees within the Governor's office who provide constituent services, review proposed regulations, and develop legislative policies should be integrated into the Office of Regulatory Reform. The precise manner of their integration should be left to the discretion of the Governor.

CONCLUSION

The recommendations contained in this report are designed to provide meaningful benefits to Oklahoma businesses as a whole and were not intended to involve specific reforms to particular statutes or regulations. Instead in the business and technology court and the office of regulatory reform the Team has identified structural changes in the judicial and executive branches which will work to create the kind of broad regulatory environment conducive to business. In its deliberations, the Team nevertheless identified several such specific recommendations. Most important of these, perhaps, is the need to reduce the cost of workers compensation to employers. Although the Team did not have the time or resources to develop a specific recommendation for workers compensation reform, it is clear that this is a problem that must be addressed.

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