

Report on South Carolina's Business Court Pilot Program

Presented to Chief Justice Jean H. Toal
September 8, 2009

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I. Introduction

In October 2007, South Carolina joined over a dozen other states in creating its Business Court Pilot Program. Chief Justice Jean Hoefer Toal's Administrative Order 2007-09-07-01 ("Order") established a business court on a two-year pilot basis in Charleston, Greenville, and Richland counties. The Order expires on September 30, 2009, and an evaluation was necessary to determine whether the program should cease, continue, or be made permanent. A committee appointed by Chief Justice Toal analyzed the Pilot Program using a variety of tools, and this report represents the results of that analysis. The committee recommends that the Pilot Program continue, with consideration given to several issues designed to improve the efficiency and effectiveness of the program.

II. Background

A. Development of South Carolina's Pilot Program

For almost a year, the South Carolina Bar's Task Force on Courts (the "Task Force") conducted extensive research on business courts across the country, analyzed various features of those courts, and identified a structure that it felt was best suited to the needs of business litigants in South Carolina. The Task Force memorialized its research and analysis in a report, which it presented to Chief Justice Toal on August 1, 2007.

The Task Force determined that South Carolina's need for a forum to hear business disputes is based on several factors: (1) business relationships are often complex, and South Carolina courts are involved in resolving disputes related to these relationships; (2) the body of law governing many business disputes depends on interpretation of complex statutes; (3) because efficient business operations require predictable options for resolving disputes, courts with expertise and repeated analysis of the applicable statutes may provide greater predictability and, thus, contribute to a more competitive business community.

In order to meet these needs, the Task Force recognized the following as best practices:

Assigning a single judge throughout the proceeding. Assignment of one judge to a case is one of the most important elements of a business court. Because business cases often have more opportunities for pre-trial resolution than other civil matters, a single judge enhances the parties' ability to resolve the matter efficiently. While South Carolina's Complex Case designation provides an avenue for securing one judge throughout a proceeding, the Task Force's research showed that having a case approved as complex is not always practical.

Development of a body of case law through written opinions. A written body of case law provides a level of predictability for parties, lawyers, and judges, and is a critical component of a successful business court.

Management of program by a single gatekeeper. Having a single person decide whether a case is appropriate for assignment to a business court is consistent with the experimental nature of a pilot program.

Promoting the use of technology. Using the business court as a forum to employ and even experiment with technology in state courts contributes to efficiency.

The Task Force's recommendations, which included these best practices, were presented to the South Carolina Bar's Board of Governors and then adopted by a vote of the House of Delegates on May 31, 2007. After studying the Task Force's report, on September 7, 2007, Chief Justice Toal issued the Order creating the Business Court Pilot Program. *See* Administrative Order 2007-09-07-01, attached as Exhibit A.

B. Description of South Carolina's Pilot Program

According to the Order, Business Court assignment is available for certain civil cases filed and subject to jurisdiction and venue in Charleston, Greenville, and Richland counties, or properly transferred to one of those counties pursuant to S.C. Code Ann. § 15-7-100. No minimum amount in controversy is required.

Judges. Three circuit court judges were assigned to preside over the Business Court, in addition to their other judicial duties: The Honorable Roger W. Young, Charleston County; The Honorable Edward W. Miller, Greenville County; and The Honorable J. Michelle Childs, Richland County.

Jurisdictional parameters. As stated in the Order, a case is appropriate for Business Court if the principal claim or claims are made under one of the following statutes:

- Title 33—South Carolina Business Corporations Act
- Title 35—South Carolina Uniform Securities Act
- Title 36, Chapter 8—South Carolina Uniform Commercial Code: Investment Securities
- Title 39, Chapter 3—Trade and Commerce: Trusts, Monopolies, and Restraints of Trade
- Title 39, Chapter 8—Trade and Commerce: The South Carolina Trade Secrets Act
- Title 39, Chapter 15—Trade and Commerce: Labels and Trademarks
- Such other cases as the Chief Justice may determine.

Consent is not required, and right to jury trial is preserved. A party must move for assignment of a case to the Business Court no later than 180 days after the commencement of the action using the form approved by the S.C. Supreme Court. The moving party must attach a complete description of the claims and the basis for Business Court assignment to the form motion, along with the filing fee. One party can move for assignment; consent of all parties is not necessary. The Chief Justice also can assign a case *sua sponte*. If a party moves for Business Court assignment, the Business Court judge makes a recommendation to the Chief Justice, who then decides whether assignment is appropriate. Further, if a case is assigned, a Business Court judge will have exclusive jurisdiction over the case. Importantly, a party moving for business court assignment is not required to waive its right to a jury trial.

Written opinions required. The Business Court judges are required to issue written orders for all decisions on Rule 12 motions to dismiss and Rule 56 motions for summary judgment, and those orders are to be made available on the Business Court web page, which is www.sccourts.org/busCourt/index.cfm. Written orders on other non-jury, pretrial matters are encouraged.

C. Evaluation Committee and Strategy

Chief Justice Toal appointed a committee of the following members to evaluate the Pilot Program: Kevin R. Dean of Motley Rice; Cory Manning of Nelson Mullins Riley & Scarborough, who is Vice Chair of the American Bar Association's Subcommittee on Business Courts; Stephanie Nye, Counsel to the Chief Justice; Pamela J. Roberts of Nelson Mullins Riley & Scarborough, who chaired the S.C. Bar's Task Force on Business Courts; Sandy Stern of Covington Patrick Hagins Stern & Lewis; Carmen Harper Thomas of Nelson Mullins Riley & Scarborough; and Bob Wells, Executive Director of the S.C. Bar (the "Evaluation Committee").

Members of the Evaluation Committee began their work on reviewing and analyzing the Pilot Program in May 2009. The Evaluation Committee met four times and engaged in numerous informal discussions regarding the Pilot Program and evaluation strategy. The Evaluation Committee's timeline is attached as Exhibit B.

III. Methodology

The Evaluation Committee used a variety of methods to obtain information about the cases that have gone through the program, to measure lawyers' reactions to the program, and to analyze the best practices that have developed since the program began in 2007.

A. Surveys of Lawyers

Input from lawyers who have participated in the Pilot Program was critical to the evaluation, so the Evaluation Committee developed a survey to distribute to the lawyers in cases in which a party moved for Business Court assignment (the “Lawyer Survey”). This group included cases in which the motions for assignment were both granted and denied. The survey questions and results are attached as Exhibit C. The Evaluation Committee used the resources of the South Carolina Bar’s relationship with Survey Monkey, an online tool that enables a user to electronically mail surveys to participants and collect the results electronically. Distributing the survey electronically enabled the Evaluation Committee to conserve resources and efficiently analyze the results. The Lawyer Survey was emailed to almost 100 lawyers; 40 responses were received.

On August 7, 2009, Evaluation Committee members Stephanie Nye and Kevin Dean presented information about the Business Court Pilot Program at the South Carolina Association for Justice (“SCAJ”) conference. As part of the presentation, Ms. Nye and Mr. Dean distributed a survey modeled on the Lawyer Survey and received 59 responses (the “SCAJ Survey”). The SCAJ Survey and results are attached as Exhibit D.

B. Review of Case Files

Another significant part of the evaluation involved reviewing all cases in which a party moved for Business Court assignment. The Evaluation Committee secured copies of Business Court case files from all three Pilot Program counties and then analyzed those files for individual case data. The case file review allowed detailed comparisons of the types of cases, their outcomes, case management, and other issues related to the program. The case data that was collected is summarized throughout the remainder of this report. Case file materials were not obtained after July 31, 2009.

C. Comments Solicited from Bar

In addition to the surveys targeted at specific audiences, the Evaluation Committee wanted to obtain comments from members of the South Carolina Bar generally. An announcement in the Bar’s E-Blast’s beginning on June 9, 2009, requested comments on the Pilot Program by July 8, 2009. In addition, the South Carolina Defense Trial Attorneys Association published a notice about the public comment period in its newsletter, The Defense Line, for Summer 2009. No comments were submitted to the email address set up by the Bar and publicized in these announcements.

D. Interviews with Judges

The Business Court judges also provided valuable input regarding the Pilot Program. Ms. Nye interviewed Judge Childs, and Mr. Wells and Ms. Nye interviewed Judges Miller and Young in June 2009. The questions used as a guide for the interviews are attached as Exhibit E.

E. Review of Other States' Activities

The Evaluation Committee leveraged some of the work that other states have done in evaluating their respective business court programs. At least 12 states had evaluation materials. The results of this review showed that lawyer surveys and judicial interviews were an effective tool for measuring reactions from lawyers that have used the programs. Useful questions from other lawyer surveys were adapted for the Lawyer and SCAJ Surveys. With regard to substantive changes to the program, other states revised forms to improve use and made other procedural improvements, but they typically continued their business court programs following the evaluation. Recently, however, other states have faced budget pressures and have decided to curtail or eliminate their business court programs.¹ South Carolina has not allocated funding to its Business Court Pilot Program. However, any funding cuts to the Judicial Department budget that would affect the circuit courts would also affect the Pilot Program.

F. Informal Interviews of Clerks of Court

Finally, the Clerks of Court in the three counties provided their thoughts on management of Business Court Pilot Program cases to Ms. Nye.

Information from each of these sources is presented in the remainder of this report.

IV. Results

A. Participation in the Pilot Program

Motions for Business Court assignment were made in 46 cases since the Pilot Program's inception, and the Chief Justice approved Business Court assignment in 42 cases.

¹ See, e.g., Mary C. Gill & Kerry K. Vatzakas, *Report on the Georgia Business Court Pilot Program*, 14 Ga. Bar. J. 38 (Apr. 2009) (noting that "[t]he most immediate challenge addressed by the Committee concerned the funding of the Business Court," and describing a proposal for a fee to transfer a case to the Business Court and another proposal to increase the number of judges available); Jackie Noblett, *Business court faces new trials*, Boston Business Journal (Aug. 7, 2009), available at <http://www.bizjournals.com/boston/stories/2009/08/10/story7.html> ("Combined with an increased case load commensurate with a recovering economy, the [funding] reductions could roll back some of the advances the court has made in making business litigation proceed with more speed and predictability—namely through the wildly popular Business Litigation Session in Suffolk Superior Court.").

Table A. Parties Moving for Business Court Assignment.

Decision to Move	Number of Cases
Parties consented	15
Plaintiff moved	21
Defendant moved	10
TOTAL	46

In five cases, the non-moving party opposed assignment; however, all five of those cases were subsequently assigned to the Business Court. The objections to assignment included assertions that the movant was using the potential Business Court assignment to delay a case that had been pending for several years. In another case, a party objected that assignment was not proper because it was requested more than 180 days after the complaint was filed.

Table B. Cases Recommended for Assignment by Business Court Judges and Assigned to Business Court by Chief Justice.

Business Court Judge's Assignment Recommendation on Assignment	Assigned by Chief Justice	Number of Cases
Yes	Yes	41
No	Yes	1
	No	4
	SUBTOTAL	5
	TOTAL	46

Table C. Status of All Cases Assigned to Business Court.

Status		Number of Cases
Active		25
Arbitration		2
Consolidated with case on general docket		1
Removed		1
Resolved	Dismissed by consent	4
	Settled	7
	Granted motion for summary judgment	1
	Judgment following non-jury trial	1
TOTAL		42

B. Lawyers' Thoughts About the Program

The Lawyer Survey shows that the Business Court met lawyers' expectations for the program, with 67% of respondents indicating a positive response to this question.² A small percentage of respondents, 8% or 3 people, indicated that the Business Court did not meet their expectations. Further, lawyers generally expressed that their clients were pleased with the Business Court experience, with 51% responding positively and only 15% responding negatively. A significant number, 33%, were neutral about their client's experience. One lawyer responding to the Lawyer Survey explained that the Business Court Pilot Program has restored some confidence in the legal system for his business clients. In addition, 58% of respondents to the Lawyer Survey wanted to keep the Business Court Pilot Program the same, while 38% wanted to modify the program, and 5% wanted to eliminate it.

The results in Table D show that lawyers perceive the greatest benefit of the Business Courts is having a single judge assigned to the case, followed by the judges' experience with business issues. While the total positive responses for efficient resolution were higher, the strength of the "strongly agree" choice for judicial experience makes judicial experience a stronger influence than efficient resolution. However, the two factors relating to judges contribute to efficient and predictable resolution of cases, which may be why the results for those questions are not as strong.

Table D. Significance of Factors in Deciding to Move for Business Court Assignment- Lawyer Survey.

Factor	Strongly Agree	Agree	Total
Opportunity to have a single judge assigned to my case.	75%	20%	95%
Potential for judge to have experience in business issues.	58%	30%	88%
Opportunity for efficient resolution of my case.	53%	38%	90%
Possibility of a predictable resolution.	35%	35%	70%

² All percentages for this report are rounded, so totals may not equal 100%.

**Table E. Significance of Factors in Deciding to
Move for Business Court Assignment- SCAJ Survey.**

Factor	Strongly Agree	Agree	Total
Opportunity to have a single judge assigned to my case.	61%	36%	97%
Opportunity for efficient resolution of my case.	42%	53%	95%
Potential for judge to have experience in business issues.	47%	44%	92%
Possibility of a predictable resolution.	29%	59%	88%

The potential for bias in favor of business is a common misperception about business courts; accordingly, the Evaluation Committee considered whether any evidence of bias existed in the Pilot Program cases. Critics argue that business courts would favor businesses by awarding more verdicts in favor of businesses than individuals. Because the program is still relatively new, the number of cases that have reached a final decision for all parties is small. The results were mixed in the only two cases where the final decisions were a result of Business Court proceedings.³ In the first case, individual plaintiffs with an ownership interest in a business prevailed over another member of the business and had the business dissolved. *See O'Brien v. Bowman*, 2008-CP-23-8557 (Greenville County). In the second case, individual defendants, who were the directors and officers of a corporation, prevailed over *pro se* individual plaintiffs who had ownership interests in the corporation and sued for breach of fiduciary duty. *See Brown v. Brown*, 2008-CP-23-0007 (Greenville County). In these two cases, the parties on both sides disputed activities of a closely held entity. Also, the prevailing party in both cases had moved for Business Court jurisdiction.

Based on a review of the types of parties in the Business Court,⁴ bias in favor of businesses should not be a concern. In the 42 cases assigned to the Business Court, individuals alone sued businesses or businesses and individuals in 16 cases. In most of those cases, however, the individuals sued as shareholders or as having some variation of an ownership interest in the business, making those cases more like business-to-business cases than a consumer suing a business.

South Carolina lawyers generally seem to believe that the Business Court is a fair option for a non-business party, with 46% of responses in the Lawyer Survey agreeing, 33% responding as neutral, and none disagreeing. While the plaintiffs' bar, which traditionally represents

³ Two cases assigned to the Business Court were resolved by arbitration. *See* Table C, *supra*.

⁴ Given the Pilot Program's short life, few cases have reached the stage where bias could be measured by a final verdict.

individual interests, typically may perceive business courts as biased, the SCAJ Survey shows that the overwhelming majority (68%) think the Business Court would be as fair to a non-business party as a business party, with only 8% in disagreement and 24% as neutral.

C. Jurisdiction

Table F shows the number of cases assigned to the Business Courts that relied on a particular enumerated basis for Business Courts jurisdiction. The number is greater than the total number of Business Courts cases because eight cases relied on more than one basis for jurisdiction.

Table F. Jurisdictional Basis for Business Court Cases.

Basis for Jurisdiction	Number of Cases
Title 33 – South Carolina Business Corporations Act	22
Title 35 – South Carolina Uniform Securities Act	1
Title 36, Chapter 8 – South Carolina Uniform Commercial Code: Investment Securities	0
Title 39, Chapter 3 – Trade and Commerce: Trusts, Monopolies, and Restraints of Trade	1
Title 39, Chapter 8 – Trade and Commerce: The South Carolina Trade Secrets Act	3
Title 39, Chapter 15 – Trade and Commerce: Labels and Trademarks	0
Any other case as the Chief Justice may determine	23

Of the cases assigned to the Business Courts relying on the “Other” category, the following table summarizes the nature of the claims.

**Table G. Nature of Claims in Business Court Cases
Designating “Other” as a Basis for Jurisdiction.**

Nature of “Other” Claims	Number of Cases
Breach of Contract	10
Shareholder Derivative Action	3
Breach of Covenant Not to Compete	2
Employment	2
Uniform Limited Liability Company Act	2
Misrepresentation (in addition to Business Corporations Act and Uniform Securities Act)	1
Non-Profit Corporations Act	1
S.C. Mortgage Brokers Act	1
S.C. Unfair Trade Practices Act (as only claim)	1
TOTAL	23

Of the cases assigned to the Business Court relying on the “Other” category, three cases also relied on the Business Corporations Act basis, one on both the BCA and the Uniform Securities Act bases, and two on the Trade Secrets Act basis. Therefore, six cases relied on “Other” as an additional basis for jurisdiction while 16 cases relied only on the “Other” category.

Comparing the actual case details to the opinions of lawyers on jurisdiction is instructive. Some lawyers responding to the Lawyer Survey indicated that they had cases that met the jurisdictional requirements for Business Court, but the Business Court was not the best option. One respondent elaborated that he limited motions for Business Court assignment to cases that “require[d] real-time decisions which affect the ongoing operations of an entity.”

In the Lawyer Survey, respondents generally favored keeping Business Court jurisdiction for a case of any size (with no jurisdictional limit) and with substantive limits on jurisdiction. In addition, while more respondents favored expanding the types of cases enumerated for jurisdiction (35%) than opposed an expansion (18%), more responses were neutral about expanding jurisdiction (48%).

Table H. Opinions on Nature of Business Court Jurisdiction- Lawyer Survey.

Opinion	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree
Limit jurisdiction to cases involving issues that could have a significant impact on the business community.	7.5%	20%	27.5%	37.5%	7.5%
Keep jurisdiction to any size as long as within substantive limits.	22.5%	40%	15%	17.5%	5%
Include more cases in substantive jurisdiction.	20%	15%	47.5%	10%	7.5%
Expand jurisdiction to cases of any size with no limit on substance.	5%	22.5%	27.5%	37.5%	7.5%

Suggestions were made to add Uniform Commercial Code, employment, S.C. Unfair Trade Practices Act, mass torts, and contract cases to the Business Court's jurisdiction. For purposes of the Pilot Program, and based on the results from the case file review showing breach of contract cases as the only predominating case type in the "Other" category (*see* Table G, *supra*), no clear need for expanding jurisdiction exists.

D. Venue

Pursuant to the Order, parties in cases in Charleston, Greenville, or Richland counties may move for assignment to Business Court, or cases in other counties may transfer to the Business Court if venue is otherwise proper in one of those three counties. The following table shows the number of cases in the three Pilot Program counties.

Table I. Motions for Business Court Jurisdiction by County.

County	Business Court Assignment Motions	Number of Cases
Charleston	Granted	14
	Denied	2
Greenville	Granted	24
	Denied	1
Richland	Granted	4
	Denied	1
	TOTAL	46

A motion to assign an Anderson County case to the Greenville County Business Court was granted, but the case settled before any Business Court proceedings occurred. *See Shingala v. Destination Hospitality, LLC*, 2007-CP-04-2447 (Anderson County).

Lawyers responding to both the Lawyer Survey and the SCAJ Survey requested that more counties be added to the Pilot Program. However, because a case may be transferred to one of the three current Business Court counties, if the transfer is appropriate under statute and the South Carolina Rules of Civil Procedure, this request may be based in part on the transfer option not being widely known. Thus, at this time, the Evaluation Committee suggests further education on the Pilot Program, including its transfer option, rather than expanding the program to other counties.

E. Written Orders

Written orders are a significant contribution to achieving the goals of the Business Courts. For this reason, written orders are required for Business Court decisions on motions under Rule 12 or Rule 56 of the South Carolina Rules of Civil Procedure. Written orders on other issues are encouraged. In the 42 cases assigned to the Business Courts, decisions on Rule 12 and Rule 56 motions have been entered in 11 cases. In those 11 cases, two written orders have been posted to the web site for Rule 12 decisions. Three opinions have been posted in other cases: two in the same case for decisions on motions for judgment on the pleadings, and one for a motion to enforce a settlement. Table J summarizes the status of written orders for the cases.

Table J. Status of Written Orders for Decisions on Rule 12 or Rule 56 Motions.

Decision on Rule 12 or Rule 56 Motion	Number	Written Order Posted	Number
Yes	11	No	9
		Yes	2
No	24	No	22
		Yes	3
Rule 12 or Rule 56 motion pending	4		
Not applicable because assignment not approved or case resolved by stipulation, etc. ⁵	7		
TOTAL	46		

⁵ *Hughes v. Moody*, 2008-CP-10-2444 (Charleston County), is included in the “Not Applicable” figure to avoid double counting a consolidated case, because *Hughes* is consolidated with *Estate of Stevenson v. Kavanaugh*, 2008-CP-10-1735 (Charleston County), which is included in the Yes row for Decision on Rule 12 motion and Opinion Posted.

In addition to the written orders that have been posted, four written orders on Rule 12 or Rule 56 motions have not been posted as of the date of this report. Based on the number of page views, each of the posted orders was viewed an average of 251 times in July 2009.⁶

Lawyers responding to the Lawyer Survey favored the requirement of written orders and wanted more written orders with more case law and analysis so they can be used in advising clients and for precedent in future cases. One lawyer also requested that the Business Court not follow the practice of soliciting proposed orders from the parties because soliciting proposed orders may not result in the substantive opinions that are the intent of the Business Court. The lawyer's response also noted that orders drafted by a particular party may reflect the writing party's bias. However, a practical approach may be for the judge to ask both sides to prepare proposed orders or to agree upon the order before submitting it to the Court. Given the number of rulings that have not been reduced to a written order, requesting proposed orders may be an effective method to increase the number of written orders in the Business Court.

F. Judges

The interviews with the Business Court judges were invaluable to the Evaluation Committee's review of the Pilot Program. Overall, the judges found the program to be effective and successful. All of the judges favored extending the Pilot Program.

The judges have attended the American College of Business Court Judges' annual meeting and expressed their desire to continue that training while they serve as Business Court judges. The judges generally complimented the lawyers litigating in Business Court for their professionalism. They agreed that a business background is not a requirement for a Business Court judge, but it is helpful. An ability to manage cases efficiently also is important. The judges indicated that their law clerks helped manage the Business Court cases effectively. With no resources allocated to the Pilot Program, the law clerks are an integral part of the judges' ability to manage the case load. The judges also communicate informally with each other regarding their practices and procedures for Business Court cases.

A consistent concern of the judges was the level of communication among the parties, the Clerks' offices, and the judges and their law clerks. More communication is needed to ensure the cases are handled efficiently.

The Lawyer Survey results showed that lawyers generally agree that judges are more involved in managing Business Court cases than other civil cases, with 46% agreeing and only 21% disagreeing. Lawyers also agreed that they communicated more with the Business Court judges than judges in other cases, with 49% agreeing and only 17% disagreeing. In addition,

⁶ Email from Winkie Clark, Internal Applications Manager, South Carolina Judicial Department, to Carmen Harper Thomas, Business Courts Evaluation Committee (Aug. 17, 2009).

most lawyers felt that the judges should not rotate every few years, with 48% expressing disagreement with that idea and only 33% agreeing. However, a difference of only 15 points may not be significant, so this idea should be reconsidered as the Pilot Program matures.

Several lawyers responding to the Lawyer Survey wanted to have full-time Business Court judges as the program grows and demand is created. One judge also thought a dedicated Business Court judge might be appropriate if the Pilot Program becomes permanent.

G. Rules and Procedures

The Lawyer and SCAJ Surveys and the judge interviews provided detailed information about procedures, especially from the open-ended questions on the surveys. Lawyers with experience in federal court and in other states offered insightful comparisons that can instruct management of the Business Court. Based on this input, opportunities exist in many areas of the Pilot Program.

The form motion for assignment was revised in November 2007 primarily to make clear that consent of both parties was not required for the motion. The case file review noted other areas where the form motion was adapted by parties filing motions for Business Court assignment:

- When a party moved for Business Court assignment outside the 180 days, the number of days on the motion was changed.
- Parties did not always attach a description of the claims to the motion, as the motion specifies, so the instruction could be clearer.
- Parties were sometimes confused about whether to pay the \$25 motion fee; this fee is required for all motions.
- Some parties did not submit the form motion but instead drafted a motion in the traditional caption and narrative format.

In addition, lawyers responding to the surveys listed a variety of possible improvements to the Pilot Program:

- Adopt rules or practices specific to the Business Court.
- Adopt procedures for electronic discovery similar to federal rules.
- Streamline the filing process for documents in Business Court cases.

- Scheduling or Timing
 - Require an initial scheduling conference to set scheduling order and briefing schedules, if applicable, or a status conference soon after assignment to the Business Court. Note that at least eight responses made a specific suggestion related to improved scheduling practices.
 - Limit the time period in which hearings of any type may be set.
 - Develop a process for scheduling Business Court motions hearings. One respondent suggested a Business Court day or term on the calendar.
- Assignment
 - Generally improve the process of assignment to eliminate inefficiencies and confusion.
 - Give the Chief Administrative Judge authority to recommend a case for Business Court assignment.
 - Refine the assignment process with Clerk's offices to improve communication about the status of assignment motions.
 - Make Business Court assignment automatic, like removal, so the parties know the status of the case.
- Make consolidation of related cases presumptive.

The open-ended responses to the surveys are attached with the surveys. These procedural proposals should be considered by a panel convened to recommend Business Court rules, as explained in the Recommendations section below.

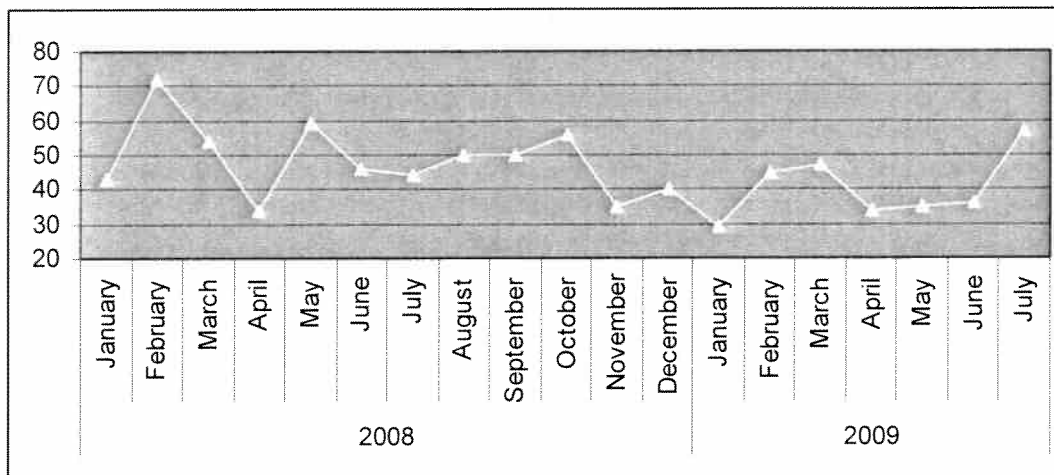
H. Technology

Although the Order encourages the use of technology in the Business Court, the Lawyer Survey showed that most lawyers had neutral responses to the question of whether they used technology more in Business Court cases than other civil cases, and 30% responded in the negative. One response to the Lawyer Survey proposed having standing instructions regarding the use of technology for the Business Court. Several lawyers acknowledged that they used Trial Director or PowerPoint in hearings or used email to exchange briefing and schedule hearings.

Once more cases reach the discovery and trial phases, one judge expects that technology use will increase.

In addition to courtroom or case management technology, the Pilot Program uses the internet to share information. The following chart shows the trend of unique page views of the main Business Court page within the S.C. Judicial Department web site, <http://www.sccourts.org/busCourt/index.cfm>, which is attached as Exhibit F.⁷

Chart A. Unique Page Views for Business Courts Web Site Main Page.



The Order requires that the written Business Court orders be posted on the Judicial Department's web site. As more opinions are posted to this web page, the organization and formatting of the page will need to be addressed to accommodate more opinions and facilitate access to them.

V. Recommendations

The following recommendations are based on the results of the Evaluation Committee's research and analysis of the Business Court Pilot Program.

A. Continue the Pilot Program for Two Years

This recommendation is consistent with the judges' and lawyers' opinions on the program. Although the Pilot Program should continue, some modifications are needed to address input received through this evaluation. A proposed order is attached as Exhibit G.

⁷ Email from Winkie Clark, Internal Applications Manager, South Carolina Judicial Department, to Stephanie Nye, Business Courts Evaluation Committee (Aug. 17, 2009).

B. Improve Awareness of Program Among Lawyers

While the Pilot Program has been successful, a greater number of cases in the Business Court would reflect acceptance of the program by the Bar. Because the traditional concerns related to business courts do not appear to be present with regard to South Carolina's Business Court, a possible strategy for increasing the number of cases is simply to increase awareness of the program among lawyers.

The Evaluation Committee intends to present the Business Court to lawyers in a variety of ways. A first step was the presentation related to this evaluation at the South Carolina Association for Justice conference. The Business Court also is on the agenda at the South Carolina Bar convention in 2010 and possibly at the South Carolina Defense Trial Attorneys Association meeting in November 2009. The Evaluation Committee also recommends developing written materials about the program to distribute to lawyers at events like these conferences. Further, the Evaluation Committee recommends publishing this report or its executive summary, along with other Business Court documents, on the Judicial Department's web site and improving the web site's searching functionality for Business Court opinions and other related documents.

C. Jurisdiction

The Evaluation Committee recommends no change to the program's current jurisdictional structure. The current structure, with its clear focus on business and commercial cases and an option for "Other" cases, is best suited to carry out the goals of the Pilot Program. The structure provides the Chief Justice the flexibility to include the cases that would benefit from business court treatment and would further the goals of the Pilot Program.

As noted above, the Evaluation Committee received feedback from lawyers around the state. This feedback suggested that the program's jurisdictional parameters should include the following types of cases: (1) mass torts and other "complex" negligence cases; (2) employment cases; (3) cases brought under the South Carolina Unfair Trade Practices Act ("SCUTPA"); and (4) breach of contract cases.

1. Mass Torts

The Evaluation Committee does not recommend including mass tort and other "complex" negligence cases in the list of specific cases that are presumptively appropriate for Business Court treatment. First, the Complex Case Designation program is appropriate to address the complex tort cases in South Carolina circuit courts. Among other things, this program provides for a single judge throughout the matter and date-specific trial dates. Second, the Business Court Program provides relief for these cases by moving cases that qualify for Business Court treatment from the general docket. Third, mass tort cases tend to have similar issues from case

to case, which has already resulted in a set of precedents in South Carolina for these issues. Finally, specifically designating these cases as appropriate for Business Court treatment is inconsistent with the goal of providing a forum for matters involving issues specific to business and commercial litigants. To the extent a case (or set of cases) involving complex tort issues may be appropriate, the Chief Judge has the ability to designate such tort cases for Business Court treatment.

2. Employment Cases

For the same reasons stated for mass tort cases, the Evaluation Committee does not recommend designating employment cases as presumptively appropriate for Business Court treatment. Even more so than mass tort cases, employment cases tend to involve issues that are largely similar from one case to the next. There is also a large body of law in South Carolina regarding these issues.

3. SCUTPA Cases

Developing a coherent and consistent body of case law on the State's unfair trade practices statute is certainly desirable and consistent with the overall goals of the Business Court program; however, the Evaluation Committee does not recommend designating SCUTPA cases as presumptively appropriate for Business Court treatment for several reasons in addition to those stated above. Very often cases that implicate business issues and commercial interests are brought as SCUTPA claims. Likewise, those cases that focus on business interests also include SCUTPA claims, plus additional claims that fall within the present jurisdictional parameters. Furthermore, including SCUTPA claims in the presumptively appropriate list could flood the business court program with cases that are unlikely to determine questions of law directly pertinent to business interests, which would run counter to the program's purpose.

4. Breach of Contract Cases

While breach of contract cases comprised the largest portion of cases relying on the "Other" basis for jurisdiction, the Evaluation Committee believes they are inappropriate for presumptive Business Court jurisdiction. Contract cases are not always cases that implicate business or commercial interests, and they are not always complex or require focused attention from a single judge. These cases are ideal for the "Other" category, and to the extent such cases are appropriate for Business Court, a party has the option to move for assignment under the "Other" basis for jurisdiction.

D. Judges

The judges currently assigned to the Business Court have been effective and should continue to preside over the extended Pilot Program. In addition, all judges who will serve as a

Business Court judge should attend appropriate training such as the American College of Business Court Judges conference.

E. Rules and Procedures

The Evaluation Committee recommends two measures to assist parties in litigating cases in the Business Court.

First, the Evaluation Committee recommends revising the motion form to clarify (further) that assignment to the program is not contingent on the consent of the parties. Any party may move for Business Court assignment. During the review, the Evaluation Committee received feedback from various individuals which suggested a certain level of confusion on this issue. The Evaluation Committee believes that a relatively simple change to the motion form will help to avoid such confusion in the future. Additional changes can address the issues noted above in the discussion of the form. *See Part G, supra.* A proposed revised motion is attached to this report as Exhibit H.

Second, the Evaluation Committee recommends convening a panel to explore the development of a written set of rules and procedures specific to the Business Court program. This set of rules and procedures would be modeled after the current rules of civil procedure or local federal rules, but would be tailored, where appropriate, to the goals of the Business Court. The panel would present its recommendation to the Chief Justice before the end of the program's second pilot period. As part of this effort, the panel would meet with the Business Court judges on a periodic basis to discuss rules and procedures. In the interim before the panel's recommendations are proposed, the Business Court judges have the authority under S.C. Code Ann. § 14-5-310 to "make and establish all necessary rules for the orderly conducting of business in" the circuit courts, which necessarily include the Business Court. The judges can adopt and publish procedures or guidelines to manage the Pilot Program cases. The proposed order extending the Pilot Program recognizes this authority. An area where the Business Court can be improved is by attention to the assignment and case management process between the parties, judges, and Clerks of Court offices. The panel on procedures can address this and other issues raised by the judges and lawyers who contributed to this evaluation.

F. Sharing Best Practices and Trends

The Evaluation Committee recommends ongoing review of the program, including regular communications with the judges and periodic reports to the Chief Justice and the judges regarding best practices and trends in other jurisdictions.

VI. Conclusion

The Pilot Program phase of the South Carolina Business Court is a resounding success, and with modifications based on input from judges and lawyers, the Business Court can continue to provide an efficient option for resolving business disputes. The Business Court is becoming a clear value to both litigants and the judicial system.

Exhibit A.

Administrative Order 2007-09-07-01

The Supreme Court of South Carolina

Re: Business Court Pilot Program

ADMINISTRATIVE ORDER

Pursuant to the provisions of S.C. Const. Art. V § 4,

I find that the South Carolina Bar has petitioned the Supreme Court of South Carolina to create a pilot program establishing a business court in the circuit courts of this state to handle complex business, corporate, and commercial matters. This recommendation originated from the South Carolina Bar's Task Force on Courts at the request of the South Carolina Bar's president and with my approval.

Establishment of Business Court Pilot Program

It is **ORDERED** that a pilot program be established in the Circuit Courts of South Carolina creating a "Business Court" for civil matters properly filed and subject to jurisdiction and venue in Charleston, Greenville, and Richland Counties, or properly transferred to one of those counties pursuant to §15-7-100 of the South Carolina Code of Laws. Assignment to the business court does not require that the parties waive their right to a jury trial.

Designation of the Business Court Judges

In addition to their other duties as circuit court judges, the following judges shall be assigned to preside over the business courts:

The Honorable Roger W. Young - Charleston County

The Honorable Edward W. Miller- Greenville County

The Honorable J. Michelle Childs - Richland County

Jurisdiction of the Business Court

1. Without respect to the amount in controversy, civil matters in which the principal claim or claims are made under the following Titles of the South Carolina Code of Laws are appropriate matters to be assigned to the business court:

a. Title 33—South Carolina Business Corporation Act of 1988;

- b. Title 35—South Carolina Uniform Securities Act of 2005;
- c. Title 36, Chapter 8—South Carolina Uniform Commercial Code: Investment Securities;
- d. Title 39, Chapter 3—Trade and Commerce: Trusts, Monopolies, and Restraints of Trade;
- e. Title 39, Chapter 8—Trade and Commerce: The South Carolina Trade Secrets Act;
- f. Title 39, Chapter 15—Trade and Commerce: Labels and Trademarks; or,
- g. for such other cases as the Chief Justice may determine.

Management and Disposition Procedures for Business Court

2. Assignment of cases to the business court may be made by the Chief Justice *sua sponte* or at the request of counsel.
3. Counsel shall request assignment of a case to the business court no later than 180 days after the commencement of the action. The request must be made on SCCA BC Form 101 to the business court judge who shall make a recommendation to the Chief Justice, through Court Administration, regarding assignment of the case to the business court.
4. The Chief Justice's decision shall be indicated on the SCCA BC Form 101, and copies of SCCA BC Form 101 shall be provided by Court Administration to counsel of record, the assigned business court judge, chief judge for administrative purposes (civil), and clerk of court for the respective pilot county.
5. If the Chief Justice approves the request, the Chief Justice shall assign exclusive jurisdiction over the case to the business court judge of the respective pilot county.
6. The business court judge shall coordinate with the chief judge for administrative purposes (civil) of the respective pilot county and Court Administration to schedule hearings and/or the trial.
7. The Chief Justice shall review the case load activity for the three designated business courts periodically during the duration of the pilot program to ensure efficiency and appropriate use of judicial resources.

Business Court Orders Available Online

8. The business court judge shall issue written orders with respect to all decisions on motions to dismiss under Rule 12 of the South Carolina Rules of Civil Procedure and motions for summary judgment under Rule 56 of the South Carolina Rules of Civil Procedure. The business court judge is encouraged to issue written orders on other non-jury, pretrial matters. All business court orders pursuant to motions to dismiss under Rule 12 of the South Carolina Rules of Civil Procedure and motions for summary judgment

under Rule 56 of the South Carolina Rules of Civil Procedure shall be publicly available through the Judicial Department's website at www.sccourts.org. The business court shall forward the orders to Court Administration to be posted.

Effective Date

9. This pilot program applies to all civil matters filed in Charleston, Greenville, and Richland counties or properly transferred to one of those counties pursuant to §15-7-100 of the South Carolina Code of Laws, after October 1, 2007 and shall remain in effect for a period of two years thereafter, unless rescinded or modified by future order of the Chief Justice.

10. To the extent available in a business court forum, the use of technology by parties in matters assigned to the business court is encouraged. The business court judge presiding over a matter shall make the final determination on whether the use of technology in any proceeding or conference is warranted.

IT IS SO ORDERED.

s/ Jean Hoefer Toal _____
Jean Hoefer Toal, Chief Justice

Columbia, South Carolina
September 7, 2007

Exhibit B.

Evaluation Committee Timeline

South Carolina Business Courts Pilot Program EVALUATION TIMELINE

Italics indicate tentative or proposed dates.





September 7, 2007	Chief Justice Toal issues Administrative Order establishing program.
October 1, 2007	Program effective date, as set by order, to remain in effect for a period of two years.
May 22, 2009	Evaluation planning meeting.
June 2, 2009	Evaluation committee met to develop evaluation strategy.
June 3- July 30, 2009	Committee reviews case files.
June 8, 2009	Public comment period began.
June 12, 2009	Evaluation Committee met to finalize survey.
June 17, 2009	Survey is distributed to lawyers and litigants with response deadline of June 23, 2009.
June 16, 2009	Interview with Judge Childs.
June 18, 2009	Interview with Judge Young.
June 22, 2009	Reminder email to lawyers who had not responded to emailed survey giving them until June 30, 2009, to respond.
June 24, 2009	Interview with Judge Miller.
June 30, 2009	Survey responses due.
July 8, 2009	Public comment period ends.
July 15, 2009	Evaluation Committee met to review results of survey, case file review, and judge interviews.
August 7, 2009, 11:30 a.m.	Presentation at the SCAJ Annual Convention in Hilton Head.
September 3, 2009	Committee met to review final draft of report and develop strategy going forward.
September 8, 2009	Committee issues evaluation and recommendations for future of Pilot Program.
<i>September 15, 2009</i>	Chief Justice Toal issues new Administrative Order implementing recommendations.
September 30, 2009	Program end date, as set by order, two years after effective date of October 1, 2007.
<i>November 2009</i>	Presentation at Commercial Law Subcommittee meeting of S.C. Defense Trial Attorneys Association.
January 21-24, 2010	Presentation at S.C. Bar Convention.

Exhibit C.





Lawyer Survey

Business Court Survey

1. The Business Court met my expectations.

		Response Percent	Response Count
Strongly Agree		33.3%	12
Agree		33.3%	12
Neutral		25.0%	9
Disagree		8.3%	3
Strongly Disagree		0.0%	0
answered question			36
skipped question			4

2. The opportunity for efficient resolution of my case was important in deciding to move for assignment to the Business Court.

		Response Percent	Response Count
Strongly Agree		52.5%	21
Agree		37.5%	15
Neutral		7.5%	3
Disagree		2.5%	1
Strongly Disagree		0.0%	0
answered question			40
skipped question			0

3. The possibility of a predictable resolution was important in deciding to move for assignment to the Business Court.

		Response Percent	Response Count
Strongly Agree	<input type="checkbox"/>	35.0%	14
Agree	<input type="checkbox"/>	35.0%	14
Neutral	<input type="checkbox"/>	22.5%	9
Disagree	<input type="checkbox"/>	5.0%	2
Strongly Disagree	<input type="checkbox"/>	2.5%	1
answered question			40
skipped question			0

4. The opportunity to have a single judge assigned to my case was important in deciding to move for assignment to the Business Court.

		Response Percent	Response Count
Strongly Agree	<input type="checkbox"/>	75.0%	30
Agree	<input type="checkbox"/>	20.0%	8
Neutral	<input type="checkbox"/>	2.5%	1
Disagree	<input type="checkbox"/>	2.5%	1
Strongly Disagree		0.0%	0
answered question			40
skipped question			0

5. The potential for the judge to have experience in business issues was important in deciding to move for assignment to the Business Court.

		Response Percent	Response Count
Strongly Agree	<input type="checkbox"/>	57.5%	23
Agree	<input type="checkbox"/>	30.0%	12
Neutral	<input type="checkbox"/>	10.0%	4
Disagree	<input type="checkbox"/>	2.5%	1
Strongly Disagree		0.0%	0
answered question			40
skipped question			0

6. The Business Court should only hear cases involving issues that could have a significant impact on the business community.

		Response Percent	Response Count
Strongly Agree	<input type="checkbox"/>	7.5%	3
Agree	<input type="checkbox"/>	20.0%	8
Neutral	<input type="checkbox"/>	27.5%	11
Disagree	<input type="checkbox"/>	37.5%	15
Strongly Disagree	<input type="checkbox"/>	7.5%	3
answered question			40
skipped question			0

7. The Business Court should hear cases of any size as long as a case is within the substantive jurisdiction of the Business Court.

		Response Percent	Response Count
Strongly Agree	<input type="checkbox"/>	22.5%	9
Agree	<input type="checkbox"/>	40.0%	16
Neutral	<input type="checkbox"/>	15.0%	6
Disagree	<input type="checkbox"/>	17.5%	7
Strongly Disagree	<input type="checkbox"/>	5.0%	2
answered question			40
skipped question			0

8. The Business Court should hear cases of any size and involving any business issue without a limit on the substantive jurisdiction.

		Response Percent	Response Count
Strongly Agree	<input type="checkbox"/>	5.0%	2
Agree	<input type="checkbox"/>	22.5%	9
Neutral	<input type="checkbox"/>	27.5%	11
Disagree	<input type="checkbox"/>	37.5%	15
Strongly Disagree	<input type="checkbox"/>	7.5%	3
answered question			40
skipped question			0






9. Business Court jurisdiction should include more types of cases than are now included.

		Response Percent	Response Count
Strongly Agree	<input type="checkbox"/>	20.0%	8
Agree	<input type="checkbox"/>	15.0%	6
Neutral	<input type="checkbox"/>	47.5%	19
Disagree	<input type="checkbox"/>	10.0%	4
Strongly Disagree	<input type="checkbox"/>	7.5%	3
answered question			40
skipped question			0


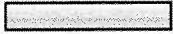
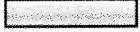
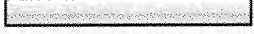

10. The level of judicial management and involvement in my Business Courts Pilot Program case was greater than in non-Business Court cases.

		Response Percent	Response Count
Strongly Agree	<input type="checkbox"/>	15.4%	6
Agree	<input type="checkbox"/>	30.8%	12
Neutral	<input type="checkbox"/>	25.6%	10
Disagree	<input type="checkbox"/>	17.9%	7
Strongly Disagree	<input type="checkbox"/>	2.6%	1
Not Applicable	<input type="checkbox"/>	7.7%	3
answered question			39
skipped question			1



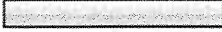


11. Business Court judges communicate more with counsel than other judges.

		Response Percent	Response Count
Strongly Agree		15.4%	6
Agree		33.3%	13
Neutral		33.3%	13
Disagree		12.8%	5
Strongly Disagree		5.1%	2
	answered question		39
	skipped question		1

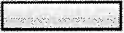

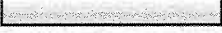
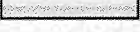
12. Different judges should rotate onto the Business Court every few years.

		Response Percent	Response Count
Strongly Agree		7.5%	3
Agree		25.0%	10
Neutral		20.0%	8
Disagree		37.5%	15
Strongly Disagree		10.0%	4
	answered question		40
	skipped question		0





13. My client generally was pleased with the experience of the Business Court.

		Response Percent	Response Count
Strongly Agree		12.8%	5
Agree		38.5%	15
Neutral		33.3%	13
Disagree		7.7%	3
Strongly Disagree		7.7%	3
		answered question	39
		skipped question	1

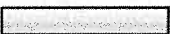




14. Based on my experience in the Business Court, the Business Court is as fair to a non-business party as a business party.

		Response Percent	Response Count
Strongly Agree		17.9%	7
Agree		28.2%	11
Neutral		33.3%	13
Disagree		0.0%	0
Strongly Disagree		0.0%	0
Not Applicable		20.5%	8
		answered question	39
		skipped question	1

15. Business Court jurisdiction is a useful alternative to a Complex Case designation.

		Response Percent	Response Count
Strongly Agree		32.5%	13
Agree		52.5%	21
Neutral		12.5%	5
Disagree		0.0%	0
Strongly Disagree		2.5%	1
answered question			40
skipped question			0

16. All parties thought assignment to the Business Court was appropriate for our case.

		Response Percent	Response Count
Strongly Agree		25.0%	10
Agree		47.5%	19
Neutral		10.0%	4
Disagree		15.0%	6
Strongly Disagree		2.5%	1
answered question			40
skipped question			0

17. I had cases that met the jurisdictional requirements for the Business Court, but the Business Court was not the best option.

		Response Percent	Response Count
Strongly Agree	<input type="checkbox"/>	0.0%	0
Agree	<input type="checkbox"/>	7.5%	3
Neutral	<input type="checkbox"/>	42.5%	17
Disagree	<input type="checkbox"/>	45.0%	18
Strongly Disagree	<input type="checkbox"/>	5.0%	2
If your answer to this question is affirmative, please describe the reasons you decided not to bring your cases into the Business Court, to the extent you are able to do so without violating the attorney-client privilege.			2
answered question			40
skipped question			0

18. I used technology—emails, phone or video conferencing, or other forms of communication—more in my Business Court cases than in typical Circuit Court cases.

		Response Percent	Response Count
Strongly Agree	<input type="checkbox"/>	2.5%	1
Agree	<input type="checkbox"/>	5.0%	2
Neutral	<input type="checkbox"/>	50.0%	20
Disagree	<input type="checkbox"/>	25.0%	10
Strongly Disagree	<input type="checkbox"/>	5.0%	2
Not Applicable	<input type="checkbox"/>	12.5%	5
answered question			40
skipped question			0

19. Please describe how technology was used in your Business Court case. If you did not use technology, please describe why you think technology was or is not being used.

	Response Count
	14
<i>answered question</i>	14
<i>skipped question</i>	26

20. Please indicate how you think the Business Court Program should proceed.

	Response Percent	Response Count
Keep the Business Court program the same. <input type="checkbox"/>	57.5%	23
Modify the Business Court program but do not eliminate it completely. <input type="checkbox"/>	37.5%	15
Eliminate the Business Court program completely. <input type="checkbox"/>	5.0%	2
<i>answered question</i>		40
<i>skipped question</i>		0

21. Please list your suggestions for procedures the Business Courts should consider adopting.

	Response Count
	25
<i>answered question</i>	25
<i>skipped question</i>	15

22. Please list your suggestions or criticisms of the Business Courts Pilot Program.

		Response Count
		19
	<i>answered question</i>	19
	<i>skipped question</i>	21

23. If the Business Courts Pilot Program Evaluation Committee could contact you to follow up on your responses, please list your name, email address, and phone number.

		Response Count
		23
	<i>answered question</i>	23
	<i>skipped question</i>	17

Business Court Survey

Open-ended Responses
Compiled July 1, 2009

17. I had cases that met the jurisdictional requirements for the Business Court, but the Business Court was not the best option.

If your answer to this question is affirmative, please describe the reasons you decided not to bring your cases into the Business Court, to the extent you are able to do so without violating the attorney-client privilege.

- I try to limit applications to the business court to those cases which require real-time decisions which affect the ongoing operations of an entity. You find this is not always necessary.
- Unable to answer due to client restrictions.

19. Please describe how technology was used in your Business Court case. If you did not use technology, please describe why you think technology was or is not being used.

- We used trial director to present documentary evidence.
- The courtroom was not well-equipped to handle more current technologies for oral argument. Further, if there are specific technologies that should be employed, or specific hoops to jump through to allow technology work in the courtroom, it would be helpful for the Business Court to issue a standard practice/standing instructions re the requirements that are easily accessible to inform Business Court litigants.
- I wasn't appropriate for this case.
- Communication with Business Court is better than a normal case. That has a lot to do with one judge knowing the file and managing the file. This is a very important aspect of the program.
- Not really used - opportunity didn't really arise.
- We have just been assigned to the business court program and have yet to have our first hearing.
- E-mail of briefing to the judge and use of e-mail to schedule hearings.
- The role technology played in Business Court was similar to the role technology plays in other Courts.
- We only used emails and phone conferencing in the business court case that I previously had. Other forms of technology were not particularly called for in my case.
- PowerPoint was used at our one hearing.
- We are at early stages of litigation, so technology issues have not arisen.
- Routine email only so far.
- Our case did not present a need to use technology.
- I did not think it was used enough.

21. Please list your suggestions for procedures the Business Courts should consider adopting.

- Rulings should be issued more quickly.
- The court should be given more time so that it can hold hearing more promptly.
- As the Court currently operates, it serves essentially as a way to have claims "fast tracked", but lacks the organization and efficiencies that are present in others' business/commercial courts. I would highly recommend the following practices listed below. These type of changes could make the Business Court into a more efficient and desirable venue in which to litigate. Adopt a set of "Business Court" rules & practices, similar to that

of the District of SC's Local Rules. Require initial scheduling conference with the judge to set a scheduling order & set briefing schedules, if applicable. Require the parties to conduct something akin to a 26(f) conference. Require briefing schedules on motions. The current practice of dropping an opposition brief in the judge's and adversary's lap at the hearing is antiquated & works against the supposed efficiencies of the business court. Yet, it happens all the time. Institute page limits (like the local federal district court rules). It is very clear that the judges do not read the briefs prior to the hearing. This is frankly a waste of time and money for the litigants. It is embarrassing when the court is unaware of what motion is even before him during argument. Enforce a real requirement that the court issue a written opinion on its ruling on motions – as opposed to a solicitation of a short proposed order from the parties. To make the Business Court attractive, litigants need certainty in the court's rulings & the specific basis for the decision. This is routinely done in other jurisdictions, but was for the most part side-stepped in this pilot program. This was extremely disappointing. By requiring & enforcing a requirement that business court judges issue their own opinions (not solicited proposed orders), SC can start to build a body of law that relates to business issues and provide more certainty in the business community. Right now, there is an alarming lack of published opinions in SC on business issues. Such a body of law would provide businesses with guidance, allow the state to start building precedence on important issues, and winnow serious issues of dispute for appeal. Additionally, requiring business court judges to draft their own opinions would eliminate bias in any proposed orders that may help the plaintiffs' or defense bar in other pending or future cases. Provide a time limit in which a hearing may be set by the court. In our cases, counsel used the fact they were in business court to call the judge's chambers & try to schedule immediate hearings. If there were a rule about the time limit in which a hearing may be set (i.e., on a motion to dismiss, a hearing shall be set within 30/45/60 days of completion of briefing, etc.), this would provide more certainty for the parties and potentially eliminate those calls. There was no clear procedure for getting a hearing scheduled on a motion in business court -- the motions were instead put into docket/hearing rotation with regular circuit court cases. Some certainty to litigants re a hearing procedure for the court would be helpful. As the Business Court stands now, it's the same as litigating in circuit court, except that there is one judge & the case moves a lot quicker. If a body of rules is not set, or if the current structure of the court is made permanent, the business court will likely become an boon to the class action/complex litigation plaintiffs' bar – it will essentially be a way for plaintiffs to get expedited discovery, expedited hearings on motions, with the unfortunate circumstance that the judge in charge is busy with a normal case load and is highly unlikely to read briefs, have a background on highly complex cases, or draft much needed opinions on issues of first impression in SC. A set of procedures would greatly aid the attractiveness (as opposed to federal court removal or litigating in circuit court) to business litigants.

- Immediate status conferences after cases are designated to the court.
- (1) Have standing orders either for entire business court program or for each judge with longer default deadlines for briefing (the motion AND any supporting briefing, response/opposition, and reply) than what is provided in Rule 6(d). (2) As part of the above or by separate order or agreement, require parties to agree to service by email (absent extraordinary circumstances). (3) Institute procedures to eliminate the limbo while the motion to transfer is pending. In this regard, one option would be for automatic transfer (like removal to federal court) with the S.C. Supreme Court's rejection of a case functioning like a remand. That way, everyone knows where the case is, which can be important when the case is moving quickly in a TRO/prelim injunction context. Also, on a similar note, need to better clarify to clerk of court staff what the motion to transfer is, how to handle, and develop a system whereby they are notified when case is transferred so that the court is sure to get the briefing (this may have happened already with more cases being transferred to business court). (4) Provide for electronic discovery procedure (for electronically stored information

or "ESI") along the same lines as revised federal rules, and perhaps, provide for a more detailed procedure along the lines of some local federal rules.

- 1) Expansion into additional counties, such as Lexington, York, and Spartanburg. 2) Expediting motions for assignment to business court. 3) Consider procedural alterations that will expedite the filing and calendaring of motions before the business court. 4) Continue education of the bar via speakers at various CLE's of the opportunities and advantages of business court.
- I would like to see the Court take on cases in some additional areas: Construction, lender liability.
- Have applications for assignment go to the administrative judge for the circuit.
- The Court needs to continue to be selective as to the cases it accepts or else it will just become another full service common pleas court.
- I would include an objective "sophistication" requirement - business experience, amount in controversy, etc. - not just all business disputes.
- I believe that the Court should consider full time business court judges, like the Chancellors in Delaware, as the business of the business court grows and such a demand is created.
- The business community views the courts and lawyers with disdain and they do not trust the jury system. This special program has done more to instill ownership in the process for business clients and has restored some faith in the system. I represent both sides, but my business clients have always been frustrated by the lack of case momentum on motions when a file rotates among judges. The Business Court allows a case to be managed by one judge and cuts down on the shenanigans that some lawyers may try to pull by having one judge deny them and then ask for the same relief from a rotating judge. Of course, it helps that the judge in the Greenville program has a good business sense and has a broad-based practice background prior to taking the bench. I applaud the Chief Justice and the committee for the Business Court program. These are complicated, knotty cases in the program and they need particularized attention above and beyond complex designation.
- Early status conference on discovery.
- In my experience, it is great as is.
- Business court should have jurisdiction to hear cases involving non-competes and provide for a mechanism for expedited declaratory judgment proceedings as provided by Rule 57.
- The calendaring of motions and trials was somewhat informal. Frankly, I didn't mind this, but if there are more cases, there might need to be a "business court" term or day on the calendar, when hearings or trials may be called. It would give more predictability in scheduling.
- Assignment to the Business Court should be simpler and more efficient.
- More streaming lining for filing. May include educating the clerk's office more about the program.
- Would like to see a separate docket, with accelerated deadlines, and more aggressive case management by the court.
- Better scheduling of matters - make it more like federal court with mandatory discussions of discovery; discovery scheduling orders, etc.
- Electronic filing; immediate scheduling of hearings when motions are filed; Presumption toward consolidation of actions when multiple actions are filed involving the same subject matter.
- All matters involving the UCC should be within the business court's substantive jurisdiction.
- I think judges should be assigned to be Business Court judges and not handle other cases. In my experience the judges were busy with other items and thus it did not seem to any more efficient.
- The business court should be expanded to embrace additional commercial disputes, primarily contract-based in focus. The business court should have a designated calendar dates each

month for motions. This will allow motions to be heard on a more predictable basis. The business court should have more formalized scheduling orders.

22. Please list your suggestions or criticisms of the Business Courts Pilot Program.

- Only problem was that lack of court reporter and court time make scheduling motions more difficult than I would have hoped.
- Please see above in Q21 for suggestions. My main criticisms, also reflected in Q21, are the following below. Please note - these criticisms are not of any particular judge's intellect or desire to serve as part of the business court, but are more a reflection of how busy business court judges are managing a regular docket & the business court docket. The court would be greatly improved by having judges who solely sit on a business court, who build an expertise and do not have a competing docket, or who have a reduced circuit/general sessions case load. - the court did not read briefs, and seemed overwhelmed at oral argument - the court rarely drafted opinions in response to substantive motions - counsel for both defendants and plaintiffs rarely served briefs before a hearing - this is not efficient practice in a business court where the parties are facing complex issues. - the lack of established procedures and rules for the business court leads to a somewhat chaotic, uncertain and inefficient process for litigants and judges. A set of business court procedures akin to "Local Rules" would greatly enhance the court's efficiency.
- Still appears to be confusion with the clerk's office in the process of getting the case from the circuit court to the Supreme Court and back again.
- Criticisms all relate from the procedures recommended above.
- I thought it was helpful to have one judge hear all arguments; however, my client would probably disagree. This is due more to outcome than anything.
- I believe the viability of the program rests on the quality of the business court judges. They must be able to hear business court cases and resist the call to turn every business dispute into an emotion laden witch hunt. Not every business break up or failure is a fraud, and they need to have a healthy skepticism that prevents bad fact from creating bad law and encourages a use of the business statutes the legislature has created for resolving these disputes. The wrong judge in the program could make it useless. Judge Miller is an excellent choice.
- Good program that gets your case heard quicker.
- My experience with the Business Court Program has been excellent.
- I have had very good experiences - no suggestions or criticisms at this time.
- None.
- Too narrow. Does not accept enough cases
- In general, I don't like the idea of creating separate courts or programs for classes of civil litigation--I think they can be handled in the usual, standard common pleas system. Thus, I am opposed to the idea of Business Court. However, the specific experience I had with the Business Court was very positive.
- The judge was not any more familiar with our case than any circuit judge I typically have with other cases. There was at least as much time between the filing of a motion and the hearing as in any other circuit court case.
- 1. Matters involving the UCC were not necessarily within the scope of the Business Court's substantive jurisdiction. 2. The process of acquiring a reference to the Business Court was cumbersome, inefficient, and one of the strongest reasons to not seek venue before the Court.
- I believe the Judges should hear only business cases and develop expertise on various business issues that could come up. I have had the opportunity to handle matters in the Business Court in North Carolina and having judges dedicated to that court is good.
- Currently, the business court is too lax.

- I fully support the continuation of the program in Charleston County and am hopeful that Judge Young will continue to participate. He is a unique judicial resource that is well-suited to the program based on his background, temperament, and fairness. My involvements with the business court have been positive, so I do not have any particular suggestions or criticisms, other than to say that the substantive jurisdiction of the Business Court should remain somewhat flexible, in my opinion.

23. If the Business Courts Pilot Program Evaluation Committee could contact you to follow up on your responses, please list your name, email address, and phone number.

- [Personal information was not included in the Evaluation Report.]

Exhibit D.

South Carolina Association for Justice Survey

South Carolina Business Courts Pilot Program

SC ASSOCIATION FOR JUSTICE CONFERENCE LAWYER SURVEY

Total Completed Surveys: 59

Please complete this survey by circling the appropriate response. Unless otherwise indicated, all questions refer to the South Carolina Business Courts Pilot Program.

1. Before today, I had some knowledge of the South Carolina Business Courts Pilot Program.

Strongly Agree –	Agree –	Neutral –	Disagree –	Strongly Disagree –
13	32	4	9	1

2. If appropriate, I would recommend to my client the use of the Business Court.

Strongly Agree -	Agree –	Neutral –	Disagree –	Strongly Disagree
11	38	9	1	

3. The opportunity for efficient resolution of my case would be important in deciding whether to move for assignment to the Business Court.

Strongly Agree -	Agree –	Neutral –	Disagree –	Strongly Disagree
25	31	2	1	

4. The possibility of a predictable resolution would be important in deciding whether to move for assignment to the Business Court.

Strongly Agree –	Agree –	Neutral –	Disagree –	Strongly Disagree
17	35	6	1	

5. The opportunity to have a single judge assigned to my case would be important in deciding whether to move for assignment to the Business Court.

Strongly Agree –	Agree –	Neutral –	Disagree --	Strongly Disagree
36	21	1	1	

6. The potential for a judge to have experience in business issues would be important in deciding whether to move for assignment to the Business Court.

Strongly Agree –	Agree –	Neutral –	Disagree –	Strongly Disagree –
28	26	3	1	1

7. Business Court jurisdiction should include more types of cases than are now included.

Strongly Agree –	Agree –	Neutral –	Disagree –	Strongly Disagree –
12	17	21	2	7

8. Different judges should rotate onto the Business Court every few years.

Strongly Agree –	Agree –	Neutral –	Disagree –	Strongly Disagree –
7	25	19	5	3

9. Overall, I think that a business court would be fair to the clients whom I represent.

Strongly Agree –	Agree –	Neutral –	Disagree –	Strongly Disagree –
14	26	14	3	2

10. Please list your suggestions, criticisms, or comments regarding the Business Courts Pilot Program or business courts in general, especially if you have suggestions that would make the Business Court an effective option for your clients.

“Expand jurisdiction to all complex litigation. Traveling judge for other circuits.”

“I have participated in the business court program in Richland County with a positive experience. Having a single judge assigned to a complex business case was valuable.”

“Need to expand potential disputes.”

“Too narrow a view on which cases qualify even when both parties agree to the business court.”

“I would suggest that Florence and Aiken be added to cover the state better.”

“Expand counties. Expand cases – some serious personal injury or catastrophic cases should be considered. Possibly include two tracks for different cases – sample schedule vs. complex schedule.”

“The Plaintiff’s Bar wants to be reassured that this program and others limit and will not lengthen the time that “non-business court cases” will take to get to trial. I think the program is a very good idea.”

“I look forward to implementation of the program on a full time basis.”

“If concept proves successful, should consider expanding principles to other areas involving complex cases (med mal, professional negligence, wrongful death, survival, products liability).”

“I have appeared before the business court in North Carolina and had reasonably good experience with the judges there. The problem I have experienced is that in North Carolina the business court is so overwhelmed with cases, plus the judges still covers regular court as well, it often takes months to schedule a hearing and months to receive a ruling.”

“There is a perception that the business court is/will be pro-business and anti-consumer. Until this perception is proven wrong, business court will be a tough sell to the plaintiff’s bar. Ensure a level playing field, and it will take hold.”

“Give the Clerks of Courts or the Chief Administrative Judges discretion to transfer certain cases to the business court program if they deem it appropriate (even if the parties do not consent).”

“I have not used the court but due to the complexity of these types of issues, this sounds like a good idea.”

“Needs to be available in Horry County, Beaufort County -- other than limited to three.”

“The North Carolina Business Court has the reputation of being a “tool” for corporations, with judges selected based primarily on corporate/business experience (bias?). North Carolina lawyers tell me that business court in North Carolina is pro-business and anti-consumer/individual. BIG QUESTION: How will South Carolina Business Court judges be chosen? From sitting circuit court judges or elected directly to business court based on “business experience?”

“I understand the history of business courts across the country has been judges become too “friendly” towards business interests, anti-consumer/individual. I see no reason to give businesses legal “benefits” unavailable to my individual clients.”

“Extend the pilot program to Florence, so that the Pee Dee area of South Carolina is covered.”

“I have one case in the business court and the program seems effective. I just hope this remains a business court and not a place for consumer cases like sometimes happens in North Carolina. Moreover, judges of business court should rotate through the counties. Otherwise we should eliminate the circuit system of rotation altogether.”

“Would like to see it for any complex case.”

“Set forth the advantages over arbitration (binding/non-binding) mediation.”

“I do not practice any business law, so I am not qualified to comment. I have a great fear that the court’s jurisdiction will expand to consumer issues or other cases between individuals and businesses. In such cases, the individuals and consumer will be forced into a forum in which the business interests are far more comfortable and indeed the court has at least the appearance of favoring businesses. I have heard this has happened in other states.”

“May want to consider adding another one or two “business” courts or business court judges to hear business cases in the areas of the state outside of the three currently

available counties. Complex cases would definitely benefit from having knowledgeable judges (knowledgeable in legal and contractual background) available and assigned.”

“All cases should be assigned to a single judge as in federal court.”

“A single judge would be helpful in complex cases. On the other hand, I have heard criticism of North Carolina business court program as being “business-friendly.”

“Before today I had no knowledge of the business court pilot program. However, I am heavily involved in complex litigation. Therefore, I am currently in favor of any program where complex cases are assigned to one judge to handle throughout the litigation process.”

“Add Horry County. Have not had an opportunity but agree it would be helpful for certain matters. Would like to leave as option. Not mandatory.”

“Expand number of counties included or add a provision allowing change of venue from neighboring counties.”

“May need more exposure to the Bar.”

Please return this survey either to the box marked Business Court Surveys at the conference registration table, by fax to (803) 799-4118 (SC Bar's fax), by email with PDF attached to bwells@scbar.org, or by mail to the following address by August 12, 2009:

South Carolina Bar
Attn: Bob Wells
Post Office Box 608
Columbia, SC 29202-608

Exhibit E.

Questions as Guidance for Judge Interviews

South Carolina Business Courts Pilot Program
QUESTIONS FOR PRELIMINARY JUDGE INTERVIEWS

Judge Name: _____

Date of Interview: _____

Interviewer: _____

1. Now that the program is underway, do you think it is accomplishing its goals (efficiency, predictability, experience) and meeting expectations?
2. How do you think your geographic location and the business community in that area has influenced the use of the business court program?
3. What do you think about continuing the pilot program?
4. What issues do you think need to be resolved? What holes in procedure or substance need to be filled in?
5. What aspects of managing business court cases are most difficult?
6. What aspects of managing business court cases do you favor?
7. How do you feel about publishing your opinions? Do you have any concerns or suggestions about that process?
8. Can you identify any improvements to the process of communicating case information to the Chief Justice's office, specifically for the recommendations for business court jurisdiction and generally for the status of cases as they are resolved?
9. How does the management of business court cases compare to management of complex cases?
10. Have you developed any procedures to accommodate business court cases?

11. How have you allocated resources to business court cases? Do you need resources for the business court pilot program beyond what you can access now?
12. How have you used technology in the business court cases before you?
13. Do you communicate with other business court judges about the program?
14. Since the program began, what training have you received as a judge for the business courts pilot program? Can you identify any training needs?
15. Do you feel like your background has been helpful in being a business court judge?
16. Do you have any concerns or requests that you think the survey and evaluation should address?
17. Can you suggest any business court cases before you that present notable issues, procedures, parties, or other issues that would be particularly worthy of evaluation?

Exhibit F.

Business Court Web Page
as of September 7, 2009

Business Court Pilot Program

<u>SCCABC101</u>	Order for Case Assignment to the Business Court Pilot Program
<u>2007-09-07-01</u>	Business Court Pilot Program Administrative Order
<u>2007-11-30-01</u>	Motion and Order for Case Assignment in the Business Court Pilot Program SCCA BC 101 (11/07)
<u>2008-09-19-01</u>	Brown v. Brown
<u>2008-10-03-01</u>	Venture Investment Properties Group, Inc. v. Whaley's Mill, L.P.
<u>2008-10-13-01</u>	Venture Investment Properties Group, Inc. v. Whaley's Mill, L.P.
<u>2009-02-10-01</u>	Order Granting in Part, and Denying in Part Defendant's Motion to Dismiss
<u>2009-04-13-02</u>	Lennon v. Smith

Exhibit G.

Proposed Order Extending
Business Court Pilot Program

The Supreme Court of South Carolina

Re: Business Court Pilot Program Extension

PROPOSED ADMINISTRATIVE ORDER

Pursuant to the provisions of S.C. Const. Art. V § 4,

I find that the South Carolina Business Court Pilot Program, established on September 2, 2007, by Order 2007-09-07-01, has operated for two years since its effective date of October 1, 2007, and has successfully created an option to litigate complex business, corporate, and commercial matters in the circuit courts of this State. A committee appointed to evaluate the Pilot Program issued a report, based on input from the Business Court judges and lawyers, recommending extension of the Pilot Program and other modifications to enhance the program's effectiveness.

IT IS ORDERED that the Business Court Pilot Program, as established in Order 2007-09-07-01, shall be extended for two years, effective October 1, 2009.

The judges designated as Business Court judges are to continue to preside over the Business Court.

In accord the laws and rules governing the courts of this State, Business Court judges are authorized to determine administrative procedures for Business Court cases that are consistent with the South Carolina Rules of Civil Procedure to the extent practicable. Any Business Court procedures shall be publicly available on the Judicial Department's web site at www.sccourts.org.

IT IS SO ORDERED.

Jean Hoefer Toal, Chief Justice

Columbia, South Carolina

_____, 2009

Exhibit H.

Proposed Revised Form Motion for
Business Court Assignment

STATE OF SOUTH CAROLINA,) IN THE CIRCUIT COURT
)
 COUNTY OF)
) **MOTION AND ORDER FOR CASE ASSIGNMENT**
) **TO THE BUSINESS COURT**
 Plaintiff) **PILOT PROGRAM**
)
 vs.)
)
 Defendant.) CASE NO.

1. As counsel for a party who has appeared in this action, we move for an order of the Chief Justice assigning this case to the Business Court Pilot Program of the South Carolina Circuit Courts. We certify that as of the date of this Motion, no more than 180 days have passed since the commencement of this action. In addition, we certify that all parties have been notified of this request.

2. The principal claim or claims made in the above-referenced matter are made under the following Titles of the South Carolina Code and the matter is appropriate for assignment to the Business Court Pilot Program. (Note: Please check all that are applicable, and attach a description of the claims made in the above-referenced lawsuit.).

- ☐ Title 33—South Carolina Business Corporation Act of 1988;
☐ Title 35—South Carolina Uniform Securities Act of 2005;
☐ Title 36, Chapter 8—South Carolina Uniform Commercial Code: Investment Securities;
☐ Title 39, Chapter 3—Trade and Commerce: Trusts, Monopolies, and Restraints of Trade;
☐ Title 39, Chapter 8—Trade and Commerce: The South Carolina Trade Secrets Act;
☐ Title 39, Chapter 15—Trade and Commerce: Labels and Trademarks; or
☐ Other Appropriate Matter determined by the Chief Justice.

3. Insert name and contact information of moving party or parties:

Party: _____	Party: _____
Name: _____	Name: _____
Bar No.: _____	Bar No.: _____
Address: _____	Address: _____
Phone: _____ Fax: _____	Phone: _____ Fax: _____
Email: _____	Email: _____
Signature: _____	Signature: _____
Date: _____	Date: _____

*Add additional signature lines and contact information as necessary.

4. Indicate whether the non-moving party or parties ☐ consents, ☐ does not oppose, ☐ opposes: ☐ position on assignment is unknown.

Recommendation of the Business Court Judge: ☐ **Recommends** ☐ **Declines to Recommend**

Signature of Business Court Judge

Date

Assignment to the Business Court Pilot Program for _____ County is hereby ☐ **ORDERED** ☐ **DENIED**.

It is further ☐ **ORDERED** ☐ **DENIED** that exclusive jurisdiction over this case be assigned to the Honorable _____ to hear and handle all pretrial motions and other matters pertaining to this case.

And it is SO ORDERED.

 Jean Hoefer Toal, Chief Justice

This _____ day of _____
 Columbia, South Carolina