

Study and Analysis of
The Philadelphia Commerce Program

J a n u a r y 2 0 0 5



Prepared by The Committee of Seventy

Dear Friends of Seventy and Interested Citizens:

For more than a century, The Committee of Seventy has worked to advance the goals of fair elections and honest government. Having successfully addressed the multiple challenges presented by the November 2004 Presidential Election, Seventy's primary day-to-day focus in 2005 will be on increasing government integrity, specifically advocating: increased transparency in government contracting to combat "pay-to-play"; the creation of an independent and permanent Board of Ethics for Philadelphia; the adoption of a comprehensive Code of Ethics to govern and inform the professional conduct of municipal officials and municipal employees; and enhanced performance of certain other entities from whom you should expect efficient and ethical governance.

On this occasion, however, it is my great pleasure to welcome you to the product of Seventy's most recent research initiative. Seventy has undertaken this study and analysis of the Philadelphia Commerce Program in response to a clear message from our constituents that that quality of our justice system is of primary importance to them. In the coming months and years, we will continue to work for improvements in our justice system with further analysis of components of the First Judicial District. As demonstrated by the list of publications below, Seventy will also continue to undertake timely analysis of a wide range of municipal entities, identifying opportunities to reduce costs, improve public services, and enhance the economic competitiveness of the Philadelphia region.

While this study reveals a generally efficient program that is highly regarded by litigants, litigators and the Court, we may not be able to deliver an equally favorable message with future initiatives. We expect our constituents to appreciate the fact that this study is an independent and non-partisan effort to advance the goals of efficiency and integrity in government. Seventy's work is not meant to denigrate any of the hard-working individuals and institutions that are sincerely trying to do the right thing. Rather, by bringing a fresh, but experienced, perspective to the table, we hope to make it easier for institutions to secure the resources necessary to do their jobs more efficiently.

This is your report and Seventy is your advocate for good government in Philadelphia and for this Commonwealth. We welcome your input, from telling us how we can do a better job to providing suggestions of other programs and agencies that would benefit from analysis.

Sincerely,



Ned Dunham
Chairman of the Board

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Election Reform, Candidate Education, Civic Engagement and Election Administration

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Who Chooses? The Need for Judicial
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How to Run for Political Office: A Manual of
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The Committee of Seventy Democracy Leadership Kit
Election Calendar 2005 and the Election Calendar 2005
Suburban Supplement
67@ Seventy – A Comprehensive Electoral Almanac
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Guide to the Conduct of Polling Places on Election Day

Most publications are available via Seventy's website at www.seventy.org. To contact a member of our staff, please call 215-557-3600 or send an e-mail to info@seventy.org.

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Executive Summary

The Committee of Seventy has undertaken a survey and analysis of the Civil Division of the Philadelphia Court of Common Pleas (“the Court”). In this report, we present an analysis of the newest program in the Philadelphia civil justice system, the Commerce Case Management Program (“the Commerce Program” or “the Program”) – a specialized forum for the resolution of business disputes.

The results of the survey are generally favorable. Based on our analysis, we conclude that the Program works well in its intended role: the efficient, fair and cost-effective resolution of business litigation. Equally important, we note that the Program is beginning to enjoy a well-deserved reputation as one of the preferred ways of resolving business disputes, a finding that can have only a positive effect on the perception of the business climate in Philadelphia.

Our study included interview responses from Program litigants, attorneys who had represented litigants in the Program, and members of the judiciary, both those serving in the Program and other trial and appellate judges.

Among the findings reported in detail below are the following:

- 76% of the respondents evaluated the Program’s case management process as “very good.”
- 61% of those who had participated in the Program’s mediation process rated it as “very effective.”
- 96% of the respondents believed that the Program had improved the time to dispose of commercial cases and 84% thought that the Program handled cases efficiently.

These findings reflect that the four-year old Program’s inaugural period has been successful.

There were some less-than-favorable results as well, including:

- only 39% of the respondents found the assistance of mediation masters, or judges *pro tem*, to be helpful; and

- only 36% of the respondents found personnel in the Prothonotary's Office to be "friendly and courteous."

These findings suggest that the Program could continue to improve with attention to these areas.

In this report, we do not attempt to provide definitive answers, but rather to develop the framework for discussion of further reforms. In the interest of presenting a balanced analysis, we have made an effort to fairly present the majority and minority viewpoints in a number of areas.

Background Discussion

The fair and efficient disposition of legal disputes is a vital government service which impacts the lives of the thousands of Philadelphians and others who seek justice in our court system every year, as well as those who are pulled into the system by circumstances beyond their control.

The judicial branch is the least visible of the three branches in the American system of government. High profile criminal cases and landmark U.S. Supreme Court decisions have shed light on the criminal justice process, but most members of the public do not know how the civil justice system works. In news briefs, citizens often hear about astronomical damage awards or implausible court decisions, but these exceptional tort cases are not representative of 99% of civil cases, a substantial portion of which do not involve personal injury and many of which concern parties with existing and ongoing business relationships. Since most citizens never expect to sue or be sued, serve as a witness in a trial, or play any other role in the civil justice system except maybe that of reluctant juror, judicial administration is far from being a central concern, even among those with an affirmative interest in public policy.

Each case filed in our courts entails both public and private costs, creating measurable and immeasurable burdens on society, in addition to the emotional and time burdens borne by those who participate as litigants or witnesses. While the public may have a general impression that the courts correctly apply the laws as passed by the legislature and as interpreted by our appellate courts, there is substantial truth to the saying “justice delayed is justice denied.”

In the real world, a favorable judicial decision achieved by spending substantial time and money often provides only a hollow victory. Unlike television dramas, where the announced verdict generally provides a satisfactory result, the transactional costs of the justice system can

render bona fide cases non-justiciable because the anticipated costs of litigation substantially exceed the potential recovery.

Fortunately, the Municipal Court of Philadelphia exists as an expedited forum for civil cases with less than \$10,000 in controversy. Unfortunately, for cases valued above this amount which must be tried in more costly forums and for modest small claims cases, the costs of litigation and attorneys' fees can dramatically reduce the value of a meritorious case. High litigation costs also compel defendants to settle cases which could be pursued on the merits if the cost of litigation did not outweigh the settlement value. Even where a case concludes with a favorable economic balance for the prevailing party after costs are totaled, the opportunity costs of the time spent in litigation can significantly reduce or eliminate the value of a "favorable" court decision or settlement.

As with more visible public services such as police protection, fire prevention, and public education, judicial forums are provided at substantial public expense. Some of the costs are paid by the parties to litigation in the form of filing fees, but the bulk of the court system's budget comes from federal, state and local appropriations. Similar to other agencies that provide important public services, the judicial branch competes with every other government program for limited resources.

Innovations that increase judicial efficiency provide savings not just for litigants, but also present the city, Commonwealth, and federal government with the opportunity to finance further court innovations from the same appropriations. Gains in efficiency in one division of a large judicial district also make it possible to reallocate judicial personnel to other divisions and potentially reduce the time to trial for criminal defendants or expedite the resolution of civil cases.

The economic costs associated with the litigation of civil disputes are borne by all members of society. The price of goods, services, insurance, and healthcare are all influenced by the efficiency of the civil justice system. In this report, we do not take a position regarding the complicated issues associated with the ongoing debate over “tort reform” in Pennsylvania. Our Board is large and diverse and, as with all Pennsylvanians, our members have a wide range of views as to the extent of the problem, the best “solution,” and who should bear the costs. That said, a concerted effort to reduce the litigation costs for all who appear in our civil courts serves the interests of justice and the consumers who ultimately bear all costs of doing business.

Finally, the citizens of this region are part of an increasingly interconnected global economy. We compete economically not only with metropolitan areas in the Northeast Corridor as we have for generations, but also with those throughout the United States and the rest of the world. Although those deciding whether to locate a business in Philadelphia, to keep a business here, or to invest capital in a Philadelphia business, mention taxes, regulatory environment, infrastructure, quality of workforce, and quality of life as the most important factors influencing their investment decisions, any variable that meaningfully affects the bottom line can impact a site or investment decision. When Philadelphia’s chief competitors were Boston and Baltimore, investor inquiries were limited to a few key variables, and we could effectively compete without highlighting or even considering every business advantage associated with locating in the Delaware Valley. In the 21st century, unprecedented competitive pressures impel most businesses to employ greater scrutiny when making investment and location decisions. Economic development agencies and chambers of commerce vigorously market their regions to the world, and the Internet permits previously unimagined access to data – yielding site evaluations at a much higher degree of scrutiny than was possible in the past. In this

environment, the efficiency of the civil justice system and its influence on the profitability of local businesses becomes both a significant variable for investors and a significant opportunity for increasing regional competitiveness.

Seventy's Analysis

Focus on the Civil Division

This comprehensive review of the Commerce Program is the first step in a larger effort to promote increased efficiency throughout the Civil Division of the Philadelphia Court of Common Pleas and to identify local innovations that the other fifty-nine Courts of Common Pleas serving more than 10 million Pennsylvanians might find useful in their effort to reduce costs or improve service.

Seventy is a non-partisan organization with a long-term perspective. As evidenced by our prior governance studies and the internal decision process used when Seventy is asked to serve as *amicus curiae*, we follow a policy of focusing our efforts on important structural reforms, even where the subject matter or issue does not have the immediate attention of the media and the public. A century of public interest work has taught us that good government is built brick by brick. Very often a greater public benefit can be obtained by addressing an obscure issue which presents a significant opportunity for reform, rather than joining battles where public passions are high, but even a successful result will yield only nominal or modest gains in efficiency or government integrity.

Because there are always numerous opportunities for meaningful reform, Seventy seeks to be pragmatic in its choice of projects. We seek to initiate governance studies and advocacy programs when circumstances are conducive to effective coalition building, since significant reform efforts generally require a committed coalition of political, civic, and business leaders.

Informal discussions with leaders of the Philadelphia Bar Association, the Greater Philadelphia Chamber of Commerce, and the Judiciary provided support for the conclusion that key members of the Philadelphia community were interested in continuing the process of civil justice reform which proactive judges and attorneys have pursued since the early 1990s.

Rationale for Starting this Project with the Commerce Program

As noted earlier, the focus of this report is the Commerce Program of the Philadelphia Court of Common Pleas. Some readers may be surprised to learn that such a program exists and others may see a more pressing need to evaluate other Court Divisions. We chose to focus our initial attention on the Commerce Program for a number of practical reasons.

First, since this is a three-judge program which has been in service for only four years, the number of cases subject to its jurisdiction is comparatively small.¹ Because the first phase of any study presents both the opportunity and the challenge of devising and fine tuning methodology, working with a small universe of data is more efficient. Sampling is still necessary for some components of the study, but the cases sampled represent a larger percentage of the universe of cases.

Second, the recent origin of the Program enabled staff and volunteers to easily access case management data for all Program cases via the Internet. In addition, the short history of the Program ensured that the memories of those we interviewed would be fresh regarding key details of the Program's inception and growth.

Third, the Program is the most recent innovation in the multiyear effort to reduce the crippling case backlog which existed in the 1980s and early 1990s. Thus, the Program is the beneficiary of prior civil justice reforms undertaken by the Court. Seventy chose to examine this capstone program because it presents the best opportunity to serve as an example of civil justice reform throughout the Commonwealth.

¹ "While the number of cases [in the Commerce Program] is indeed smaller than other types of civil litigation, the number of cases per judge is very consistent with that which is found in other jurisdictions. In the Delaware Chancery Court there are approximately 200 cases assigned to each judge while in Boston and New York there are 284 and 400 cases respectively assigned per judge. As of July 7 [2004], the number of Commerce cases assigned to each of our judges is 325. If nonjury matters are included in this total, the number rises to 360 cases assigned per judge." Letter from interviewee to Frederick L. Voigt Esq., Executive Director, Committee of Seventy, Re: Commerce Court Review Project 1 (July 19, 2004) (copy on file with the Committee of Seventy).

Fourth, although most attorneys who have appeared before the judges of the Program have handled only one or two Program cases, there is a core group of experienced litigators who have practiced business law in Philadelphia for decades and have had the opportunity to observe the evolution of commercial dispute resolution in the city's courts since the days of excessive backlogs. This presented the opportunity to interview a number of individuals with both expertise and experience spanning the full transformation brought about by the reform efforts of the 1990s.

Given the above factors, Seventy saw a great opportunity to serve the needs of our various constituents with a report which is novel, comprehensive, and will further the public interest in having an effective and efficient court system.

Historical Context

To fully appreciate the magnitude of judicial reform represented by the Program, it is helpful to review the historical context of the Philadelphia Civil Justice System.

Brief History of the Philadelphia Court of Common Pleas: 1727-1980

Pennsylvania's court system was created in 1727, a few years after the British Crown endorsed the Judiciary Act of 1722. That Act created the Pennsylvania Supreme Court, providing a court of final appeal in the colony. It also created the Courts of Common Pleas in Philadelphia, Bucks, and Chester counties, which were designated as the courts of general jurisdiction.

In 1776, the Pennsylvania Constitution further expanded the judiciary by creating Courts of Common Pleas for previously unserved counties, as well as creating the Courts of Sessions and Orphans' Courts in each county. Pennsylvania courts evolved again in 1790 when in an attempt to alleviate some of the caseload handled by the Supreme Court justices, the new state constitution separated counties into districts, with a president judge at the head of each district's Court of Common Pleas.

Additional efforts were made in later years to further reduce the caseload of the Pennsylvania Supreme Court, including the creation of the Superior Court as an intermediate appellate court in 1895. The Constitution of 1968 significantly altered Pennsylvania's judicial landscape with the creation of the Commonwealth Court, which hears cases brought against and by the Commonwealth, as a means to further reduce the workload of the Superior and Supreme Courts. The 1968 constitution also reorganized the judiciary into the Unified Judicial System

(comprised of the Supreme, Superior, and Commonwealth Courts; the Courts of Common Pleas; and other special courts).²

The Philadelphia Court of Common Pleas is divided into the Family Court Division, the Orphans' Court Division, and the Trial Division. Twenty judges currently are assigned to the Family Court Division, which is further divided into two sections. The Juvenile Division has jurisdiction over "(1) delinquency cases involving offenders under 18 charged with misdemeanor or felony offenses, (2) dependency cases involving abused or neglected children or incorrigibility, and (3) criminal cases involving an adult offender and a juvenile victim, and (4) termination of parental rights and adoption cases."³ The Division's programs include Juvenile and Specialized Probation Units, the Adoptions Unit, and Aftercare Units. The Domestic Relations Division hears cases involving paternity, support, visitation, and domestic violence.

The Orphan's Court Division "protect[s] the personal and property rights of all natural persons and entities that may not otherwise be capable of handling their own affairs,"⁴ such as minors, incapacitated persons, and estates. Three judges currently are assigned to the Orphans' Court Division.

The Trial Division has general jurisdiction in civil and criminal cases, except for matters that are under the Family Court Division or Orphans' Court jurisdiction. There are twenty-nine judges assigned to the Civil Trial Division, which has jurisdiction over cases involving amounts in controversy over \$10,000, including contract, negligence, and equity actions. The Criminal

² A History of Pennsylvania's Courts, Pennsylvania's Unified Judicial System (Apr. 12, 1999) <http://www.courts.state.pa.us/Index/UJS/courthistory.asp> (last visited May 25, 2004).

³ Juvenile Court – Family Court Division, The Philadelphia Courts – First Judicial District of Pennsylvania <http://courts.phila.gov/common-pleas/family/juvenile/> (last visited June 30, 2004).

⁴ Orphans' Court Division, The Philadelphia Courts – First Judicial District of Pennsylvania <http://courts.phila.gov/common-pleas/orphans/> (last visited June 30, 2004).

Trial Division, with forty-one judges, has jurisdiction over all felony cases and criminal appeals from the Municipal Court of Philadelphia, which hears misdemeanors and summary offenses.

A Crisis in Philadelphia's Court of Common Pleas: 1980-1990

During the 1980s, it became clear that there were major problems facing the Court. One of the most severe and crippling was the ever-increasing backlog of cases. Between 1979 and 1989, the year-end inventory of criminal cases progressively increased from 3,429 cases to 11,990, despite the fact that the Court disposed of twice as many cases in 1989 as it had in 1979 (15,159 dispositions in 1989 versus 7,167 in 1979) with basically the same number of assigned judges.⁵ Similar problems existed in the civil division: by 1992, estimates placed the civil case backlog at 28,000 cases.⁶

During this period of increasing case backlog, there was little judicial accountability. During the 1980s, the Court did not have a mechanism in place to monitor and evaluate the productivity of individual judges and there were significant discrepancies in productivity among those judges. For example, in 1989, one judge had more dispositions by jury trial than the total of all types of dispositions by another judge.⁷ Coupled with the lack of performance measures, concerns arose about misconduct, as evidenced by the Roofers Union bribery scandal in which over a dozen judges were suspended or removed.⁸ Finally, liberal hiring rules and the exclusion of many positions from civil service requirements permitted the Court to serve as one of a few remaining patronage havens in Philadelphia government. All of these concerns led to a general feeling of distrust towards the courts in Philadelphia among the Bar and business communities.

⁵ Philadelphia Court of Common Pleas Judicial Study Committee Report, 6 (May 1990).

⁶ Lisa Brennan, Phila. Court System Embarks on Program to Reduce Backlog, THE LEGAL INTELLIGENCER, Oct. 27, 1992.

⁷ Id.

⁸ Editorial, A Never-Ending Scandal, PHILA. INQUIRER, Dec 3, 1992, at A26.

As the backlog of cases increased, operating costs of the Court grew progressively. From 1980 to 1989, total direct expenditures by the Court of Common Pleas increased by sixty-four percent (64%) from \$46.7 million to \$72.9 million.⁹ The overwhelming percentage of total direct expenditures was spent on employee salaries and benefits. From 1980 to 1989, personnel services costs, that is, costs directly associated with employing all court personnel except judges consisting almost entirely of full-time salaries¹⁰, increased from \$38.2 million (82.1% of total expenditures) to \$61.9 million (84.4% of total expenditures), while the number of court employees only increased by eight (from 2,228 to 2,236). These expenses created a cost per disposed case of \$554.30 for the Trial Division in 1989.¹¹

A Turning Point

In 1989, the mounting crisis in the Court prompted many dedicated judges to take the initiative to work in small groups for much-needed change.

One such group was a committee headed by Judge Albert W. Sheppard Jr. which consisted of sixteen Court of Common Pleas judges.¹² After several months of study, the committee published a report suggesting improvements for the Court's operations. One proposal advocated the reorganization of the Court's administration. Another proposal advocated the adoption of a much-needed system for monitoring judicial productivity. The committee also suggested new case management procedures for both the criminal and civil sections of the Trial Division. Case management techniques and case "tracks" suggested by the committee would

⁹ The national rate of inflation during this period was 50%, according to the Bureau of Labor Statistics Inflation Calculator, U.S. Dep't of Labor, <http://www.bls.gov/cpi/> (last visited Jan. 5, 2005).

¹⁰ Judges are paid by the Commonwealth and not the judicial district they serve.

¹¹ DELOITTE & TOUCHE MGMT CONSULTING & AM. UNIV. – BUREAU OF JUSTICE ASSISTANCE, CITY OF PHILADELPHIA COURT OF COMMON PLEAS AND MUNICIPAL COURT: PHILADELPHIA COURT SYSTEM MANAGEMENT AUDIT, at app. C (June 14, 1990).

¹² Members of the study committee included Hon. Mark I. Bernstein, Hon. Edward J. Blake, Hon. Legrome D. Davis, Hon. Nelson A. Diaz, Hon. Jane Cutler Greenspan, Hon. John W. Herron, Hon. Leon Katz, Hon. I. Raymond Kremer, Hon. William J. Manfredi, Hon. Frederica A. Massiah-Jackson, Hon. William J. Mazzola, Hon. Edmund S. Pawelec, Hon. Michael R. Stiles, Hon. Carol Engel Temin, Hon. Thomas D. Watkins, and Hon. Jerome A. Zaleski.

later be adopted in the “Day Backward” and “Day Forward” Programs and also in the Commerce Program.

The Sheppard Report, as well as other reports issued by ad hoc committees of concerned judges, was instrumental in creating a cooperative atmosphere in which real reform was possible. The Report facilitated the state Supreme Court’s takeover of the Philadelphia court system, during which the Supreme Court assumed responsibility for all personnel and fiscal decisions within the Court, including a wage freeze and the elimination of many court jobs. A vital part of the success of the takeover was the collegial working relationship between the Supreme Court and the judges of the Court arising from their shared goal to effect real change. The Supreme Court listened to suggestions from the judges and the Bar, and in turn the judges fully supported the measures the Supreme Court implemented. This constructive and positive relationship, paired with the initiative of individual judges, led to the many successful changes in the Court.

Structural Improvements in the Court of Common Pleas During the 1990s

The early 1990s reform movement brought organizational innovations designed to increase the efficiency of the Court. In 1992, pressure from the state’s business community and members of the Philadelphia Bar Association led the House Judiciary Committee of the Pennsylvania House of Representatives to consider a bill to create a Chancery Court, similar to that in Delaware, to decide only cases dealing with business law. A judge in the new Chancery Court ostensibly would have more business law expertise than a Court of Common Pleas judge, leading to greater overall efficiency.¹³ Although the bill never passed, this discussion clearly facilitated the creation of the Philadelphia Commerce Program years later.

¹³ John L. Kennedy, Creation of Chancery Court Moves Closer to Reality, Pa. L.J., Sept. 7, 1992.

Creation of the Complex Litigation Center

Other measures implemented to increase case flow in the Civil Division included the development of the Complex Litigation Center, which opened in February 1992. The Mass Tort Program focused on Philadelphia's many asbestos, DES, and L-Tryptophan cases (which, at the beginning of 1992, accounted for 6,245 of the 43,752 total pending civil cases¹⁴) as well as other mass tort cases. Cases assigned to this program were subject to mandatory monthly meetings to facilitate case management procedures. Case Management Orders were issued for each case to set guidelines on how and when actions could be filed, to outline discovery and motion procedures, and to schedule trial dates. The Court established standardized procedures for pleadings, discovery, and depositions for cases in this program.

The Major Non-Jury Program has jurisdiction over all non-jury cases, including equity cases. Each case is scheduled for a Status/Trial Scheduling Conference at which dates for a mandatory settlement conference and the trial are set. The methods employed in both programs have been successful in expediting litigation. Currently, actions in the Mass Tort Program are on an eighteen to twenty-four month track, and cases in the Major Non-Jury Program are on a ten to twelve month track, with a discovery deadline eight months after filing. The efficient movement of cases in the Complex Litigation Center programs depends on closely monitoring a case's progression from filing to disposition, achieved through Status and Settlement Conferences.¹⁵

Institution of the "Day Forward" and "Day Backward" Programs

Even with the above innovations, improvements were still desperately needed to reduce the Civil Division's major jury inventory of 28,496 cases as of March 1992.¹⁶ In March 1992,

¹⁴ Case-Delay Reduction Strategy Unveiled, THE LEGAL INTELLIGENCER, Mar. 24, 1992.

¹⁵ "Complex Litigation Center," The Philadelphia Courts – First Judicial District of Pennsylvania (1997) <http://courts.phila.gov/pdf/civil2001/clc.pdf> (last visited June 15, 2004).

¹⁶ Case-Delay Reduction Strategy Unveiled, *supra* note 14.

the Court set out to accomplish two ambitious but essential goals: to reduce the number of pending major jury cases to a one-year backlog within three years; and, within five years, to comply with the ABA's Standards of Timely Disposition¹⁷, in the processing of all major jury cases (i.e., 90% of all civil cases to be concluded within twelve months of filing, 98% to be concluded within eighteen months of filing, and 100% to be concluded within twenty-four months of filing, except cases with exceptional circumstances as determined by the Court).

To achieve these goals, the Court established two two-phase programs: the "Day Backward" program for the 13,000 cases filed before October 2, 1989, and the "Day Forward" Program for the 15,496 cases filed after October 2, 1989.¹⁸ Since many of the 13,000 Day Backward cases had been settled without notice to the Court, the first phase of that program consisted of identifying viable cases by requiring counsel to notify the Court of settlements. The Court estimated that this phase would reduce the number of actual pending cases to 9,000. The second phase of the Day Backward Program involved disposing of the remaining active cases. Medical malpractice, products liability, and other complex cases would be transferred to programs in the Complex Litigation Center. Other major jury cases would be scheduled for Settlement Conferences before Settlement Masters. A case not disposed of at the first conference would be scheduled for a second conference within thirty days before a Judge Pro Tempore (a voluntary position held by an experienced attorney, who works in tandem with the Team Leader) or scheduled for a meeting before a judge if the parties believed that doing so

¹⁷ American Bar Assoc., Standards of Timely Disposition, in STANDARDS ON JUDICIAL ADMINISTRATION, VOL. II: STANDARDS RELATING TO TRIAL COURTS (1992).

¹⁸ Cases filed between October 2, 1989, and June 1992 have also been referred to as "Day Backward II" cases, with cases filed before October 2, 1989, referred to as "Day Backward I." Under this classification, only cases filed after July 1992 are referred to as "Day Forward." See Civil Backlog Reduction 'Phenomenal,' Cappy Says; 13,000 Cases Cleared in 15 Months, THE LEGAL INTELLIGENCER, Mar. 31, 1994.

would assist settlement. A case not disposed of at the second conference would be scheduled for trial under Case Management Order.¹⁹

For cases filed after October 2, 1992, the first phase of the Day Forward program involved revision and enforcement of existing rules. A major problem faced by the Court was that in 11,091 of the 28,496 pending major jury cases, the type of complaint was not specified on the docket, making accurate statistical compilation of the types of cases pending impossible. To remedy this situation, the Court mandated that, as of April 1, 1992, all complaints filed in Philadelphia must comply with Local Rule 205.2, requiring that the “case type” appear in the complaint. The Prothonotary’s Office would be free to reject any complaint that did not have adequate information for assignment. The Court also planned to create a cover sheet to clearly convey information including case type for more efficient case management.

In the second phase, the Court focused on disposing of Day Forward cases which were less than three years old (also known as “Day Backward II cases”) and actively managing new cases to prevent them from becoming old cases. A group of judges and attorneys worked together to create the Day Forward Case Management Program for all major jury cases.²⁰ A central feature of this program was the need for timely disclosure of information to ensure the ease of case flow. Cases were assigned to teams of judges, with each team supervised by a colleague who served as Team Leader. Within thirty days of filing, the Court scheduled all Day Forward cases for a mandatory Case Management Conference to be held within ninety days from the date of filing. The Court required the parties to submit a Case Management Conference Memorandum before the conference. This memorandum served as a basis for the Case Manager to create a Case Management Order setting deadlines for discovery and scheduling a Settlement

¹⁹ Case-Delay Reduction Strategy Unveiled, *supra* note 14.

²⁰ Day Forward Program, The Philadelphia Courts – First Judicial District of Pennsylvania (1997) <http://courts.phila.gov/pdf/civil2001/dfp.pdf/> (last visited June 15, 2004)..

Conference, Pre-Trial Conference, and Trial. The Court also assigned cases to a case management track in the Case Management Order. Expedited Track cases were scheduled for trial one year after filing, Standard Track cases went to trial within 18 months, and Complex Track cases were to be tried within two years of filing.

After completion of discovery, a Judge Pro Tempore would hold the Settlement Conference. If a case was not settled at the Settlement Conference, a Pre-Trial Conference would be held. Prior to a Pre-Trial Conference, each party had to submit a Pre-Trial Memorandum identifying all witnesses and exhibits so each litigant could assess the opponent's case. If a settlement was not reached at the Pre-Trial Conference, an Order for Trial would be issued, and the Trial was scheduled. The Day Backward/Day Forward Programs were overwhelmingly successful in reducing the backlog of cases in the Civil Division. As of March 1994, only 364 Day Backward I cases remained unassigned, and Day Backward II cases had been reduced by half.²¹

The Introduction of Judicial Productivity Measures

In the early 1990s, the Court introduced a methodology to measure and compare judicial productivity. The objective was to determine a judge's "daily weighted output," which represents the assignment of estimated average times for completing various types of judicial actions.²² The measurement and comparison of judicial productivity has created an atmosphere of positive competition among judges, which is conducive to the prompt disposition of cases and therefore an important means of increasing the efficiency of the Court.

²¹ Civil Backlog Reduction "Phenomenal", *supra* note 18.

²² Judges were first grouped based on program, and the dispositions that they handled were totaled by type (such as guilty pleas, waivers, etc.). Then, each type of disposition was given an assigned time value. The product of the number of dispositions handled and the assigned value for that type of disposition was divided by five hours, which is the length of a standard courtroom day. The resulting number was the weighted days produced for that particular type of disposition. This formula was repeated for every type of disposition. Then the sum of the weighted days produced for all disposition types was divided by the number of days that a judge was assigned to the program; that number was multiplied by 100 to provide that judge's "daily weighted output."

Creation of the Commerce Program

After the dramatic success in reducing the civil case backlog and improving overall efficiency, the Court was able to focus on other, more specialized, ways of improving the Court and responding to the needs of the legal community.

Despite the earlier failure to adopt legislation to create a statewide business court, the continuing drive for efficiency in the Court and the desire to have a specialized court for business law cases led to the creation of the Commerce Program in 2000. The Program has many of the same features as the Day Forward Program. Judges are assigned to the Program by the Administrative Judge. The Program began with two judges, and an additional judge has been assigned to handle the increasing caseload. The Program involves an individual calendar where a case is assigned to one judge from filing to disposition; the judge for a particular case handles all discovery issues – thus avoiding inconsistency in discovery decisions. Judges in the Program hear cases involving intracorporate disputes, Uniform Commercial Code-based actions, surety bonds, trade secrets, noncompete agreements, business torts, securities transactions, corporate trust affairs, declaratory judgment claims against insurers, and third-party claims against insurers. Cases excluded from the Program include, among others: individual claims against businesses, personal injury or wrongful death claims, malpractice claims, environmental claims, and claims involving occupational health or safety.²³ An attorney filing a complaint and signing the Civil Cover Sheet must certify whether or not the action is subject to Program jurisdiction. Disputes over designation to or exclusion from the Program must be filed in the Prothonotary's Office and are resolved by the Administrative Judge.

²³ A complete listing of cases subject to and not subject to and exempt from the Program can be found in the Appendix. infra, appc. B, C.

As with the Day Forward Program, cases in the Program are subject to a mandatory Case Management Conference within ninety days after filing. This conference which is conducted by a Civil Case Manager appointed by the Court allows the parties to discuss possible means of early disposition and concludes with the Case Manager issuing a Case Management Order setting deadlines for discovery, service of expert reports, filing of motions and scheduling a Settlement Conference and a Pre-Trial Conference.

Each case is also assigned to a track, as with the Day Forward Program. Commerce Expedited Track cases include those with routine legal issues, scheduled for trial within thirteen months of filing the complaint. Almost all other cases are assigned to the Commerce Standard Track with a trial date within eighteen months of filing. Particularly complicated cases may be assigned to the Commerce Complex Track with a trial date within two years of filing. The judge assigned to these cases may schedule status conferences at any time, and as often as he or she deems it productive, before trial.

The purpose of the Settlement Conference is to encourage the parties to reach a resolution without the time and expense of a trial. At the Settlement Conference, the judge may suggest the use of any form of Alternative Dispute Resolution, including mediation or assignment to a Judge Pro Tempore. The Judges Pro Tempore for the Program are nominated and selected by the Business Litigation Committee of the Philadelphia Bar Association Business Law Section. There are currently approximately eighty Judges Pro Tempore, all volunteers who have participated in an Alternative Dispute Resolution training program. The Program judge may refer a case to nonbinding mediation, or to another Settlement Conference supervised by a Judge Pro Tempore, at any time.

If a case is not settled at the Settlement Conference, the parties attend a Pretrial Conference and generally are required to file Pretrial Statements before the conference. After this conference, the Judge issues a Trial Scheduling Order setting forth specific dates for various matters such as the exchange of trial briefs and exhibits intended to be offered as evidence, identification of deposition materials, and the service and filing of objections to any documents or other exhibits.

While certain procedures from the Day Forward Program were adopted in the Program, there are still some differences worth mentioning. First, the settlement rate of the Commerce Program is twice that of the Day Forward Program, and is achieved much earlier in the course of the case.²⁴ Second, in the Commerce Program, unlike in the Day Forward Program, “mediation [is] stressed and there [is] a built in procedure to stay all proceedings for two or three months to allow meaningful mediation following a period of discrete discovery.”²⁵ Third, unlike the Judges Pro Tempore in the Day Forward Program, who may have had limited experience with the types of cases they were assigned, those in the Program must have at least 15 years of trial experience focusing on commercial litigation. Finally, Program judges regularly author opinions on preliminary objections, thereby helping to create a substantial body of law which parties can use to assess the strength of claims and defenses. In contrast, judges in the Day Forward Program frequently overruled preliminary objections without written opinion.²⁶ As such, the Day Forward Program failed to establish much accessible precedent for future litigants.

²⁴ Letter from John W. Herron, Judge, First Judicial District of Pennsylvania Court of Common Pleas, to Frederick L. Voigt, Esq., Executive Director, Committee of Seventy, Re: Commerce Court Review Project 2 (July 20, 2004) (copy on file with The Committee of Seventy).

²⁵ Id. at 3.

²⁶ Id. at 3.

Early Reactions to the Commerce Program's Performance

During the first several months following its inception, the Program generally received favorable reactions from both the legal and business communities. Some had objected to the creation of the Program, characterizing the effort as a misdirected attempt to solve greater problems within the Court, since it would only affect a small number of cases, and arguing that resources would be better spent on other parts of the Court. Proponents of the Program contended that commerce cases constituted one-seventh of the inventory of major litigation matters, and argued that concentrating these cases in one program would result in more efficient handling of non-commercial civil cases as well.²⁷ Supporters of the Program also praised the creation of the Program's website, at <http://courts.phila.gov/common-pleas/trial/civil/commerce-program.html/>, which not only outlines the organization and procedures of the Program but also contains an index of over 430 opinions searchable by topic. This resource is invaluable to lawyers who are seeking to expeditiously learn more about the Program.

In the early months of the Program, the volume of cases filed was relatively small—about fifty cases in the first two months.²⁸ Between January 2000 and August 2003, however, the volume of cases filed grew by approximately ten percent.²⁹ During the design phase of the Program, it was estimated that about 1,000 cases would be filed per year. While actual numbers have fallen short of that prediction, the Program's accomplishments have been notable. Between January 1, 2000 and October 25, 2002, 1,767 cases had been filed and 1,145 had been disposed.³⁰

²⁷ Mitchell L. Bach et al., Letter to the Editor Commerce Program Becomes Model of Judicial Management, THE LEGAL INTELLIGENCER, Apr. 24, 2002.

²⁸ Lori Litchman, So Far, So Good at the Commerce Court, THE LEGAL INTELLIGENCER, Feb. 14, 2000..

²⁹ Danielle N. Rodier, Attorneys Impressed With Commerce Court, THE LEGAL INTELLIGENCER, Aug. 6, 2003.

³⁰ The Hon. Albert W. Sheppard Jr.: The Philadelphia Commerce Court – Dedicated to Finding the Best Solutions for Business Disputes, THE METROPOLITAN CORPORATE COUNSEL VOL. 10, NO. 2, Dec. 2002.

The Evaluation of the Bar: Surveys of Trial and Corporate Counsel

Background Information

In 2003, Seventy retained Parente Randolph, an independent accounting and consulting firm, to survey attorneys and corporate litigants who had been involved with the Program. The questions asked of participants were culled from the Court Self-Assessment Program developed by the Bureau of Justice Assistance. In the survey, we aimed “to identify opportunities for improved Program efficiency, to enhance the reputation of Philadelphia as a favorable location for businesses by raising awareness of a venue designed to resolve business disputes efficiently, and to further educate the public about the functioning of [its’] judicial system.” Parente Randolph received fifty-six responses, maintained the anonymity of respondents, and tabulated the responses. In general, respondents had positive things to say about the Program, and in many cases were very impressed with its impartiality and effectiveness, but some expressed dissatisfaction with certain aspects of the Program.

Summary of Survey Results

Experience with the Bench

At the time of the survey, respondents had appeared, in court or in chambers, before a Program judge in an average of six cases since the inception of the Program. Respondents had also appeared before an average of two different Program judges.

Respondents’ Backgrounds

Respondents’ backgrounds and experience in legal practice and with the Court varied, though they generally had strong foundations upon which they based their responses. About 42% of respondents identified “General Practice” as their primary practice area, while 2% identified themselves as corporate counsel. Fifteen of the other 29 respondents said they primarily practiced commercial litigation (approx. 52%). A number of other areas of practice

were represented by one or two respondents. The average respondent had twenty-two years of experience practicing law and twenty-one years of practice in Philadelphia County, and the average respondent's law firm employs eighty-seven lawyers. Eighty-one percent of respondents were male; 19% were female. Thirty-eight percent were between forty-five and fifty-four years of age with another 21% percent between fifty-five and sixty-four and 19% between thirty-five and forty-four. Ninety-four percent of respondents identified themselves as Caucasian American, 2% as Native American, and 2% as Asian American/Pacific Islander. The remaining 2% of the respondents identified themselves as multi-racial.

Case Management Techniques

The Program has shown how improved case management can be implemented. Its case management techniques (including Case Management Conferences/Orders, Settlement Conferences, and case management tracks) were modeled after the Day Forward program, which was created to manage, coordinate, and schedule major civil jury cases more effectively. Seventy-six percent of respondents evaluated the Commerce Program's case management process, as very good. In contrast, 8% of respondents believed that the Program was not needed. When asked to evaluate specific elements of the process, 62% of respondents found the case management conference to be worthwhile, 95% believed the three management tracks (Commerce Expedited, Commerce Standard, and Commerce Complex) were sufficient, and 60% found the event dates set forth by the Case Management Order to be appropriate. However, 24% of respondents believed the Case Management Conference is not needed, 5% believed that the three management tracks are insufficient, and 13% believed that the event dates set forth by the Case Management Order are not well-thought out. While the majority of respondents regarded the Program's case management process favorably, the negative responses are noteworthy.

Mediation and Settlement Conference

Mediation has also proven to be a key aspect of the Program's offerings. Ninety-one percent of respondents were familiar with the Program's mediation process, and 42% had previously had an opportunity to utilize the mediation component. Of those who had used mediation, 61% found the program to be very effective. However, it is also important to note that only 39% of respondents found the assistance of Pro Tems to be very helpful and effective in the settlement process. In addition, one respondent commented that the Program needs "a forceful effort and stringent compliance with rules by all pro-terms [sic]." Given the mixed reactions revealed by the survey, the effectiveness of the Pro Tems in the mediation and settlement process is an area that could use some attention on the part of the Court.

Views of the Court

Judicial efficiency is a major goal of the Program. Over 96% of respondents believed the Program had improved the time to disposition aspect of usually protracted commercial cases, with 84% of respondents having found that the Program handled commercial cases efficiently. More than 84% of respondents found the posting of opinions to the Program website to be beneficial. Over 98% of respondents believed that the Program represents recognition by the Court of meaningful differences between commercial and non-commercial cases. Ninety-six percent of respondents found the Program to be successful or moderately successful overall, and 97% of respondents would direct a case to be heard in the Program if they had a choice of venue.

Courteous and Responsive Treatment

When evaluating the treatment they received from Program courtroom personnel, respondents were generally positive. Seventy-three percent of respondents found courtroom personnel to be friendly and courteous, 62% of respondents found courtroom personnel available to answer questions, and 44% of respondents believed personnel were able to provide adequate

answers. 56% of respondents found courtroom personnel willing to take time to explain things to them.

Respondents expressed similar opinions regarding non-Program court personnel, but satisfaction levels were somewhat lower. With respect to Court Administrator's Office personnel, 54% of respondents found them friendly and courteous, and 56% found them available to answer questions. Only 44% believed the Court Administrator's Office personnel knew the answers to those questions, and only 46% found the personnel willing to take time to explain things to them.

Responses to the same questions with regards to the Prothonotary's Office personnel were even more unfavorable. Only 32% of respondents found the Prothonotary's Office personnel to be friendly and courteous, and only 18% of respondents found them available to answer questions. Only 20% of respondents believed the personnel knew the answers to those questions, and 20% of respondents found the personnel willing to take time to explain things. It is important to note, however, that Court employees, whether they are in Court Administration or the Prothonotary's Office, are not allowed to give legal advice. Many people are not likely to know of this prohibition and thus assume that Court employees are unwilling or unable to answer a question.

Respondents were asked whether they believed the treatment they received from the Program was influenced by certain factors. Eighty-three percent of respondents strongly disagreed that their treatment by the program was influenced by their age. With respect to other factors, 90% strongly disagreed that gender influenced their treatment; 65% strongly disagreed that reputation of client or counsel was an influential factor; 92% strongly disagreed that

nationality influenced Program personnel; and 94% strongly disagreed with the notion that race/ethnicity influenced treatment.

Respondents were questioned about their interactions with Program judges. Ninety-six percent had previously had an occasion to speak to or be spoken to by a Program Judge, 80% of which stated that they were treated very respectfully. In addition, 96% of respondents had occasion to observe a Program judge carry out his official duties, 67% of which noted that the judge treated people very respectfully.

Equality and Fairness

In the survey we strived to gauge respondents' feelings on the equality and fairness of the Program. Impressively, 90% were very satisfied with the treatment they received based on interaction with the bench. In addition, 91% were very satisfied with the fairness of treatment they observed others receiving. Overall, 87% of respondents were very satisfied with the treatment their cases received in the Program. When asked if rulings were influenced by certain personal attributes of litigants or counsel, 90% felt strongly that rulings were not affected by age, 92% felt strongly that rulings were not affected by gender, 75% felt strongly that rulings were not affected by reputation of counsel or client, 94% felt strongly that rulings were not affected by nationality, and 96% felt strongly that rulings were not affected by race or ethnicity.

Verbatim Recordings of Proceedings

The survey questioned respondents about their use of verbatim recordings of Program proceedings. Only 33% of respondents had used the recordings, which is not surprising considering the high rate of settlement. Of that number, 72% thought the record was accurate. Only 6% of the 33% who had used the recordings strongly felt that the recordings were inaccurate. Reported problems included inaccurate reporting, incomplete transcripts, late delivery, and translation needs.

Only 7% of respondents reported problems that required discussion with opposing counsel, and those were restricted to informal discussion only. Respondents spent an average of just one hour resolving problems concerning Program records. While 69% of respondents reported little difference between the problems encountered in Program transcripts as compared with other courts' transcripts, 25% noted fewer problems in Program transcripts.

General Comments

Although most responses were favorable, some were not. These included complaints that the Program “has no teeth,” that “city personnel in general are rude and obnoxious,” and that an individual judge “was the worst . . . that I have ever appeared in front of.” Others called for the need for “more judges and clerks” and better “accommodation to non-native English speaking litigants.” Among the positive comments were a statement that it is “an excellent program,” that there are “classy judges” in the Program, that it is “an enlightened addition to the Court of Common Pleas [that] . . . should continue,” and that it is “enormously valuable to the business community and therefore to the business climate of the City of Philadelphia.”

The Program's Record in the Appellate Courts

Of the eighty total appeals taken from Program decisions to either the Superior Court or the Commonwealth Court, twenty-four were withdrawn or discontinued and fourteen are still pending at the time of the appellate evaluation. This means that only forty-two cases on appeal, or 52.5%, have actually reached disposition by an intermediate appellate court thus far. Of the forty-two cases which have reached an appellate decision, twenty-four appeals have been affirmed by the appellate court, giving an affirmance rate of 57.1% for all Program appeals addressed on the merits.

On the surface, this percentage is significantly lower than the Superior Court's affirmance rate for all Pennsylvania Court of Common Pleas cases: 78.3% in 2000.³¹ This difference is largely explained by the fact that there have been many Program appeals that were either dismissed or quashed as a result of post-trial settlement or a failure by the appellant to properly pursue the appeal. Furthermore, the Superior Court's published affirmance rate is for all Court of Common Pleas cases, criminal, family and civil – and unlike civil matters where parties pay their own fees on appeal, in most criminal matters legal representation is provided at public expense and so almost every criminal conviction is appealed regardless of the merits of the appeal.

When Program appeals that were dismissed or quashed are not included in the analysis, leaving only cases which were addressed by an appellate panel, the affirmance rate is a significant 85.7%.³² Only two Program cases were reversed on appeal, giving a reversal rate of 2.5% for all Program appeals, and a rate of 4.8% for those appeals that reached disposition by the appellate court. Excluding the fourteen Program appeals that were dismissed or quashed, the reversal rate was 7.1%. Another two Program cases on appeal were reversed and remanded, again resulting in rates of 2.5% for all Program appeals, and 4.8% for those appeals that reached disposition by the appellate court. Excluding the fourteen dismissed or quashed appeals, the rate is again 7.1% for cases that were reversed and remanded.

These rates are impressive compared to the Superior Court's overall reversal rate of 13.3%, but it is important to note that that the Superior Court's rate includes both cases that are simply reversed, as well as cases that are reversed and remanded. If the Program appeals that

³¹ All rates given for the Superior Court include both published and unpublished opinions. Superior Court rates were determined using the total of appeals affirmed, reversed, remanded, and dismissed. Unless otherwise noted, this is the method used to determine rates for Commerce Program appeals.

³² This number includes only appeals that were affirmed, reversed, or remanded. It does not include appeals that were dismissed or quashed.

were only reversed and those that were reversed and remanded are considered together (for a total of four cases), the reversal rate is 5% for all Program appeals, and 9.5% for those appeals that reached disposition—slightly higher, but still lower than the Superior Court’s reversal rate. Excluding the fourteen appeals that were dismissed or quashed, the rate of reversal is 14.3% for Program cases that were just reversed or reversed and remanded. These low reversal rates are evidence that the Program is working well.

Of the forty-two cases that reached disposition by the appellate court, fourteen were dismissed or quashed, for a dismissal rate of 17.5% for all Program appeals and a dismissal rate of 33.3% for those appeals that reached disposition. In contrast, the Superior Court’s overall dismissal rate was only 3.7%. The relatively high dismissal rate for Program appeals helps to account for its relatively low affirmance and reversal rates in comparison with the Superior Court’s overall affirmance and reversal rates.

Issues Raised by Appellants

Since fourteen of the appeals are still pending, it is unknown at this point which, if any, issues will be addressed by an appellate court on appeal. Similarly, since thirty-eight appeals were withdrawn, dismissed, or quashed, no issues were reached by the appellate court for any of those cases. If those appeals that are pending or were withdrawn, dismissed, or quashed are disregarded, twenty-eight cases remain. Of those twenty-eight appeals, twenty-one were decided by the appellate court without a published opinion, thus it was not possible to determine which, if any, issues were reached by the appellate court.

The issues on appeal could be determined in only seven published appeals. Three of these appeals were affirmed by the appellate court, and four were reversed, or both reversed and remanded. In the three appeals that were affirmed, the issues raised included statutory

interpretation or application, misinterpretation of law or facts, and sufficiency of evidence. The appellate court found that there was either harmless error or no error on the part of the lower court for the issues involved in each of these cases. The two cases which were reversed by the appellate court because of error on the part of the lower court involved issues including statutory interpretation or application, misinterpretation of law or facts, and abuse of discretion by the trial judge. The two cases which were reversed and remanded by the appellate court due to error on the part of the lower court involved issues of misinterpretation of law or facts and sufficiency of evidence.

Commerce Program Proceedings

We reviewed eighty appeals from the Program from its inception in January 2000 through December 2003. At the lower court, three of these cases were jury trials, nineteen were bench trials, and thirty were disposed by either summary judgment or through preliminary objections. Out of the remaining twenty-eight cases that did not fall into one of the above categories, seven were settled after assignment to a trial judge, one was settled prior to assignment to a trial judge, five were confessions of judgment, three were dismissed for lack of jurisdiction, and three were transferred to another jurisdiction. There was also one case where a Program judge vacated the judgment from another, non-Program court, one case in which a Program judge entered a non-suit, two cases in which a Program judge ordered a discontinuance, and one case that was dismissed for failure to join a party. Finally, there was one case in which a motion for a new trial was denied after being transferred to the Program, one where a petition to enforce the liquidator's order was denied, one where a motion to compel arbitration was granted, and one where a motion to stay arbitration was denied.

Evaluation of Case Docketing Procedures

For every court case, a record is created when the complaint or other document seeking a legal remedy is filed with the court. This record is a file folder which should contain every document which is filed in the case in accordance with state and local rules of civil procedure. The record folder also contains a running list of docket entries, which are notations of each document contained in the record and the date on which it was filed with the court. Each document is inserted as it is received so that the filings are in reverse chronological order, with the most recent on top. This is the official document which is relied upon by the court and the parties throughout the case to determine compliance with the rules of court and adherence with applicable filing deadlines.

Given the importance of the record to every proceeding, a significant consideration when assessing case management efficiency is whether the record for a given case is readily available for review by counsel, a party to the action, or a member of the general public.

In the spring of 2004, volunteer law students working on behalf of Seventy analyzed files from the Prothonotary's Office to establish the efficiency of record retrieval.³³ Seventy analyzed Docket reports for consistency, availability, and legibility. The following findings were based on a methodology derived from a model system developed by courts for self-analysis of judicial efficiency.

Summary of Statistical Findings

Of sixty-two available docket reports from cases on record with the Prothonotary's Office, forty were located in a closed on-site location (64.5%), eighteen were pending (29.0%), and four were closed off-site (6.5%). Of 62 files, 8 (12.9%) were not recovered because they

³³ While dockets are available on the Internet, the law interns were looking at the actual files in the Prothonotary's Office.

were either located off site or the file system made retrieval impossible. Two were in judge's chambers, four were in a separate off-site location, and two were not retrieved because file or cabinet systems were broken.

Of the fifty-six docket reports retrieved, the time required to locate the docket ranged from twenty minutes (1 case or 1.8% of all cases), ten minutes (11 or 19.6%), five minutes (29 or 51.8%) to less than five minutes (15 or 26.8%). All the documents retrieved showed consistency of medium and location, and all retrieved cases were well preserved. With few exceptions, the entries were readable and understandable. Of some fifty-five docket reports retrieved, thirty-four (61.8%) included all relevant materials while twenty-one (38.2%) were missing one or more documents relevant to the case. In certain files, important motions, appeals, or notices of settlement were not included. In single cases, motions to consolidate cases and rulings on injunctions were missing.

Of some fifty-five docket reports reviewed for correct order, twenty-seven files (49.1%) were in the correct order while the contents of twenty-eight files (50.9%) were out of order in some respect. Of the twenty-eight files out of order, eight were not in clear chronological order and three were only slightly out of order. In some cases, extensive notes were misplaced or the docket showed no sign of coherent order.

Of the fifty-five docket reports reviewed, the final disposition of forty-two cases (76.4%) was identifiable. The final dispositions and judgments of an additional nine cases (16.4%), while identifiable, were for cases still pending before the Commerce Program. The final outcomes of four cases (7.2%) were not discernible for various reasons. Final disposition in the form of withdrawal, settlement, or removal to federal court was largely evident and easy to understand.

An Overview of United States Commerce Courts and Commerce Programs

The Commerce Program is not unique; several other states have developed programs or separate courts devoted to cases involving business disputes. This trend reflects a recommendation by the American Bar Association that all states create a business court.³⁴ While Philadelphia's Commerce Program shares many of the same objectives and characteristics as these other business courts, there are significant differences in structure and operation.

One important distinction is that, unlike some states' business courts, Philadelphia's Commerce Program is not a separate court. For example, Delaware's Court of Chancery is a separate court from which appeals are taken directly to the Delaware Supreme Court. In contrast, Philadelphia's Commerce Program is part of the Trial Division of the Court of Common Pleas. Likewise, the business "courts" in New York, Maryland, and North Carolina are actually specialized forums within other courts. New York's Commercial Division is part of the Supreme Court of the State of New York (which is a trial court comparable to the Courts of Common Pleas in Pennsylvania) with branches in the seven counties where business litigation is most common.³⁵ In Maryland, the Business and Technology Case Management Program was created as a specialized function within the state's Circuit Court System.³⁶ Finally, North Carolina's Business Court is also part of the North Carolina State Courts' trial division.³⁷

The Program also differs from these other business courts in terms of the types of cases that may be litigated. While all business courts or programs are similar in that they were created to deal with cases involving complex issues of commercial law, each state program has a rule or

³⁴ *About the North Carolina Business Court*, North Carolina Business Court, at <http://www.ncbusinesscourt.net/New/aboutcourt/> (last visited June, 18 2004).

³⁵ *The Commercial Division of the State of New York – General Information*, Commercial Division of the State of New York, at http://www.nycourts.gov/comdiv/general_information.htm (June 18, 2004).

³⁶ *Maryland Business and Technology Case Management Program*, at <http://www.courts.state.md.us/businessstech/index.html> (June 18, 2004).

³⁷ *About the North Carolina Business Court*, *supra* note 34.

statute defining its commerce program's jurisdiction. For example, Philadelphia's Commerce Program details very specific categories of cases that may and may not be assigned to the Program.³⁸ The Commercial Division of the Supreme Court in New York County also sets out specific guidelines for the types of cases that may be filed, including a monetary threshold of \$125,000.³⁹

Other business courts are not as strict about the assignment of cases. For example, Delaware's Court of Chancery is actually authorized to hear all equity cases, although it has evolved to primarily specialize in business litigation because of the large number of corporations incorporated in that state. In North Carolina, the General Rules of Practice for the Superior and District Courts allows the North Carolina Supreme Court Chief Justice to assign "complex business cases" to the Business Court, but the rule purposely does not define the phrase "complex business case." This gives the Chief Justice "the flexibility to respond to requests that might not have been anticipated when the rule was amended,"⁴⁰ permitting a wider range of cases to enter the program where the assignment will facilitate the efficient resolution of a complex business matter. The Maryland Business and Technology Case Management Program provides the same judicial flexibility in assigning cases. The Administrative Judge for the circuit in which a case is filed can designate a case for the program if he or she believes that the case poses complex business or technological issues.⁴¹

In order to further facilitate the processing of complex business litigation, some business courts have made a special effort to take advantage of technological advances which facilitate

³⁸ For a complete list of the types of cases that are and are not subject to the Philadelphia Commerce Program, please refer to the Appendix, *infra* at apps. B, C.

³⁹ *Guidelines for Assignment of Cases*, Commercial Division of the State of New York, *at* http://www.nycourts.gov/comdiv/Guidelines_for_Assignment_of_CasesNYC.htm (June 21, 2004). Guidelines for assignment vary by county.

⁴⁰ *About the North Carolina Business Court*, *supra* note 34.

⁴¹ MD. R. 16-205.

litigation management. New York's Commercial Division has helped develop case management software that is used throughout the state's court system. The branches in Monroe and New York Counties also allow electronic filing of cases, and several of the branches post opinions on their websites. New York County's branch of the Commercial Division utilizes a "Courtroom for the New Millennium," which employs flat-screen computer monitors throughout the courtroom, real-time court reporting, and computer docking stations for counsel. These features have reportedly reduced the average time required for jury trials up to 40%.⁴² North Carolina has implemented similar technology in its Business Court. E-filing and a computer-based case management system, as well as a calendar accessible through the court's website, help to facilitate case flow. Technological enhancements in the courtroom itself give parties the option of using video and electronic slide shows during presentations. Both opinions of decided cases and docket reports of active cases are available on the court's website, and an online tutorial on how to use the court's technology will be released soon.⁴³

While it is not yet at the same technological level as these other courts, Philadelphia's Commerce Program has begun to make effective use of technology. Its website contains many resources for attorneys wanting more information about the Program, including general court regulations relating to commerce cases, an index of all Program opinions searchable by topic, and a summary of cases that have been transferred out of the Program for lack of jurisdiction. Because of its small size, many believe that the Program would be an ideal place to test the feasibility of e-filing in the Court of Common Pleas.

⁴² Md. Bus. & Tech. Task Force, *Maryland Business and Technology Court Task Force Report*, at app. B, at <http://www.courts.state.md.us/finalb&treport.pdf> (last visited June 21, 2004).

⁴³ *North Carolina Business Court Technology*, North Carolina Business Court, at <http://www.ncbusinesscourt.net/New/technology/> (last visited June 21, 2004).

Summary of Seventy's Methodology and Analysis

For each governance study, Seventy employs research methods which facilitate an accurate evaluation of the agency, program, or policy area under review. We do not commence a study with an agenda or a preferred outcome. Every study involves compilation and analysis of multiple categories of data, which avoids putting undue emphasis on any single variable. Dozens of interviews are conducted with a wide range of stakeholders and other experts who are knowledgeable about the subject matter. To articulate a complete picture, we make every effort to interview supporters and detractors of a given program, members of the public and private sectors and, where applicable, academics and practitioners. Finally, we make every effort in our studies to interview individuals associated with comparable programs in other parts of the country.

Prior to commencement of every governance study, and periodically after work has begun, Seventy's Board members and staff consider which means of data collection and analysis will be most effective, discuss and analyze the strengths and weaknesses of any approach before adopting it, and revise the approach as necessary. Seventy is fortunate to have active Board members who are leading practitioners in the areas of law, business management, social sciences, and accounting, and an extensive network of professional contacts in other areas who generously provide pro bono support.

Seventy relies on available research models which have been extensively tested and proven over time. In other cases where no applicable models are available, Seventy will devise a new method for dealing with a given set of data. In all cases, we make a concerted effort to ensure that our methods yield an accurate and defensible result.

Summary of Commerce Court Study Methods

For the Commerce Program Study, Seventy decided to focus on a few important variables:

- (1) the satisfaction of the trial bar;
- (2) the satisfaction of the corporate community;
- (3) the public accessibility of case management information;
- (4) the Program's record in the Pennsylvania Appellate Courts; and
- (5) a comparison of other U.S. Commerce Programs and Commerce Courts.

Survey of Trial and Corporate Counsel

Source of Survey Questions

In order to measure satisfaction of those served by the Program, Seventy sent a survey to parties and counsel who had litigated cases in the Program. We based the survey questions on National Center for State Courts (NCSC) questionnaires. In 1990, the NCSC established twenty-two standards for defining court performance that fall into five categories: (1) access to justice; (2) expedition and timeliness; (3) equality, fairness, and integrity; (4) independence and accountability; and (5) public trust and confidence, and developed questionnaires based on these standards. After considering using the standard NCSC survey, which arguably would prevent any bias in comparing results to other court studies conducted at a later date, we decided to borrow from the NCSC questionnaire but to create a tailored survey to enable us to better understand and analyze the specifics of the Program. This survey contained questions about respondents' backgrounds, their experiences with the Program, their opinions of different parts of the Program, the accuracy of records, whether they received courteous and responsive treatment, and whether they believed the Program was equal and fair. Respondents also had an opportunity to provide more specific comments confidentially, and the option to submit anonymous comments which would be forwarded directly to the Program Judges.

Selection of Survey Respondents

We elected to send surveys to parties and counsel whose names appeared in the docket reports of Commerce Program cases. Recognizing that those parties and counsel with the most experience appearing before the Program would have the greatest knowledge about and greatest interest in the Program, we made the decision to survey a higher percentage of those with multiple cases before the program.

Since participants are generally more forthcoming when anonymity is ensured, Seventy retained the independent accounting firm Parente Randolph, LLC to mail the surveys and tabulate the responses. Parente sent surveys to 368 trial attorneys and received fifty-six responses (15.2%). In an effort to gain the input of corporate counsel, corporate executives, and business owners, Seventy also sent surveys to randomly selected litigants whose names and addresses were culled from the Program dockets. Parente sent surveys to 392 of these corporate litigants and received only five responses (1.3%). While this response rate was very disappointing compared to the rate of survey participation by trial counsel, the low response rate may be attributable to a couple of factors. First, the contact information in the docket may be out of date or incomplete. Second, in most cases, Program parties have had only one or two appearances before a Program Judge. As such, the lack of participation on the part of corporate counsel may be based on the expectation that they will not litigate in the Program again or simply that their experience was favorable or unremarkable.

In an effort to obtain more of a response from in-house corporate counsel, Seventy contacted the Association of Corporate Counsel Delaware Valley Chapter (DELVACCA) to seek the support of the DELVACCA Board in facilitating the participation of their members in this survey. DELVACCA agreed and supplied a membership list to Parente Randolph, which sent 631 surveys to DELVACCA members. Ultimately, thirteen responses were received (2.06%).

Unlike the docket-based survey of corporate parties, with DELVACCA the contact information for potential respondents was fresh and we can assume accurate. So the low response rate here may be reflective of favorable experiences on the part of corporate counsel or a lack of prior contact with the Program, given the human tendency to voice a complaint when one feels aggrieved.

Interviews

Although public records, websites and surveys can provide a great deal of information about the functioning of government, these sources are no substitute for interviewing those who have firsthand knowledge of a subject organization, especially in the context of the civil justice system which receives little media attention.

Seventy interviewed dozens of individuals who are knowledgeable of the efforts to reform the Court during the 1990s, or were involved in the unsuccessful efforts to create a statewide business court, and/or were involved in the successful development of the Program. In the interest of obtaining a full and frank discussion, we promised the interviewees that we would keep their identity confidential and not directly quote them.

The Prothonotary's Office

In order to determine the efficiency with which the court docketing system is maintained, we randomly selected sixty-four cases assigned to the Program for docket evaluation. Volunteer law students, supervised by a member of Seventy's Board, reviewed both the official records which are maintained at the Court of Common Pleas and the electronic docketing system available via the Internet. The focus of this part of the survey is on the accuracy of records, the completeness of records and the promptness with which court filings are docketed.

Appeals from the Commerce Program

A fundamental way to measure the effectiveness of a court program is to look at the outcome of appeals taken from decisions of that Court. When a case is affirmed, dismissed, or withdrawn on appeal, it is reasonable to conclude that the trial court did a good job of effectively resolving the dispute. When a case is reversed or remanded, the assumption may be that the trial court committed an error. While this is not always the case and the evolution of our common law system depends on judges sometimes accepting new legal theories and arguments, in the case of a business court, a low reversal rate facilitates dispute resolution among sophisticated parties who base their business dealings on the expectations created by a stable body of legal precedent.

Seventy examined appeals taken from the Program to the Superior Court and the Commonwealth Court, Pennsylvania's intermediate appellate courts. Given the size of the Program and the fact that an overwhelming majority of civil cases settle before trial, Seventy was able to review all eighty appeals. By searching the civil docket database on the Court's Trial Division website, we were able to note the trial court proceeding, appeal outcome, and issues raised on appeal for each of these cases. We then analyzed this data to determine if any patterns were evident across the body of appeals.

Overview of other Commerce Programs and Comparison with Philadelphia's Commerce Program

Although the Delaware Chancery Court has been in existence for many years, the development of other forums specifically for business disputes is a recent phenomenon, with the Philadelphia Commerce Program one of just a few such programs. To compare and contrast existing Commerce Court Programs, Seventy reviewed the Internet sites for the business courts in North Carolina, Maryland, and New York, as well as the Delaware Chancery Court. Seventy

first compared the jurisdictions of these business courts to that of the Philadelphia Commerce Program. We also observed the different ways in which technology has been utilized in the different commerce programs.

Conclusions

The Potential for Growth of the Commerce Program within the Philadelphia Court of Common Pleas

The Court assigned two judges to the Commerce Program when it created the Program in 2000. Based on caseload growth, the program expanded to three judges in March of 2002.⁴⁴ Among the interviewees, there is a consensus that three judges are sufficient for the current caseload. There is also a consensus that the Court should not expand the judicial complement unless necessitated by an increased case load, in that part of the appeal of the Program is the consistency of decision-making and the fact that lawyers know they are going to appear before one of three judges. Interviewees also expressed a belief that the jurisdiction of the program as presently defined is appropriate to the mission of the program to serve as a dispute resolution mechanism between business entities. Some interviewees expressed general opposition to assigning non-commercial matters to the Program judges, but no one asserted that the handling of some non-jury matters by Program judges compromised the effectiveness of this program. A few litigators suggested that if the average pace of case management were further accelerated, it might actually move too quickly for the attorneys.

The Potential for Additional Specialized Programs within the Philadelphia Court of Common Pleas Trial Division

Some interviewees expressed a belief that some of the efficiency gains demonstrated by the case management techniques and judicial specialization of the Program could be adapted to other classes of cases, for instance to a “Medical Malpractice Program.” While we recognize there might be efficiency benefits derived from having a specialized medical malpractice forum with judges and law clerks who focus on this class of cases, significant and fundamental

⁴⁴ Lori Litchman, *Herron Picks 3 Judges as Supervisors*, LEGAL INTELLIGENCER, Jan. 22, 2001, at 1.

differences exist between commercial litigation and most other classes of civil cases which need to be discussed.

First, in the context of business litigation, a party is sometimes a defendant and sometimes a plaintiff, depending on the transaction. Frequently the opponent is a valued and long term business “partner,” who may be a major customer or hard-to-replace vendor. On the basis of these relationships and the fact that a corporate entity is likely to appear on either side of the caption, parties in commerce cases are more concerned about judicial competency than philosophical leanings, preferring judges who are knowledgeable, fair, efficient, and consistent. These are all important judicial qualities for any case, but business parties particularly recognize their importance. Among other things, these elements greatly increase the likelihood of an early settlement, or at least reasonably cost-effective litigation.

In the context of medical malpractice, medical patients are the plaintiffs and doctors and other medical professionals are the defendants. While many litigants might agree that malpractice litigation would be more efficient with judicial specialization, many would be concerned about the possibility that the judges assigned to the program would lean philosophically towards the opposition, and that they could find themselves in an unfriendly, if not hostile, forum. Medical malpractice cases also are much more personal, visceral, and contentious, which makes these controversies generally less amenable to settlement and mediation than a commercial dispute. Finally, in medical malpractice cases, there is little, if any, incentive to settle based on a desire to preserve an ongoing business relationship.

Given these differences between business cases and most other classes of litigation, the fact that the Court already has specialized programs in place for some classes of complex cases, and the fact that consensus among members of the Bar would be difficult to achieve since most

practitioners are aligned consistently with either doctors or patients, there appears to be little interest or opportunity to consolidate medical malpractice cases into one program similar to that of the Commerce Program.

The Potential for Geographic Growth of the Commerce Program

In the interest of enhancing Pennsylvania's attractiveness as a site for corporate headquarters, an effort was made in the 1990s to create a specialized commercial court with statewide jurisdiction. County bar associations around the Commonwealth were very concerned that a specialized business court based in Philadelphia (and perhaps Allegheny County) would siphon off legal business from law firms in the smaller counties in favor of firms based in the urban centers of Philadelphia and Pittsburgh.

The creation of a multi-county or statewide business court would require legislation by the General Assembly. Although some of those interviewed thought a statewide Commerce Court would be advantageous for Pennsylvania, they acknowledged that the opposition would be very difficult to overcome—as it was in the 1990s.

As an alternative, a few interviewees thought a regional Commerce Program, composed of either five or nine Southeastern Pennsylvania Counties, would be desirable from the standpoint of economic competitiveness. Even with a smaller geographic scope and fewer judicial districts included, most acknowledged that local interests in the judicial districts would create substantial resistance to any change in the status quo. Opposition to geographic expansion of the Philadelphia Commerce Program could also come from business and economic development interests in Pennsylvania counties not included in the expanded jurisdiction on the basis they would be at a competitive disadvantage compared to counties served by a regional Commerce Program. Therefore, it appears that a multi-jurisdictional Commerce Program or Commerce Court is unlikely to receive serious consideration in the near future but, as discussed

below, the Philadelphia Commerce Program may readily serve as a model for commercial litigation programs for judicial districts serving second class/second class A counties (500,000 to 1,500,000 inhabitants) and perhaps the larger third class counties (225,000 to 500,000 inhabitants).

Is the CCP Trial Division More Efficient as a Result of the Commerce Program?

Many variables affect the efficiency of a court system: the volume of cases, the existence of judicial vacancies, the nature and complexity of cases, the quality of counsel, the state of the economy, and state and local rules of court—so that improvement in a given court system is very hard to measure with any degree of precision. Additionally, a good court system will also draw complex cases which might have been filed elsewhere had it not been for the improvement in time to trial and court reputation, so while the number of cases may remain consistent, the quality and quantity of justice may increase significantly.

Prior to the institution of the Program, the Court assigned complex business cases to judges throughout the Civil Program of the Trial Division. Now every case which is within the clearly defined Commerce Program jurisdiction is routed to one of three judges who specialize in commercial law. These judges are supported by seven law clerks.

The universal response of interviewees was that this sort of subject matter specialization results in more efficient handling of these cases and also improved the efficiency of the Civil Division by freeing the dockets of other civil judges of periodic encounters with complex multi-party business matters.

In addition, the posting of Program opinions by the Court was viewed very favorably by practitioners. A 211 page indexed Summary of Opinions is available, as well as an Index of Opinions, a Search Page, and a “Synopsis of Cases Transferred from the Commerce Program.”

These on-line resources represent a growing body of Program jurisprudence which counsel and parties can rely upon during the course of litigation.

The fact that these materials are freely available to litigants also facilitates consistency of decisions within the Program, because this growing body of law provides easily accessible precedent for many pre-trial issues which might not get frequent attention by Pennsylvania's appellate courts, but which could be very important to the outcome of a given case.

Choice of Forum: Federal Court or Commerce Program

In many commercial cases, the identity of parties to the dispute and legal questions at issue provide the basis for federal or state court jurisdiction. If jurisdiction is appropriate in two or more court systems (federal court and possibly multiple states), counsel may choose to file in any court where venue would be appropriate.

Two major issues impacting the decision about where to file a complaint are the expected time to trial and the reputation of the judges who may be assigned to hear the case. The demographics of the relevant jury pool may also be relevant to counsel's decision, but this is less significant in the context of a business dispute between two corporate entities than in the case of a corporate entity and an injured person. In the latter case, there is a perception among defense attorneys and corporate defendants that urban juries are more sympathetic with and more generous to plaintiffs than their suburban and rural counterparts.

Before the institution of the Program, the conventional wisdom among local trial attorneys was that it was preferable to file commercial cases in federal court. Prior to the reduction of the Court of Common Pleas civil case backlog during the 1990s, few corporate clients would have chosen to litigate a commercial dispute in the Philadelphia Trial Division if federal jurisdiction were available. The civil backlog that existed in the 1980s and early 1990s meant very few business cases were litigated in the Philadelphia Court of Common Pleas prior to

the late 1990s, when the Court's time to trial became competitive with the federal Eastern District of Pennsylvania.

When the backlog was brought under control, a second dynamic still weighed in favor of litigating in federal court. Federal judicial nominees are generally subject to an intensive background evaluation prior to nomination by the President and require confirmation by a majority of the U.S. Senate to assume office. In contrast, Common Pleas judges are elected by voters, most of whom possess little information about the candidates and base their decisions on the shorthand of party identification. Political considerations play a major role in both judicial selection processes, but the formality of the federal appointment process creates the appearance of a rational, "merit-based" system and the presumption of a better qualified federal judiciary.

In establishing the Commerce Program, the Philadelphia Court leadership overcame this traditional perception by assigning two well regarded Common Pleas judges to the Program. In time, members of the bar and their clients saw that the quality of justice and time to trial were factors favoring Commerce Program dispute resolution, and they also recognized the advantage of knowing that one of only three judges would be hearing their case. Interviewees indicated that these assignment decisions were essential to earning the trust of trial and corporate counsel.

The federal court, like smaller Pennsylvania counties, uses a rotating calendar system in which every judge hears every class of case within the federal jurisdiction—civil, criminal, and administrative. This generalist approach means that a litigant can draw any one of twenty judges appointed to the Eastern District (not including Senior Judges).

Given the importance of predictability and efficient resolution for commercial parties, the decision on venue became easier for litigants after the Program had demonstrated its effectiveness. The choice became one of appearing before one of three judges specializing in

commercial law, or the uncertainty of appearing before one of more than twenty judges who could be assigned the case in federal court.

On this basis, the litigators who were interviewed generally expressed a solid preference for filing a case in the Program, and had been advising their clients of the benefits of the Program, compared to federal court. Many also related stories of their corporate colleagues writing choice of forum clauses into commercial agreements specifying that disputes would be litigated in the Program. This change in attitude on the part of experienced litigators is probably the best endorsement for the Program, particularly since most litigators indicated they would have avoided bringing or defending a commercial dispute in the Court wherever possible earlier in their careers.

Specialization vs. Rotation

In more populous Judicial Districts, such as Philadelphia and Allegheny County, the Court of Common Pleas is divided into multiple divisions and judges specialize in one area of law, and perhaps even one class of case within this area of law. For example, in the Philadelphia Trial Division, some judges hear homicide cases exclusively.

In counties with a small number of judges, each member of the Court of Common Pleas may have a mixed calendar, hearing domestic relations cases one week, a homicide the next and a personal injury case the third. While this variety is probably more interesting for an individual judge, it is also arguably less efficient than having a judge who is an expert in one area of the law becoming more knowledgeable with each case heard.

For smaller jurisdictions, the volume of cases is light enough to permit every member of the court to hear cases within the full range of their jurisdiction. In large population centers, the courts could not function efficiently without specialized divisions and specialized programs within those divisions. Given this reality, the question arises as to whether it is best to have

judges spend most of their careers in a couple of assignments or to institute a regular rotation of judges between divisions and programs, in order to keep judges fresh and interested in their work and to ensure that all classes of litigants receive the same quality of justice. In the absence of a system of regular rotation, an argument can be made that the best or best connected judges will receive and remain in what the judges themselves view as the most desirable or prestigious assignments, whereas those who are not favored by the Bar or who lack political influence will languish in difficult or undesirable judicial assignments.

Those interviewed offered the full range of opinions on this subject, with some strongly favoring long-term or career specialization and others advocating regular, mandatory, and frequent rotation (1-2 year assignments) as best for both the public and the judges themselves. Most opinions fell between these two extremes, but it was noteworthy that even those who were strong proponents of regular rotations believe that given the nature of the subject matter, terms of service with the Program should be longer than other judicial assignments and having some prior business litigation experience as an attorney should be a positive factor in assignment to the Commerce Program.

Permanence of the Commerce Program

One debate focusing on the future of the Program is whether it should be institutionalized as a separate Division within the Philadelphia Court of Common Pleas. Currently the Court consists of the Trial Division, the Family Division, and Orphans' Court. For this institutionalization as a Division of the Court to be implemented, the Pennsylvania General Assembly would have to enact legislation. Given the political dynamic of the Commonwealth, it would be very difficult to pass a bill conferring a benefit on Philadelphia without legislators from other counties seeking local court funding or additional judgeships for their Judicial Districts, whether or not these changes would qualify as a good investment.

The Court created the Program, and it continues to exist pursuant to the authority of the Pennsylvania Supreme Court over the Courts of Common Pleas. Proponents of a separate Division argue that creation of a Commerce Division by the General Assembly would ensure the permanence of the program and, in turn, provide corporate parties with assurance that choice of forum clauses, which specify litigation before the Philadelphia Court of Common Pleas Commerce Program, would remain effective.

Equally important, we found that members of both the Bar and the Judiciary are very pleased with the Program - four years after its creation the Program has no real opposition or threats to its existence. The program has broad support among members of the bench and Bar and its permanence will be assured as long as it contributes to the efficient resolution of commercial cases in Philadelphia.

Potential Economic Benefits of the Commerce Program

In addition to the systematic efficiency gains which can be attributed to assigning Judges with substantive expertise to business cases, there are direct economic benefits to the City of Philadelphia. The anecdotal evidence that parties are choosing the Program as the venue to litigate contractual disputes means that cases which could be litigated elsewhere are coming to Philadelphia. This is not to say that Philadelphia is becoming a more litigious business environment, just that unavoidable litigation which might be brought somewhere else in the country is being drawn here based on the competitive advantage provided by the quality and efficiency of our court system.

Although economic benefits are difficult to quantify without hiring a team of economists, several interviewees made the point that Program litigation is good for local legal employment and Philadelphia's hospitality industry. One interviewee pointed out that in a recent case which would not have been brought in Philadelphia but for the availability of the Program there was a

hearing which required the attendance of approximately 100 attorneys, most of whom were from other cities and were staying in Center City hotels. This is just one observation, but it is credible and it does show that the Program has the potential for creating cash infusions directly into the local economy.

As discussed above, businesses consider a long list of factors when deciding where to site their headquarters and facilities. As evidenced by the experience of Delaware with its Chancery Court, the quality of available commercial dispute resolution a significant factor. Those who were interviewed agreed that the Program was an asset in the traditional realm of business siting competition. Some also emphasized the Program is good for Philadelphia law firms, which may benefit not only from siting decisions favoring Philadelphia which expand our local economy, but also from being able to offer potential clients based in other jurisdictions the services of litigators who are very experienced with the Program.

The Potential for Replication of the Commerce Program in other Pennsylvania Judicial Districts

As demonstrated by Philadelphia's experience, the efficiency gains and consistency of outcome achieved by judicial specialization could be readily implemented in other Pennsylvania Judicial Districts. In Philadelphia, the defined jurisdiction justified the initial assignment of two judges to this program, but even where there is insufficient commerce litigation for a full time judicial assignment, some of the larger counties could experience significant benefits by concentrating the existing commercial caseload before one judge, preferably a judge with meaningful commercial litigation experience before ascending to the bench.

Given the amount of time and volume of cases needed to build the reputation of a commercial program, the economic development opportunity provided by following the Philadelphia model is limited to the largest counties in Pennsylvania. However, Commerce

Program-inspired reforms could increase overall civil justice efficiency and improve commercial case settlement rates in medium-sized jurisdictions. Even for the least populous judicial districts, employing commerce program case management tools and the publication of opinions may facilitate more efficient resolution of those commercial cases which arise among local businesses, all of whom have all of the same interests as large corporations in the fair, efficient and prompt resolution of business disputes.

A Final Note: Catalysts for the Reforms and the Creation of the Commerce Program

The recent history of the civil justice system in Philadelphia is extensively documented in an earlier section of this report, but this subject deserves some additional attention here. There was consensus among interviewees that a decade of prior reforms undertaken by the Trial Division of the Court of Common Pleas was a prerequisite for the creation of the Commerce Program.

According to those we interviewed, reforms and innovations in both the Civil and Criminal Programs eliminated massive case backlogs and allowed the judiciary to take a proactive approach with the Program. Those with whom we spoke identified a number of individuals as the moving force behind various reform efforts. Members of both the Pennsylvania Supreme Court and the Philadelphia Court of Common Pleas received the most frequent recognition. Credit was also given to elected officials, court administrators and some very dedicated members of the Philadelphia Bar Association.

In the opinion of most interviewees, this was a multifaceted reform effort and any attempt to specify individual credit would necessarily overstate, understate or overlook some of the important contributions made by individuals who were committed to providing Philadelphia with an effective and modern civil justice system. In the span of a decade, the Philadelphia court

system eliminated an overwhelming backlog of civil cases and became one of a handful of jurisdictions in the United States to offer a specialized forum for business litigation. Four years later, this program is well regarded by the bench, the bar, and the business community. The broader lesson here is that a dedicated group of citizens, professionals, and elected officials can make a significant difference even when faced with the most adverse of circumstances, limited resources, and overwhelming sense of complacency.

As the Pennsylvania Judiciary and the Philadelphia Bar prepare to address the considerable challenges of reforming Philadelphia's Family Court Division, a system overwhelmed by volume, undermined by widespread pro se representation, and in great need of new facilities, this report should serve as a reminder of what the leaders and members of the bench and Bar are capable of when they work together. As with the efforts to reform the criminal and civil sides of the Trial Division, there will be no quick or easy solutions, but the steps leading to creation of the Commerce Program provide a framework for addressing what in many ways is a greater challenge.

Finally, whether or not those who created the Program envisioned it as an engine of economic development or just a more efficient means of business dispute resolution, the consensus of those interviewed is that it contributes significant revenue to the local economy and has the potential for enhancing Philadelphia's economic competitiveness.

Commercial conflicts are inevitable, but prolonged and expensive commercial litigation is not. The Philadelphia Commerce Program provides one more reason for sophisticated business people to bring, or maintain their businesses in Philadelphia.

APPENDIX “A”

A. Survey of Parties who have appeared in the Commerce Program of the Philadelphia Court of Common Pleas

The Commerce Program is a division of the Philadelphia Court of Common Pleas which has jurisdiction over certain specified classes of business and commercial litigation. The Committee of Seventy is conducting an independent and comprehensive study of this program and is seeking the input of a wide range of stakeholders, including corporate counsel. Your prompt response will assist our efforts to present a balanced report identifying both the strengths of the Program and opportunities for greater efficiency.

Note: We realize your corporation may have appeared in the Court of Common Pleas a number of times in the last four years. If you need assistance in determining which Commerce Program cases your firm has litigated to refresh your memory, please call our office at 215-557-3600. Please return the completed questionnaire by April, 2004 (date is contingent on mailing date) using the accompanying pre-addressed business reply envelope.

How familiar are you with the Philadelphia Commerce Program? Please check all that apply.

_____ I have participated in one or more Commerce Program Cases. How many? _____

_____ I have supervised the trial of one or more Commerce Program cases. How many? _____

_____ My corporation has been a party to at least one Commerce Program case. How many? _____

_____ I am aware of the Commerce Program through news accounts and discussions with colleagues.

_____ I was not aware that The Philadelphia Court of Common Pleas offers a Commerce Program for the resolution of business disputes. For more information about the program, please see: <http://courts.phila.gov/common-pleas/trial/civil/commerce-program.html>

Part I. Experience With the Bench

1. Since the Commerce Program's inception, how many cases has your organization litigated before a Commerce Program judge? _____
2. Before how many different Commerce Program judges has your organization appeared? _____

Part II. Commerce Program Practices

3. Are you familiar with the Commerce Program protocols making mediation available?
Yes___ No___

4. Have you had an opportunity to avail yourself of the mediation component of the program?

Yes___ No___

5. If you have used the program mediation process, please evaluate its effectiveness.

Very Effective_____1_____2_____3_____4_____5_____6_____No Help

6. The Commerce Program has approximately 90 to 100 Judges Pro Tempore to assist with mediation and with settlement conferences (these are attorneys with at least 15 years of trial experience as business litigators who volunteer their time with the program). As to the settlement conferences, do you find them to be helpful and effective in settling cases?

Very Effective_____1_____2_____3_____4_____5_____6_____No Help

7. How do you rate the Commerce Program overall?

Successful___1___2___3___4___5___6___Unsuccessful

8. If you have a choice of venue, would you direct a case to be heard in the Commerce Program?

Yes, very much_____1_____2_____3_____4_____5_____6_____No, not at all

9. If you have appeared in Commercial/Business/Chancery courts in other States and appeared before a Philadelphia Commerce Program Judge, how does your experience with the Philadelphia Commerce Program compare to your experience in other jurisdictions?

Very Favorable_____1_____2_____3_____4_____5_____6_____Very Unfavorable
 _____Not Applicable

Part III. Courteous and Responsive Treatment

	Strongly Agree					Strongly Disagree	No Contact
<i>Courtroom personnel:</i>							
10. Are friendly and courteous	1	2	3	4	5	6	9
11. Are available to answer my questions	1	2	3	4	5	6	9
12. Know the answers to my questions	1	2	3	4	5	6	9

13.	Are willing to take time to explain things to me	1	2	3	4	5	6	9
<i>Court Administrator's Office</i> personnel:								
14.	Are friendly and courteous	1	2	3	4	5	6	9
15.	Are available to answer my questions	1	2	3	4	5	6	9
16.	Know the answers to my questions	1	2	3	4	5	6	9
17.	Are willing to take time to explain things to me	1	2	3	4	5	6	9
<i>Prothonotary's Office</i> personnel								
18.	Are friendly and courteous	1	2	3	4	5	6	9
19.	Are available to answer my questions	1	2	3	4	5	6	9
20.	Know the answers to my questions	1	2	3	4	5	6	9
21.	Are willing to take time to explain things to me	1	2	3	4	5	6	9
Do you believe your treatment by the Program was influenced by your:								
22.	Age	1	2	3	4	5	6	
23.	Gender	1	2	3	4	5	6	
24.	Reputation of Counsel or Client	1	2	3	4	5	6	
25.	Nationality	1	2	3	4	5	6	
26.	Race/Ethnicity	1	2	3	4	5	6	

27. Have you had occasion to speak to and/or be spoken to by a judge of this Program?

Yes___ No___

28. If "Yes," how respectfully were you treated?

Very Respectfully ___1___ 2___ 3___ 4___ 5___ 6___ Very Disrespectfully

29. Have you had occasion to observe a judge of this Program carry out his official duties?

Yes___ No___

30. If “Yes”, how respectfully do you feel the judge treated the people with whom he was working?

Very Respectfully ___1___ 2 ___3___ 4 ___5___ 6 ___Very Disrespectfully

Part IV. Equality and Fairness

31. Based on your interaction with the Judges, to what extent are you satisfied with how you have been treated by the Program?

Very Satisfied ___1___ 2 ___3___ 4 ___5___ 6 ___Very Dissatisfied

32. Based on your observation of the Judges, to what extent do you believe that individuals have been treated fairly by the Program?

Very Satisfied ___1___ 2 ___3___ 4 ___5___ 6 ___Very Dissatisfied

33. Based on your interaction with the Court, to what extent are you satisfied with how your case has been treated by the Court?

Very Satisfied ___1___ 2 ___3___ 4 ___5___ 6 ___Very Dissatisfied

	Strongly Agree					Strongly Disagree
Based on your cases, Program rulings are affected by:						
34. Age	1	2	3	4	5	6
35. Gender	1	2	3	4	5	6
36. Reputation of Counsel or Client	1	2	3	4	5	6
37. Nationality	1	2	3	4	5	6
38. Race/Ethnicity	1	2	3	4	5	6

Part VI. Background

39. Your gender? ___Male___ ___Female___

40. Your age? 24 & Under 25-34 35-44 45-54 55-64 65-74 75 & Over

41. Race/Ethnicity: (Please circle)
- | | | |
|-------------------|-------------------------|------------------|
| African American | Caucasian | American |
| Native American | Asian | American/Pacific |
| Hispanic American | Other (please specify): | Islander/ |

Part VII: Comments

42. Please provide comments about particular service areas in the courthouse that you think are doing well or that need improvement.
43. Please use the space below to make any additional comments:
44. If you would like a comment passed on directly to the Commerce Program, please use the space below to do so.

Thank you for your cooperation in completing this survey.

The Committee of Seventy

Return the Survey to:

Parente-Randolph will insert the appropriate contact information

APPENDIX “B”

B. Cases Subject to the Commerce Program⁴⁵

Notwithstanding anything to the contrary in General Court Regulation 95-2 (Day Forward Program) or any other General Court Regulation, Jury, Non-Jury & Equity, and Class Action cases filed on or after January 1, 2000, but not Arbitration cases, shall be assigned to the Commerce Program if they are among the following types of actions:

1. Actions relating to the internal affairs or governance, dissolution or liquidation, rights or obligations between or among owners (shareholders, partners, members), or liability or indemnity of managers (officers, directors, managers, trustees, or members or partners functioning as managers) of business corporations, partnerships, limited partnerships, limited liability companies or partnerships, professional associations, business trusts, joint ventures or other business enterprises, including but not limited to any actions involving interpretation of the rights or obligations under the organic law (e.g., Pa. Business Corporation Law), articles or incorporation, by-laws or agreements governing such enterprises;
2. Disputes between or among two or more business enterprises relating to transactions, business relationships or contracts between or among the business enterprises. Examples of such transactions, relationships and contracts include:
 - (1) Uniform Commercial Code transactions;
 - (2) Purchases or sales of businesses or the assets of businesses;
 - (3) Sales of goods or services by or to business enterprises;
 - (4) Non-consumer bank or brokerage accounts, including loan, deposit cash management and investment accounts;
 - (5) Surety bonds;
 - (6) Purchases or sales or leases of, or security interests in, commercial, real or personal property; and
 - (7) Franchisor/franchisee relationships.
 - (8) Actions relating to trade secret or non-compete agreements;
 - (9) “Business torts,” such as claims of unfair competition, or interference with contractual relations or prospective contractual relations;
 - (10) Actions relating to intellectual property disputes;
 - (11) Actions relating to securities, or relating to or arising under the Pennsylvania Securities Act;
 - (12) Derivative actions and class actions based on claims otherwise falling within these ten types, and consumer class actions other than personal injury and products liability claims;
 - (13) Actions relating to corporate trust affairs;
 - (14) Declaratory judgment actions brought by insurers, and coverage dispute and bad faith claims brought by insureds, where the dispute arises from a business or commercial insurance policy, such as a Comprehensive General Liability policy,

⁴⁵ “Philadelphia Court of Common Pleas Trial Division – Civil, Administrative Docket 02 of 2003, In Re: Commerce Case Management Program,” *The Philadelphia Courts – First Judicial District of Pennsylvania* <http://courts.phila.gov/pdf/regs/2003/cptad02-03.pdf> (8 July 2004).

- and;
- (15) Third-party indemnification claims against insurance companies where the subject insurance policy is a business or commercial policy and where the underlying dispute would otherwise be assigned to the Commerce Program, not including claims where the underlying dispute is principally a personal injury claim.

APPENDIX “C”

C. Cases Not Subject to the Commerce Program⁴⁶

The following types of matters are not to be included in the Commerce Program;

- (16) Matters subject to Compulsory Arbitration in this Court or to the jurisdiction of the Municipal Court, including any appeals.
- (17) Personal injury, survival or wrongful death matters.
- (18) Individual (non-class) consumer claims against businesses or insurers, including products liability and personal injury cases.
- (19) Matters involving occupational health or safety.
- (20) Environmental claims not involved in the sale or disposition of a business and other than those addressed in Commerce Program types 9 or 10 above.
- (21) Matters in eminent domain.
- (22) Malpractice claims, other than those brought by business enterprises against attorneys, or accountants, architects or other professionals in connection with the rendering of professional services to the business enterprise.
- (23) Employment law cases, other than those referenced in Commerce Program type 3, above.
- (24) Administrative agency, tax, zoning and other appeals.
- (25) Petition Actions in the nature of Change of Name, Mental Health Act Petitions, Petitions to Appoint an Arbitrator, Government Election Matters, Leave to Issue Subpoena, or to Compel Medical Examination.
- (26) Individual residential real estate and non-commercial landlord-tenant disputes.
- (27) Domestic relations matters, and actions relating to the distribution of marital property, custody or support.
- (28) Any matter required by statute, including 20 Pa. C.S. Chapter 7, §§711 & 713, to be heard in the Orphans' Court or Family Court Division of the Philadelphia Court of Common Pleas, or other matter which has heretofore been within the jurisdiction of the Orphans' Court or Family Division of this Court.
- (29) Any criminal matter other than criminal contempt in connection with a Commerce Program Action.
- (30) Such other matters as the Court shall determine.

⁴⁶ *Id.*

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