



NEVADA LEGISLATURE
LEGISLATIVE COMMISSION'S SUBCOMMITTEE
TO STUDY THE BENEFITS, COSTS, AND FEASIBILITY OF
THE IMPLEMENTATION OF COURTS OF CHANCERY
(Assembly Concurrent Resolution No. 35, File No. 109, *Statutes of Nevada 2007*)

SUMMARY MINUTES AND ACTION REPORT

The second meeting of the Legislative Commission's Subcommittee to Study the Benefits, Costs, and Feasibility of the Implementation of Courts of Chancery was held on March 18, 2008, at 10 a.m. in Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. The meeting was videoconferenced to Room 2134 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. A copy of this set of "Summary Minutes and Action Report," including the "Meeting Notice and Agenda" ([Exhibit A](#)) and other substantive exhibits, is available on the Nevada Legislature's website at www.leg.state.nv.us/74th/Interim. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (e-mail: publications@lcb.state.nv.us; telephone: 775/684-6835).

SUBCOMMITTEE MEMBERS PRESENT IN LAS VEGAS:

Senator Bob Beers, Chairman
Senator Terry Care
Senator Barbara K. Cegavske
Assemblyman William C. Horne
Assemblyman Tick Segerblom

SUBCOMMITTEE MEMBER PRESENT IN CARSON CITY:

Assemblyman John C. Carpenter

LEGISLATIVE COUNSEL BUREAU (LCB) STAFF PRESENT:

Jennifer Chisel, Senior Research Analyst, Research Division
Kevin C. Powers, Senior Principal Deputy Legislative Counsel, Legal Division
Bryan Fernley-Gonzalez, Deputy Legislative Counsel, Legal Division
Lucinda Benjamin, Senior Research Secretary, Research Division

OPENING REMARKS

Senator Bob Beers, Chairman, welcomed members, presenters, and the public to the second meeting of the Legislative Commission's Subcommittee to Study the Benefits, Costs, and Feasibility of the Implementation of Courts of Chancery.

APPROVAL OF THE "SUMMARY OF MINUTES AND ACTION REPORT" OF THE MEETING HELD ON JANUARY 29, 2008, IN LAS VEGAS

- The Subcommittee **APPROVED THE FOLLOWING ACTION:**

SENATOR CARE MOVED TO APPROVE THE MINUTES OF THE JANUARY 29, 2008, MEETING IN LAS VEGAS, NEVADA. THE MOTION WAS SECONDED BY ASSEMBLYMAN SEGERBLUM, WHICH PASSED UNANIMOUSLY. SENATOR CEGAVSKE WAS NOT PRESENT FOR THE VOTE.

OVERVIEW REGARDING BUSINESS COURTS IN OTHER JURISDICTIONS

- Chairman Beers discussed the panel format for the meeting and asked the panel members to provide the Subcommittee members with their professional biographies. Please refer to [Exhibit B](#) for complete biographies of the presenters.
- Lee Applebaum, Attorney, is a litigation partner in Fineman, Krekstein & Harris, Professional Corporation, Philadelphia, Pennsylvania, focusing his work on business and commercial litigation matters, as well as insurance coverage and bad faith cases. He has been involved in a wide variety of disputes involving real estate, the *Uniform Commercial Code*, business torts, contract actions, securities law claims, employment disputes concerning wrongful termination and restrictive covenants, insurance coverage and defense matters, and has litigated, written, and spoken extensively on civil litigation regarding the Racketeer Influenced and Corrupt Organizations Act (RICO).
- Mitchell L. Bach, Attorney, member in Eckert Seamans Cherin & Mellott, Limited Liability Corporation, Litigation Division, Philadelphia, Pennsylvania. Mr. Bach has extensive experience in a wide variety of civil matters including securities fraud, RICO, construction litigation, intellectual property litigation, environmental litigation, banking litigation, and major commercial disputes. Mr. Bach is also highly skilled in the use of alternative dispute resolution techniques, having made innovative use of such cost-saving methods throughout his career.
- Merrick L. Gross, Attorney, Akerman Senterfitt, Miami, Florida, primarily practices in the areas of commercial litigation, banking and lending litigation, class actions, construction, bankruptcy and creditors' rights, and e-discovery. He has industry experience in banking and financial institutions and insurance. Mr. Gross was

appointed by Chief Justice R. Fred Lewis to the Florida Supreme Court Task Force on Management of Cases Involving Complex Litigation. He also has extensive experience writing and lecturing on the subject of business courts.

Robert L. Haig, Attorney, Kelley Drye & Warren Limited Liability Partnership, New York, New York, focuses on commercial, personal injury, and other types of civil litigation in federal and New York State courts and both the trial and appellate levels. As co-chair of the Commercial Courts Task Force, Mr. Haig was instrumental in developing and expanding the Commercial Division of the New York State Supreme Court. The program's accomplishments have inspired a number of other states, including California, Connecticut, Massachusetts, Pennsylvania, and Rhode Island, to establish their own commercial sections, modeled on the New York system. Mr. Haig has advised many other states on creation of business courts and continues to be active in this area.

- The Honorable Ben F. Tennille, North Carolina Business Court, Greensboro, North Carolina, was appointed the first Special Superior Court Judge for Complex Business Cases in the Greensboro Business Court established in 1996, which was the first statewide business court in the nation. He has presided over the growth and development of the North Carolina Business Court, which has served as a model for many other states in the attempt to create a more business-friendly judicial system. With the addition of business court judges in 2006, Judge Tennille is now the Chief Special Superior Court Judge for Complex Business Cases, in the Business Court, now located in the Elon University School of Law, Greensboro, North Carolina.
- Lee Applebaum presented a historic jurisdictional overview of business courts and said that the Delaware Court of Chancery is the court that first comes to mind when people think of a business court. However, the Court has a very narrow jurisdiction. Since the early 1990s, new business courts have developed in 15 states. He explained that the New York and Chicago courts were formed to address problems concerning the handling of business and commercial disputes. In his opinion, it is important that the business community perceive the disposition of commercial litigation to be rational and predictable, and prior court systems were not handling litigation with alacrity or informed decision making.

Further, Mr. Applebaum explained that the cities of New York and Chicago created programs where certain types of business and commercial disputes were assigned to individual judges to preside from the onset to the end of the case, which was not how disputes were managed previously. He noted that the New York Court was the most expansive and dealt with equity dispute cases typically assigned to a court of chancery and also included disputes with money damages. He further explained the business court's jurisdiction was very broad and received sizeable business disputes and, as a result, the business community benefited from informed decision making. Fifteen years later, both programs are still operating and the State of New York has expanded outside of New York City to ten different counties, or district courts; in Chicago the business

court is operating well. Mr. Applebaum stated new business courts have expanded to 15 states.

Continuing, Mr. Applebaum said there are business courts in: (1) a county near Atlanta, Georgia, conducting a pilot program; Maryland and North Carolina with statewide programs; and Philadelphia, Pennsylvania. He described the basic model used in New York City and said the court's cases include a broad range of business and commercial disputes involving intergovernmental or intra-corporate affairs; partnership disputes, restricted governance, trade secrets, breach of contract claims that involve monetary damages, trust disputes, and a variety of other business disputes. He explained that any program modeled after New York City's business court would be assigned a broad range of disputes. Mr. Applebaum referred to Judge Ben Tennille and the North Carolina business court, which in his opinion is the pioneer in the basic model of jurisdiction and is one of the most respected courts in the United States. Further, he said in the basic model a single judge may not hear hundreds of cases, but all the cases heard would be complex involving important matters.

He concluded by explaining that a third more complex model has recently evolved in the last year, which is a two-part specialized court. The court hears complex business cases in one jurisdiction that includes complex business disputes or commercial disputes, and the other jurisdiction hears complex cases whether or not they are business cases. Examples of the new model type are located in Eugene, Oregon; Fort Lauderdale, Florida; and Pittsburgh, Pennsylvania, which have developed in the last 18 months.

- Senator Care referred to Mr. Applebaum's article titled "The 'New' Business Courts" ([Exhibit C](#)) and explained the creation of the two business courts operating in Nevada. He described previous testimony before the Subcommittee and explained judges in Nevada have calendars that are not exclusive to the business court and include criminal cases as well. He asked whether similar situations occur in other jurisdictions or if the goal was to develop an exclusive business court with specific jurisdiction.

The panelists responded to the question from Senator Care as follows:

- Mr. Applebaum stated there are some instances, such as Maryland, where the judges have a calendar in addition to their business court calendar. However, in his opinion the typical model has a business court judge dedicated to business and commercial disputes, so the judge can develop expertise in business and commercial litigation, and the litigants that come before them have confidence the judge is extremely familiar with the issues of the case. He said in a few jurisdictions a business court judge may also hear nonbusiness court disputes and even criminal disputes because there may not be enough business court cases to fill the judge's docket. Depending on how the court system is setup, there may be specialized judges with cases that are assigned to them. He said the State of Maryland is very selective, so there are not a large number of cases

in the system to warrant an exclusive business court judge. In the New York City, North Carolina, and Philadelphia courts, the judges' dockets are more than full.

In his view, Mr. Applebaum said one of the first steps in setting up a business court is to address the following questions: (1) will every business or commercial case be sent to the business court; and (2) are there enough cases to keep an individual judge's docket full. He explained that the complex model could have a situation in which there are not enough complex cases to keep an individual judge's docket full; therefore, cases could be heard as well, similar to what happens in Washoe and Clark Counties. He speculated that the jurisdiction assigned to the business court in Nevada is narrower than the courts in New York City or Philadelphia.

- Mr. Haig was of the opinion that the question of placing a business court in a particular jurisdiction often depends on the number of cases and whether they warrant a full-time judge, which may be used as a reason for not having a business court. He said the simple answer would be to let the business judge take the business cases as they are assigned to the court and handle other court system cases until there are enough business cases on the docket for a full-time judge.

Mr. Haig also explained that there is nothing conceptually wrong with a judge's docket having half business cases and half consisting of other cases. However, the real benefit of a business court is to provide a significant education in business litigation for the judge and when that is diluted by handling other litigation; therefore, the judge is not being immersed in business case law, which may not be as useful to the business community. He concluded there is nothing wrong with a business court judge handling other cases, particularly if the judge has expertise in another area.

- Mr. Gross explained the history of the business court is mixed in the State of Florida. He stated the first business court started in Orlando in 2004 with one judge. The Chief Judge basically separated a division from the court system and assigned all of the business cases that fit the criteria set forth in the Chief Judge's administrative order to the business court. Mr. Gross said the first attempt in Florida to develop a business court assigned a Chief Judge who carried her existing docket that totaled approximately 2,000 cases which, in his opinion, may not have been the best strategy. It resulted in a great deal of work for the judge, who admirably was able to handle the caseload.

Mr. Gross stated that when similar courts were started in Miami Dade County and in Hillsborough County in Florida the existing divisions were modified. The judges in those counties had their existing caseloads redistributed, but they were also given all of the older business-type cases for each of the existing divisions, approximately five to ten cases of each. He said the judges started with an existing docket consisting of 200 to 300 cases, and then as new cases were filed they were added to a specific division. Continuing, Mr. Haig explained that just recently a fourth hybrid court was started in Broward County, which is a complex litigation court with two components for: (1) complex tort cases; and (2) complex business cases. The model is similar to

the court in Miami and Tampa, Florida, which began by reassigning court cases and then adding new cases from the circuit court filing sheet.

- Chairman Beers stated the volume of the business court caseload in Nevada requires judges in Nevada to handle business and non-business cases, so the judges assigned to the business court lack the time to write opinions. He asked which of the 15 established business courts regularly produce written opinions of decisions.

The panelists responded to the question from Chairman Beers as follows.

- Mr. Applebaum said it was less than 50 percent of the cases in Philadelphia.
- Judge Tennille stated that producing written opinions in business court cases was one of the primary reasons that the court was established. All three of the judges regularly write opinions for their business court cases. In his opinion, one of the reasons that the American Bar Association has been so supportive of the business court concept is that the courts have written opinions, which provide guidance for the business community and for lawyers advising their clients.
- Judge Tennille concluded that having written opinions was one of the main reasons the business court was expanded and for the court's success in North Carolina. He explained that written opinions are placed on the Internet in a word-searchable context to be readily accessible to the legal bar. Individuals can research the website to determine if a judge has ever ruled on a particular issue pertinent to their specific case, which aids lawyers in private practice.
- Mr. Haig agreed with Judge Tennille's comments about the desirability of opinions and said having written opinions was one of major reasons for creating a business court in New York in 1995. Another reason for insisting on written opinions and encouraging judges to write them is that a body of law is developed that is predictable. It allows businesses that are contemplating certain transactions or steps in their case to predict the likely outcome and determine if there is prior disposition. In his opinion, if a state does not have a well developed body of opinion in state law, the ability to accurately predict outcomes is lessened. Obviously, even if there are numerous opinions, lawsuits will occur and people will still get into a dispute because of the complexity of fact patterns.
- Judge Tennille stated one of the things that influenced North Carolina is that very few business cases make their way to the appellate courts or to the state Supreme Court because businesses need an answer expeditiously. Business men and women have a decent idea of the law and conduct their business practices accordingly. In his view, businesses do not want to wait two or three years in an appellate process to get an answer to a question, so trial court opinions become much more important. He provided an example of the Broward Chancery Court and the importance of the decisions made at a trial level. Business attorneys are able to get a quick answer that

they can appeal; however, generally cases get resolved after summary judgment or a quick bench trial of some type. He explained that very few cases are appealed because businesses simply cannot wait two or three years for the appellate process to receive an answer. He pointed out that the opinions at the trial level become much more valuable because that level is where ultimate decisions are probably made in 80 to 90 percent of the cases.

- Kevin C. Powers, Senate Legal Counsel and Bill Drafting Adviser, Legal Division, LCB, questioned if North Carolina business court cases are reported in an official case report, and if not, have State or local rules been amended to allow citation to and reliance on those unreported cases.

The panelists responded to the question from Mr. Powers as follows:

- Judge Tennille stated North Carolina has an electronic filing system for the business court. He explained that for all trials, all of the opinions are posted on the Internet so there is no official publication. He clarified that North Carolina is a trial level court therefore decisions are not binding on other trial level judges, but are binding precedent within the business court.
- Mr. Bach said the use of websites to publish opinions is practiced in quite a few business courts. He added the same process is conducted in Philadelphia for the Commerce Case Program, which began about eight years ago.
- As an example, Judge Tennille explained that several years ago when he made a decision involving the merger between Wachovia Corporation and First Union Subtrust Bank, the day he entered that opinion on the website, it was downloaded 23,000 times in the first day. He noted that rather than waiting for the decision to be published, it was posted instantaneously for anyone in the market place interested in that litigation to see the outcome before the market opened that day. In his opinion, putting the opinions on the website is of tremendous value.
- Mr. Applebaum discussed on the business court's website in Philadelphia in which there are between 750 and 800 opinions posted. He said LexisNexis and Westlaw publish virtually all of the opinions. Mr. Applebaum added that opinions are being studied more and more frequently and cited in federal courts. He explained that having cases available for reference is a substantial part of the practice of the business court in Philadelphia. In his opinion, the reason jurisdictions would not have opinions, at least online, is a function of the clerking staff and whether or not the judges had access to clerks. He suggested to the Subcommittee members that at least one law clerk per judge be allocated to enable the business court to produce written opinions.
- Judge Tennille said he has operated without a law clerk, but stated he is far more productive with a clerk and noted in North Carolina each judge has one.

- Chairman Beers asked if the business, chancery, or complex courtroom operations in jurisdictions around the country were funded entirely by litigant fees.

The panelists responded to the question from Chairman Beers as follows:

- Mr. Haig said the issue of funding business courts is widely debated, and arguably there is some misunderstanding. In his opinion, creating business courts does not require additional money. He explained in a number of states business cases were assigned to an existing judge with their nonbusiness caseload transferred to other judges. As a result, there were no incremental costs, and only marginal costs were required to start up the business court. If new court houses and courtrooms were constructed or new judges were appointed than costs would be incurred.

He further explained that the New York business court started as a division of the highest trial court in the State, and the budget at that time was approximately \$1 billion per year for the entire court system. He explained the total amount of additional money spent on the business court was nearly \$100,000 for new technology, which was used experimentally and then expanded to other areas of the court system. There were no new courthouses, courtrooms, or judges, so no additional costs were incurred. In conclusion, Mr. Haig said that a business court can function mainly by assigning business cases to an existing judge who has experience and expertise in business and commercial cases and possesses an ability to resolve them, which is more important than anything that would require funding.

- Judge Tennille commented that when he took office in 1996, the North Carolina Legislature appropriated \$3,000 for a laptop computer for him, the total funding for the business court, which did not have a separate budget. He explained that under the current process, when a case is removed from the regular court to the business court, similar to cases being removed from state court to federal court, there is a \$250 removal fee that is assessed; however, these funds are not controlled by or directed to the business court. The funds become a part of the state General Fund, and the business court is simply a part of the overall court system. The court operates like all of the other courts do, with the exception of the three judges being assigned a law clerk.
- Mr. Bach noted in Philadelphia there were no additional costs associated with the development of the business court. He said existing judges and existing courtrooms were used. The only additional costs were for a law clerk assigned to the judges; there were no other incremental costs.
- Mr. Gross said the process for developing the business court in Florida was similar to Philadelphia where existing judges and courtrooms were utilized. He stated there was a slight reallocation of personnel regarding the use of law clerks and case managers, but no additional funding was required, and the court was not funded by special filing fees.

- Mr. Applebaum said the examples described are typical scenarios that include a relatively modest expense for law clerks or a reallocation of funds. He opined there is no need for construction of new courthouses or courtrooms. He explained that there are a couple of instances in which legislatures allocated substantial funds for the establishment of a business court in Atlanta, Georgia, where the business court is part of a broader program. Mr. Applebaum surmised Nevada may be looking at a business court as an important part of the overall economic environment of the region, not just the litigation or judicial environment, so the investment in a business court with new technology would be an important boom in marketing the region.

Mr. Applebaum provided an example of a similar occurrence in London, England, where there are a variety of specialized business courts. He explained that a new business court building is being constructed that is ultramodern and designed to centralize the different business courts in one location. This is being done in part because London considers it an important part of its overall financial well being to offer judicial or litigation services to the commercial community internationally. In summary, he said few places have additional funding or substantial innovation funding available, so, in his view, the typical perspective was previously described by the panelists.

- Mr. Haig said one of the disadvantages to spending additional money or having special filing fees is that questions may come up or issues about equal access to justice, and some constituencies could possibly complain that the business court is an elite institution that spends resources that should be spent elsewhere. In his view potential problems could be avoided if no extra funding is used for the business court.
- Senator Care stated in Nevada's civil practice a Discovery Commissioner issues scheduling orders and adjudicates discovery disputes. He explained that not just in business cases but any district court judge could elect to retain jurisdiction over discovery disputes, but generally the matters rest with the Discovery Commissioner. He asked: (1) how discovery is handled in other jurisdictions; (2) whether the business court judge retains the case in all its aspects; or (3) if a Discovery Commissioner is involved in motions for protective orders.

The panelists responded to the questions from Senator Care as follows:

- Mr. Gross said in Florida, unlike New York City and Chicago, in all the state circuit courts the judge who is assigned the case on the first day handles the case through trial. It is the same procedure in the business court. He said some magistrates help with discovery disputes, but not many of them. The judges are not dedicated solely to the business courts, so they handle most of the discovery issues themselves. Cases are initiated when the judge enters a case management order. He said the judges call the parties into a meeting during the pendency of the action for further case management to monitor deadlines and, as needed, handle dispositive motions to move the case along, as opposed to letting them languish.

- Judge Tennille said he also handles a case from beginning to end and concluded there are cases, such as mergers and acquisitions, where he must keep careful control to benefit the parties and the court. He explained he handles the case from beginning to disposition including all of the discovery disputes. He noted that North Carolina has a rotation system where judges rotate every six months; however, the rotation is a real disadvantage in a complex business case because the judge must then deal with many different opinions from all the judges in the same case. He endorsed having the case assigned to one judge for all purposes.
- Mr. Haig said one of the primary functions of a business court judge is, as others have stated, to manage discovery proactively, in light of the fact that so few business cases across the country actually get tried to conclusion. In his opinion, the judge oversees discovery and handles motions, particularly dispositive motions. However, he stated that having the judge assigned at the very beginning of the case to lay out a discovery schedule and ensure the parties adhere to that schedule is one of the most important things a business court judge can do. He said in most places a discovery commissioner or a magistrate may not have the same degree of credibility and respect that a trial judge would have; therefore having the trial judge involved could ultimately achieve efficiencies in getting the parties to adhere to the schedule and perform accordingly. Many business cases are disposed of promptly.
- Mr. Applebaum said the comments made today were common throughout the country regarding the judge handling all case management. He recently became aware of a dispute in Maryland that involved electronic discovery, and noted the state was attempting to identify a list of people who had special expertise in electronic discovery issues who could be appointed as special masters for handling electronic discovery disputes. These types of cases can become very detailed and very burdensome and provide examples of when a business court judge might refer for electronic discovery.
- Judge Tennille said that electronic discovery is the “800-pound gorilla” in most big corporate litigation. He reiterated the extreme importance for trial judges to manage decisions and problems because the only way to control the cost in electronic discovery, which can run into millions of dollars, is to focus the discovery on the key issues. He asserted a discovery master might have difficulty, but a judge who has ultimate control of substantive law in the case has greater ability to limit expensive discovery by focusing on the primary issues in the lawsuit.
- Assemblyman Segerblom referred to Mr. Applebaum’s article titled “The ‘New’ Business Courts” ([Exhibit C](#)) and said even Delaware is now moving toward a combination equity and law court and asked if there is an advantage to having strictly one or the other.

Panelists responded to the question from Assemblyman Segerblom as follows:

- Mr. Applebaum said based on what has occurred in the new business courts over the last 15 years and following their lead in extending jurisdiction, an exclusive equity jurisdiction probably does not make sense in the current environment. He stated the Chicago business court has inclusive law jurisdiction in the chancery division, so all the business cases of the type handled by the Delaware Chancery Court are handled in the chancery division not on a commercial calendar. In his opinion, if Nevada is trying to model itself after Delaware for the purpose of obtaining incorporations and becoming akin to the chancery division model, then perhaps an argument could be made to simply follow the Delaware model which would develop an expertise in dealing with inter-corporate disputes and other equitable disputes of restricted covenant
- Senator Beers asked Mr. Applebaum if Delaware is following the direction of the new business courts.
- Mr. Applebaum replied that Maryland put a tremendous amount of effort into studying the creation of a business court, developing a business and technology case management program within the jurisdiction of the court, and including cutting-edge twenty-first century issues concerning biotechnology. Maryland adopted this program, and within six months the changes were made in Delaware. Mr. Applebaum stated there is a long-standing idea regarding the mediation-only concept in which the chancellors could become mediators for complex disputes. In addition, he explained that Delaware instituted the following stipulations;
 1. The parties must volunteer to participate;
 2. One of the parties must be from Delaware; and
 3. The litigation must be worth more than \$1 million.

In conclusion, he explained the new Delaware program is solely for monetary disputes focused on technology. He surmised Delaware sees the chancery court, its legislation, its corporation law, as part of the same whole, and that their court system must keep up with developments that affect corporations. He said Delaware would permit some monetary disputes into the chancery court, so that their Superior Court could mediate the business disputes. Mr. Applebaum was of the opinion that mediation is being used more and more, and the State of Delaware recognizes that maintaining a purely equitable, traditional chancery jurisdiction would not keep up with a modern business court model.

- Judge Tennille added that North Carolina has specific jurisdiction of Internet technology and said it was more important to focus on and effectively manage the substance of the cases rather than focus on the form of the court system. In his view Delaware recognized the need, as well, to have important cases decided quickly.

He stated when a case involves technology, if a year passes before a case goes to trial the technology has probably changed and may even have become obsolete. He stated it is more important to examine the local economy and what types of cases are handled in the court system that are critical to the economy to ensure those cases are processed efficiently and with expertise. He explained North Carolina is proposing to build a biotechnology industry and currently has significant businesses located in Durham, Raleigh, Salem, and Winston and said the Legislature decided that the technology-based businesses will have a better avenue in the court system.

- Mr. Haig cautioned about placing too much emphasis on what Delaware does because Delaware is truly unique. In his view, Delaware has terrific judges and a suburb legal bar; however, it is a very small state and unlike any other in the United States with a substantial portion of the state revenue received from corporate filings. Mr. Haig said the chancery court is part of the package in Delaware; the total number of cases filed each year in the Delaware court system is between 10,000 and 15,000 a year and the meaningful cases in the chancery court total only a few hundred. In the New York County commercial division alone there are 5,000 to 6,000 commercial cases filed a year and there are nine other counties scattered around the state. Revenues that pertain to the business court are not significant in New York but are significant in Delaware, if the filings are included. Mr. Haig supported Judge Tennille's comment to examine:

1. What types of businesses are in the local economy;
2. What kind of business disputes are occurring;
3. What type of businesses would be attracted to the area; and
4. How can the court system be structured to deliver good service to those businesses.

In his view, the court system needs to allow businesses to efficiently resolve their disputes and continue to operate and pay taxes.

- Judge Tennille commented that the judges in the Delaware Court are some of the most capable people in America. He recently learned that Delaware now has more businesses incorporated in the state than they have citizens, which provides a perspective on the state's unique position on how important the legal system is to the economy of Delaware. In his opinion, trying to recreate the Delaware process would not work for Nevada, North Carolina, or many other states. He concluded all states have different problems, businesses, and business environments, so there is a need to develop systems that work for area and business economy.
- Senator Care said Nevada prides itself as being the Delaware of the West and explained Nevada was quick to recognize newly created business entities. Nevada has a mergers and conversions statute and the fees that come with incorporation are a source of revenue for the State. In his view, the creation of the Subcommittee was in part based

on the theory that if a chancery court were created, when incorporations increased, there would be a forum in the event of sophisticated business disputes. Based on his review of materials received, Senator Care surmised that the creation of business courts is driven by the fact that they provide good judicial economy and asked if there was a marked increase in the number of incorporations where business courts were created or did the need arise for a business court because industry located in an area.

In response to the request from Senator Care, the panelists responded as follows:

- Mr. Haig stated there are no statistics to support an increase in incorporations in states that have business courts. In any state, the issues of taxes and regulation are more important to a business deciding to locate or remain in a state. He said having a business court is something states talk about, but in his view it would not be the deciding factor for a businessman. In New York a business court was created in 1985 because there was widespread dissatisfaction in the business community with the ability of the State court system to decide business cases efficiently and expertly. He explained the bottom line was that the business community thought the state courts were not businesslike. Businesses would do anything to get into the federal court, the courts of another state, or to get into private alternative dispute resolution (ADR), which was the single most important motivation for the creation of a business court in New York.

Continuing, Mr. Haig stated the business community has come out strongly in favor of the business court; for example, the Business Council of New York State, the largest business organization representing 4,000 member corporations, gave solid support of the business court from its inception and publicly promotes the commercial division, which was not true in the past. The fact that New York has a good business court reflects a degree of hospitality toward businesses. Mr. Haig noted that taxes and regulations are the most important factors.

- Judge Tennille supported Mr. Haig's comments and stated his experience has been much the same. He said North Carolina started a business court because a commission on business laws examined the state's economy and made a recommendation to attract business to the state. The industrial development community clearly uses the benefits of the court to recruit new businesses, but the important benefit has been the support of the business community, not only for the business court but for the entire court system.
- Mr. Applebaum referred to a *Stanford Law Review* article ([Exhibit D](#)) dated December 2002, titled "The Myth of State Competition in Corporate Law." He asserted the title presents the idea that there is competition with the State of Delaware for incorporations. He said the article includes discussion of business courts with references about Nevada. The article mentions only a few states have implied the purpose of establishing a business court was to obtain incorporations and, in his view, at least some states have indicated that an increase in incorporations would certainly be a desired corollary if not the direct object of a business court. He was of the opinion

that states would not want to create a situation where businesses would want to leave or incorporate elsewhere just to avoid the court system.

- Mr. Bach added that it is not an issue of where businesses incorporate, but rather where litigators decide to bring cases. He said state courts were not very popular with litigators before business courts existed, which is true in Philadelphia. Mr. Bach stated that when he started practicing law 35 years ago the state court was something to be avoided at all costs, but that situation has changed dramatically. He indicated there are many more cases being filed in the state court system now that a business court exists and fewer cases are being removed.
- Mr. Applebaum read a direct quote from the *Stanford Law Review* article that pertains to Nevada: ([Exhibit D](#)):

The business courts in North Carolina and Nevada are a partial exception in that attracting incorporations may have been a secondary motive for their creation. But both suffer from the same severe design flaws—broad subject matter jurisdiction, retention of juries, and unpublished opinions being the most important ones—as the other business courts.

- Senator Beers requested the citation and quote be sent to Jennifer Chisel, Senior Research Analyst, Research Division, LCB.
- Judge Tennille said North Carolina has retained juries and complex business litigation. He estimated most business cases, 90 percent or better, will settle after the summary judgment stage. He also explained there are very few complex business cases that go to juries, and when they do there is generally a good reason why they do. There is either a dispute of over-credibility, which juries are just as capable as a judge of deciding who is telling the truth. They involve what he referred to as “lottery-cases” where a lawyer or the client has decided the case is their opportunity to “punch their lottery ticket.” They are not interested in any type of reasonable settlement because they want to see if they can get the \$25 million judgment. He was of the opinion that the fact that North Carolina has jury trials does not have any impact on the way the system operates.
- Mr. Haig agreed with Judge Tennille and stated there are not that many jury trials in business cases in New York. He used Delaware as an example of expanding its jurisdiction over the past 15 years to make its court system more attractive as a forum for litigation to businesses outside of Delaware. He said one of the early innovations occurred in 1994 with the Summary Proceedings Act. He explained the Act provided if there was an action at law for money damages the case could be brought before the chancery court unconsent. He explained there were three requirements: (1) the parties had to agree to waive a jury trial in an action for money damages; (2) the case had to be for \$1 million or more in damages; and (3) the parties had to waive some discovery.

Mr. Haig further explained that as a result of the first five or six years of that Act, there was not a single case filed in that program. He commented that part of the problem was since the litigation was on consent, if one party proposed waiving a jury trial then the other party thought that the first party saw some advantage in there being no jury trial; therefore, they insisted on retaining a jury trial. The program was generally considered not to be the most effective way to achieve the goal and has had some cases filed in the program but no significant volume.

- Judge Tennille said there is a similar rule in North Carolina for all the superior courts and the business courts for a summary proceeding. He explained the rule has existed for over ten years, but to his knowledge has never been used. He presented two reasons for that:
 1. Lawyers get concerned about what the other lawyers are thinking with respect to a jury trial and someone decides to not waive the jury trial; and
 2. The process for litigation is shortened, which reduces lawyers' fees that are generated in big discovery disputes.

In Judge Tennille's opinion any state that has adopted that kind of procedure has seen virtually no use at all.

- Assemblyman Carpenter asked if the judges are elected or appointed and must they run for the office of business judge.

Panelists responded to the question from Assemblyman Carpenter as follows:

- Mr. Gross explained that in Florida all the trial judges are elected, even those that are appointed by the Governor have to stand for election after appointment. He said they do not run specifically for divisions of the court, i.e., family, criminal, civil, or probate. Mr. Gross stated the judges run for a county court judge and then are assigned by the chief judge to the different divisions, and the same is true for the circuit court. He said under the canons of Florida, judges cannot campaign on or delve into specific issues other than their personal credentials.
- Judge Tennille said that in North Carolina the three business court judges are appointed. The Governor appoints the judge to the seat, and the judge is designated as a business court judge by the Chief Justice of the State Supreme Court. It is a two-step process and based on merit selection. He said the business court judges do not run for election as the regular Superior Court judges do.
- Mr. Bach explained the judges in Pennsylvania are appointed to the business court and vacancies are coveted positions. For the judges who are interested in being assigned, there is no formal campaigning but there is informal campaigning that takes place. Interested individuals demonstrate that they possess the expertise and experience to

handle business court cases and that they have the interest to do so. In his view, business court judges have a heavier workload because of additional paperwork and more dispositive motions to be resolved and more opinions to be written.

- Chairman Beers was of the opinion that one of the goals of the business court in New York was to keep companies out of court and to generate tax revenue for state government. He asked if any studies have been conducted to quantify that opinion.

Panelists responded to the question from Chairman Beers as follows:

- Mr. Haig said the topic has been discussed over the years, but he was of the opinion that there has not been an empirical, statistically rigorous analysis of the issue. However, he noted in New York over the last couple of years a series of focus groups have been conducted throughout the State of New York in five different locations. At each focus group there were in-house counsel, chief litigation counsel for New York corporations, practicing lawyers, and some of the business court judges participating in the discussion off-the-record using a stenographer and identifying the attendees only as speaker number one, number two, et cetera. The discussion did not include public comment. Mr. Haig mentioned he was the moderator for the five focus-group sessions. In his opinion, many of the in-house business counsel were very candid about their expectations, what worked and did not work, and the study reflected high satisfaction with the business court in New York from the business community. He explained that the several dozen in-house lawyers that participated said they were generally very pleased with the operation.

Further, he asserted that the National Center for State Courts and other groups have discussed another program, which would consist of the submission of questionnaires to businesses all over the country to compare, in a rigorous way, the experiences in and outside of business courts. Mr. Haig estimated the cost of this nationwide program to be approximately \$2 million.

- Chairman Beers instructed staff to e-mail the website address to the Subcommittee members.
- Judge Tennille suggested the Subcommittee review the study performed by the National Center for State Courts (NCSC) in California on their complex litigation courts. He stated the end result included reactions from a fairly extensive study of the State Bar and lawyers' reactions to the system as opposed to businesses. He noted that in the fall of 2008, the NCSC, with the support of the Delaware Supreme Court, will sponsor a program in Delaware for states that are interested in creating business courts, and noted the Honorable Myron T. Steel, Chief Justice of the Delaware Supreme Court, is supporting the effort for NCSC. Judge Tennille indicated Richard Van Duizend, Principal Court Management Consultant, NCSC, is responsible for setting up the program. In conclusion, he said he was not aware of any studies and agreed with Mr. Haig that the task would be enormously expensive.

- Mr. Applebaum referred an organization in Philadelphia called the Committee of Seventy, which has performed a survey in Massachusetts on the satisfaction or dissatisfaction of docket-flow management, but the survey did not include empirical analysis of actual effects on incorporations or on business relocation. However, the survey information is very positive and provides good feedback from Massachusetts corporations. Mr. Applebaum was of the opinion that occasionally there is a misconception by the public, legislatures, or the legal bar that by establishing a business court or commercial court that businesses always win their cases, especially against consumers. He stated that positive feedback does not equate to always getting favorable rulings, and that is absolutely not what is intended. He explained that sometimes that misconception is conveyed, but in his view positive feedback entails consistency, reliability, and informed opinions.

Commenting further, Mr. Applebaum said Judge Tennille provided an example regarding a case where his opinion was downloaded from the Internet over 20,000 times in one day. He explained that the lawyer who lost that case agreed to have the case tried in front of Judge Tennille, and he was so impressed with the process it inspired him to emulate the business court process in his own state. The lawyer was happy he went through the process even though he had lost the case.

- Mr. Haig discussed information available in New York regarding a set of statistics pertaining to the average number of days from filing of a case to disposition. He explained the statistics reflect a substantial reduction in the time period from beginning to end of a case. In his view, the reduction is significant because many individuals perceive the most inefficient part of business litigation is when cases drag on for very long periods of time, which creates a series of learning curves and is enormously expensive for the clients and lawyers to litigate.

He said a business court judge is proactive and maintains the exigency to move the case along without long periods of hiatus. He was of the opinion that business clients find that feature of the business courts particularly attractive because it reduces the amount they pay for their lawyers to get up to speed multiple times during the cycle of the case.

- Assemblyman Horne asked for clarification of the discovery process in the various jurisdictions. He noted that Nevada has a Discovery Commissioner in Clark County and Washoe County and reiterated in Philadelphia and New York the business court judge does the discovery schedule. Assemblyman Horne indicated that if that process were initiated in the Second Judicial District Court of Nevada, the Discovery Commissioner would be eliminated from the process. He asked if separate rules of civil procedure could be used in the business court or would there need to be a more finite rule.

Panelists responded to the question from Assemblyman Horne as follows:

- Judge Tennille responded and said there are specific local rules for the business court in North Carolina that are different from the standard court system, along with different procedures for the business court. For example, he explained within 30 to 60 days of a case being assigned to a business judge, the lawyers must file a case management report that contains the details of the case, and then a case management conference is conducted. Judge Tennille indicated he makes the clients attend the case management conference to review the mediation, arbitration, alternative dispute resolution, discovery process, limits on depositions, interrogatories, and document production. The judges have control over the case management conference, which eliminates an enormous number of potential disputes because the lawyers are involved from the beginning of the process. They know the judge who entered the first scheduling order is going to maintain control of the case to the very end. He said there are separate rules for the business court and noted the rules are available for viewing on the North Carolina Business Court's website at <http://www.ncbusinesscourt.net>.
- Assemblyman Horne stated Judge Elizabeth Goff Gonzalez and Judge Mark Denton preside over the business courts in the Eighth Judicial District Court of Nevada and reiterated when cases enter into the business court arena, the parties know the discovery schedule. He asked if a lawyer wanted to modify the schedule how would the judge handle that issue.
- Judge Tennille clarified the limits are not in the rules, but are set in the case management conference because they are geared specifically to that case. Further, he said the judge has a list of the substantive issues before him and knows what the lawyers want to do in the discovery process; however, the scheduling order is geared specifically to that case. He commented there is nothing in the local rules that establishes an ideal discovery schedule because everything is done strictly by judicial case management.
- The Honorable Elizabeth Goff Gonzalez, Department 11, Eighth Judicial District Court of Nevada, stated that if there is a need to suspend the local rules in the business court then Judge Mark Denton, Department 13, Eighth Judicial District of Nevada, or she would issue a separate scheduling order or discovery court order after conducting a meeting, which is similar to the case management conference described by Judge Tennille. She said the goal is to bring the case to an early resolution to minimize the attorneys' fees for the business.
- Assemblyman Segerblom asked if the filing fees from the corporations go directly to the Delaware Chancery Court to fund the business court. He also asked for the amount of filing fees received in Nevada and where the money is allocated.

Panelists responded to the question from Assemblyman Segerblom as follows:

- Judge Tennille was of the opinion that the filing fees are not appropriated directly to the Chancery Court. He said like most other states the fees go into a General Fund, but the funds make up a much larger percentage of the General Fund in Delaware than they do in most other states.
- Chairman Beers asked Judge Gonzalez and Judge Denton if the litigants in Nevada pay additional fees to the business court that parties in other courts do not pay.
- Judge Gonzalez stated that when discussions were held with the Bench Bar Committees at the January meeting of the Subcommittee, they discussed with the attorney's the possibility of having a "special master" assigned to the business court like the Discovery Commissioner to maintain consistency. She indicated there was not adequate funding to currently do that, but some of the attorneys at the Business Bar Committee thought the change would be effective. Judge Gonzalez said she handles most of the discovery disputes in the business court cases and Judge Denton handles the disputes in his court and explained that she and Judge Denton work closely together to keep the lawyers moving toward the goal of resolving cases. In closing, Judge Gonzalez said Paul R. Heimanowski, Attorney, Lionel Sawyer and Collins, was one of the attorneys on the Bench Bar Committee for the business court.
- Kevin Powers, Senate Legal Counsel and Bill Drafting Adviser, Legal Division, LCB, asked the panelists' opinion on subject matter jurisdiction for the business courts. Currently under the Nevada model because the courts establish the business court structure in the district court, the courts establish the subject-matter jurisdiction for the business courts in Clark and Washoe Counties. He asked what the panel thought about the potential advantages of having the Legislature determine the subject matter jurisdiction of the business court through legislation.
- Mr. Haig was of the opinion that judges are better able to address questions of how their courts should operate and determine court jurisdiction, rather than legislators. He added there is an argument that court rules are frequently the best way to determine subject matter jurisdiction because the legislative process is less flexible than court rules.
- Judge Tennille elaborated on the North Carolina process, which in his view was a compromise. He explained the Chief Justice of the North Carolina Supreme Court impaneled a commission on the future of the North Carolina business court. The commission consisted of lawyers, members of the Legislature, lay members of the public, and members of the judiciary. Among the lawyers were plaintiffs' lawyers, defense lawyers, large and small law firm lawyers, which ensured a large perspective of the legal community was included. He said that the commission was charged with making recommendations on what the substantive areas of the law should be for the

business court. A recommendation was made to the Legislature after many months of study and meetings, which the Legislature ultimately adopted.

Judge Tennille also noted there was not a lot of negotiation with the business court judges in that process. The only issue that was negotiated was the inclusion of nonprofit corporations in the jurisdiction and that was agreed upon with the provision that the jurisdiction would eliminate church disputes, which are very time consuming.

- Mr. Applebaum concurred with the process described by Judge Tennille that included all the different communities that have an interest in developing the concept and jurisdiction of the business court. Mr. Applebaum provided an extreme example where the New Jersey Legislature voted unanimously to not just create a business court but to create a new division for business disputes, which was passed by a nearly unanimous vote in both houses, but the Supreme Court was not consulted in the process. Consequently, the Supreme Court justices determined under the *New Jersey Constitution* that the issue was in their province, and the Court should ultimately be the entity making the decision. Therefore, a message was sent to the Legislature that if the law were to pass, the Court would declare it unconstitutional and not enact it.

Continuing, Mr. Applebaum discussed another example of what occurred in Oklahoma in 2003. The Oklahoma Legislature was planning to create business courts in the two largest cities in the state and wanted the Supreme Court to implement a plan, but the business courts were never established for various reasons. When the Legislature introduced legislation past year delineating the courts' jurisdiction, the bill did not pass. He concluded that unless the court and the legislature are on the same page, the concept will be difficult to implement.

Concluding his remarks, Mr. Applebaum reiterated that business courts such as those in Philadelphia and Florida were implemented by local administrative rule of a president judge, which may not have officially involved the State Supreme Court or the legislature. He was of the opinion that the method depends on individual state constitutions in terms of what entities create the jurisdiction. He stated it is very important to have all stakeholders involved in the fundamental development process to create the right product.

OVERVIEW REGARDING COURTS OF LAW AND COURTS OF EQUITY

- Bryan Fernley-Gonzalez, Deputy Legislative Counsel, Legal Division, LCB, submitted a memorandum and discussed the differences between courts of law and courts of equity. Please see [Exhibit E](#). He also explained the issuance of writs and effects on the common-law courts.

PUBLIC COMMENT

- No public comment was presented.

DISCUSSION OF SCHEDULING AND WORK PLAN OF FUTURE MEETINGS

- Assemblyman Segerblom asked for additional information on the Delaware business court including the types of cases, funding, corporate structures and shareholder rights. Jennifer Chisel, previously identified, discussed possible dates for future meetings and explained that topics for the next meeting would focus on issues in Nevada.
- Senator Care asked for information on enhancing the current business court in Nevada through court rule rather than constitutional amendment.
- The next meeting was scheduled for April 29, 2008, at 10 a.m.

ADJOURNMENT

There being no further business to come before the Subcommittee, the meeting was adjourned at 11:58 a.m.

Respectfully submitted,

Lucinda Benjamin
Senior Research Secretary

Jennifer Chisel
Senior Research Analyst

APPROVED BY:

Senator Bob Beers, Chairman

Date: _____

LIST OF EXHIBITS

[Exhibit A](#) is the “Meeting Notice and Agenda” provided by Jennifer Chisel, Senior Research Analyst, Research Division, Legislative Counsel Bureau (LCB).

[Exhibit B](#) is a document titled “Presenter List: March 18, 2008, Meeting,” provided by Jennifer Chisel, Senior Research Analyst, Research Division, LCB.

[Exhibit C](#) is a *Business Law Today* article titled “The ‘New’ Business Courts” dated March and April 2008 written by Lee Applebaum, Attorney, litigation partner in Fineman, Krekstein & Harris, Professional Corporation, Philadelphia, Pennsylvania

[Exhibit D](#) is a *Stanford Law Review* article titled “The Myth of State Competition in Corporate Law.” dated December 2002, and submitted by Lee Applebaum, Attorney, litigation partner in Fineman, Krekstein & Harris, Professional Corporation, Philadelphia, Pennsylvania

[Exhibit E](#) is memorandum dated March 18, 2008, to members of the Legislative Subcommittee to Study the Benefits, Costs, and Feasibility of the Implementation of Courts of Chancery, titled “Overview Regarding Courts of Laws and Courts of Equity,” provided by Bryan Fernley-Gonzalez, Deputy Legislative Counsel, Legal Division, LCB.

This set of “Summary Minutes and Action Report” is supplied as an informational service. Exhibits in electronic format may not be complete. Copies of the complete exhibits, other materials distributed at the meeting, and the audio record are on file in the Research Library of the Legislative Counsel Bureau, Carson City, Nevada. You may contact the Library online at www.leg.state.nv.us/lcb/research/library/feedbackmail.cfm or telephone: 775/684-6827.