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Transforming Nevada into the Judicial Delaware of the West: How to Fix Nevada's Business Courts

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TRANSFORMING NEVADA INTO THE JUDICIAL DELAWARE OF THE WEST; HOW TO FIX NEVADA’S BUSINESS COURTS

*Joshua Halen**

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Abstract

Specialized business courts have become increasingly more popular throughout the United States as a way for states to speed up litigation for businesses and as a means of attracting businesses to their state. Nevada has been attempting to brand itself as “the Delaware of the West” in an attempt to lure businesses to incorporate or relocate to Nevada. Following the trend of other states, in 1999, Nevada created a business court within its general jurisdiction trial courts in both Washoe and Clark County, the two most populous counties in the state. However, the current Business Courts in Nevada have not succeeded in meeting the expectations set forth. This paper addresses the problems that the Nevada Business Courts have experienced during their existence. By examining and evaluating what has been successful in other state’s business courts, this paper will provide recommendations on how Nevada should reform its Business Courts in order for the state to reach its goal of becoming “the Delaware of the West” for business incorporation.

I. INTRODUCTION

Specialized commercial courts have become increasingly popular in the last fifteen to twenty years in the United States and within Western society as a whole.¹ Specialized business courts have been among the most popular of these specialized courts created by U.S. states. Business courts in their modern development come in two distinct forms: (1) a separate court system that has its own jurisdiction or (2) business court programs that are a division of general trial courts.² The most notable and well-known example of the first form is the Delaware Court of Chancery. The Court of Chancery is an equity court that hears disputes involving trusts and estates, fiduciary duties, guardianships,

¹ The Ad Hoc Comm. on Bus. Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947, 949 (1997). France, Germany and the United Kingdom all have some type of specialized courts that deal in commercial litigation. *Id.* at 950.

² Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 151 (2004).

civil rights, and corporate governance.³ The other type of commercial court is called a business court program in which the general state trial court has created a special business court that “hears business disputes primarily or exclusively.”⁴ Today, twenty-two states have these business court programs including Delaware, New York, North Carolina, and Nevada.⁵ The Nevada Business Court has been established in two of Nevada’s eleven district courts; the two being selected are the Second Judicial District Court and the Eighth Judicial District Court.⁶ The Second Judicial District Court is located in Washoe County, which is home to Reno, and the Eighth Judicial District Court is located in Clark County, with Las Vegas as the largest city in Clark County. These are also the two most populous counties in Nevada.⁷

The rationale for the first modern business court program was to “alleviate[] back log, as well as . . . expediting cases, reducing expenses, creating consistency in case management, and creating judicial expertise in business and commercial matters.”⁸ The increase in business court programs across the country have also been seen as a way for states to attract out-of-state businesses, or alternatively, to dissuade in-state businesses from moving to another state.⁹ Having businesses either move to or stay in that state leads to an increase in a state’s economy and an increase in filing fees for the state.¹⁰ Having a well-respected business

³ DEL. CODE ANN. tit. 10, § 341(1999). *See also* Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 7 (1995).

⁴ John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1922 (2012).

⁵ DEL. CODE ANN. tit. 10, § 341 (1999); NEV. 2D J. DIST. CT. R. 2.1; NEV. 8TH J. DIST. CT. R. 1.61; N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70 (2015); N.C. BUS. COURT RULE 1.2. *See also* Coyle, *supra* note 4, at 1918.

⁶ NEV. 2D J. DIST. CT. R. 2.1, *available at* <http://perma.cc/AUT6-NVTQ>; NEV. 8TH J. DIST. CT. R. 1.61, *available at* <http://perma.cc/L6L6-4BS6>. *See* Bach & Applebaum, *supra* note 2, at 184.

⁷ *Nevada Counties by Population*, NEVADA DEMOGRAPHICS, http://www.nevada-demographics.com/counties_by_population (last visited Oct. 11, 2014).

⁸ Bach & Applebaum, *supra* note 2, at 152-53.

⁹ Coyle, *supra* note 4, at 1919.

¹⁰ *Id.* In Nevada, filing fees are fees assessed by the Nevada Secretary of State to a corporation at the time the articles of incorporation are filed with the Secretary of State and are determined by the total amount of shares provided for in the articles of incorporation. NEV. REV. STAT. § 78.760 (2013). In Nevada, filing fees are also collected by the Nevada Secretary of State for limited liability

court in a state will lead to corporations litigating cases in that state as opposed to another, thus increasing the money generated for in-state lawyers.¹¹

The goal of the Business Court of Nevada was to promote business in the state by improving the justice system.¹² The idea of establishing a business court in Nevada was first proposed and discussed by the Nevada Legislative Committee's Subcommittee to Encourage Corporations and Other Business Entities to Organize and Conduct Business in Nevada.¹³ The Nevada Business Courts are part of the general trial court system and have special rules; among which dictate the courts' jurisdiction and provides the process of selecting judges.¹⁴ The court rules dictate that the chief judge of the district court shall appoint a Business Court judge for a term of two years.¹⁵ The judges appointed to hear business cases are generally trial court judges, who stand for election every six years.¹⁶ The business court judges hear both criminal and civil cases as well as the business court cases; however, if a business case is on the docket, the business case takes precedent.¹⁷ The only requirement for a Business Court judge in Nevada is that the judge has experience in business related topics.¹⁸

The system in Nevada is molded after the court systems of Delaware, New York, and North Carolina.¹⁹ While the chief justice of

companies that are organized under Nevada law. NEV. REV. STAT. § 86.561(f) (2013).

¹¹ Coyle, *supra* note 4, at 1919.

¹² *Nev. Leg. Comm'n's Subcomm. to Encourage Corps. and Other Bus. Entities to Organize and Conduct Bus. in this State*, 71st Sess., at 2 (Nev. 2000), available

at http://www.leg.state.nv.us/74th/Interim_Agendas_Minutes_Exhibits/Exhibits/Chancery/E012908B.pdf. See also Bach & Applebaum, *supra* note 2, at 184-85.

¹³ *Nev. Leg. Comm'n's Subcomm. to Encourage Corps. and Other Bus. Entities to Organize and Conduct Bus. in this State, Rep. of the Supreme Court Taskforce Formed to Study Methods of Creating a Bus. Court*, 1999-2000 Interim Sess., (Nev. 2000), available at <http://perma.cc/8EBP-57BL>.

¹⁴ NEV. 2D J. DIST. CT. R. 2.1 (Business Court Docket); NEV. 8TH J. DIST. CT. R. 1.61 (Assignment of business matters).

¹⁵ NEV. 2D J. DIST. CT. R. 2.1.

¹⁶ NEV. CONST. art. VI, § 5.).

¹⁷ NEV. 2D J. DIST. CT. R. 2.1.

¹⁸ *Id.* This requirement is only in place in the Second District Judicial Court. The term "business related topics" is not defined in the court rules.

¹⁹ Nev. Sec'y of State, *Business Courts*, SLIVER FLUME NEVADA'S BUSINESS PORTAL, <https://perma.cc/V5NA-K8EV> (last visited Oct. 11, 2014).

the Nevada Supreme Court has defined the Nevada Business Courts as successful since their implementation,²⁰ there are some problems with the current system. In 2007, the Nevada Assembly created the Legislative Commission's Subcommittee to Study the Benefits, Cost, and Feasibility of the Implementation of Courts of Chancery ("Nevada Chancery Subcommittee").²¹ The Nevada Chancery Subcommittee focused on four areas of improvement to the Nevada Business Courts: (1) the need for published opinions, (2) time to disposition of cases, (3) expertise of business court judges, and (4) establishing judicial precedent.²²

While the Nevada Legislature failed to act on the Nevada Chancery Subcommittee's recommendations,²³ this paper will examine the business court systems in other states that Nevada modeled its system after, explore the problems identified by the Nevada Chancery Subcommittee facing the current Nevada Business Court, and provide recommendations on how to improve Business Courts in Nevada based on results from other states.

For Nevada to become the "Delaware of the West" for business incorporation, Nevada needs to create a single, separate, specialized Business Court, which has jurisdiction to hear business cases over the entire state, instead of two separate Business Courts in two districts. This New Business Court would have jurisdiction over all business matters that are currently heard in the Business Courts, as prescribed by the current court rules. In the New Business Court structure, three judges will make up the court, with one judge hearing a case. Unlike the Delaware Court of Chancery, the new business court would be a court of law and equity. A panel of business experts of the state will recommend

²⁰ *Requires the Publication of the Written Opinions of a Business Court Under Certain Circumstances: Hearing on S.B. 5 Before the S. Judiciary Comm.*, 2009 Leg., 75th Sess. 4 (Nev. 2009) (statement of C.J. James W. Hardesty, Nevada Supreme Court), available at <https://perma.cc/2CYT-XT9M>.

²¹ Assemb. Con. Res. 35, 2007 Leg., 74th Sess., (Nev. 2007) (enacted).

²² *Implementation of Courts of Chancery: Hearing on Assemb. Con. Res. 35 Before Nev. Leg. Legis. Comm'n's Subcomm. to Study the Benefits, Costs, and Feasibility of the Implementation of Courts of Chancery*, 74th Interim Sess., 1st meeting (Nev. 2008) [hereinafter *First Meeting*], available at <http://perma.cc/5DVQ-DRF4>.

²³ S.B. 5, 2009 Leg., 75th Sess. (Nev. 2009), <https://perma.cc/MX66-PETX>. (S.B. 5 was an Act by the Nevada Senate requiring the clerk of a district court to publish the written opinions of a business court. This was the only recommendation of the Nevada Chancery Subcommittee that was introduced during the 75th Legislative Session. It failed to pass.)

each judge to the Governor of Nevada, where the governor can either appoint the judge to attempt to be confirmed by the Nevada Senate, or seek another candidate, similar to the process Delaware has for the selection of chancellors. . After six years, a New Business Court judge will stand for re-election, where the electorate will either approve or disapprove of keeping the judge. Finally, in order to improve predictability from the decisions by the New Business Court, the court's opinion must be published in a reporter and be made available on the Internet for the public and businesspeople to view.

II. PURPOSE AND GOALS OF A BUSINESS COURT

“There are two main purposes for creating business courts: the primary purpose is to serve the administration of civil justice, and the secondary purpose is to attract and retain business within a state.”²⁴ Business courts were developed to create stability in a state's judicial approach to businesses and corporations,²⁵ or the business courts were developed to attract businesses to the state²⁶. Additional goals for creating a business court include cases that will be heard by uniquely experienced judges in the subject area, creation of a body of case law promoting consistency within the state corporate and commercial law, moving cases more expeditiously to benefit parties who require timely disposition of cases that include both business and non-business cases, and increase a state's competitiveness in the area of business incorporation.²⁷

The first goal, serving the administration of civil justice, is served by state courts in general.²⁸ The main goals of serving civil justice are “access to judicial resources, timely action, ruling and

²⁴ Anne Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. ST. U. L. REV. 477, 482 (2007).

²⁵ See *infra* Part B on Supreme Court of New York Commercial Division.

²⁶ Nev. Leg. Comm'n's Subcomm. to Encourage Corps. and Other Bus. Entities to Organize and Conduct Bus. in this State, 71st Sess., at 2 (Nev. 2000), available at <http://perma.cc/5H72-BQ95>.

²⁷ ABA SECTION OF BUSINESS LAW, ESTABLISHING BUSINESS COURTS IN YOUR STATE (2009), available at http://apps.americanbar.org/dch/thedl.cfm?filename=/CL150011/sitesofinterest_files/establishing-business-courts0809.pdf.

²⁸ Nees, *supra* note 24, at 482.

operating with equality and integrity, maintaining judicial independence, and instilling public trust and confidence in the judicial branch.”²⁹ Business courts meet these goals in several different ways. The nature of complex cases, those typically found in business cases, require more judicial management, which is possible when a judge is relieved of non-business cases, especially given the additional resources available to a specialized judge.³⁰ Business court judges can also spend less time working on these complex cases as their experience and expertise grow in the area, especially when the cases involve issues that the judge constantly sees.³¹ Along with time being better spent by judges, business courts allow judges to issue superior decisions as their expertise grows.³² When the quality of the opinions increase, the entire judicial branch benefits as these opinions result in less time being spent by appellate judges combing through the issues or deciphering trial court opinions.³³ In addition, when complex cases are handled by one judge, the rest of the general trial judges can give more attention to less complicated cases, increasing judicial efficiency throughout the court system.³⁴

Business courts also provide for consistent and accurate decisions.³⁵ These decisions lead the court to apply a uniformed standard for other judges and for corporate leaders to follow.³⁶ Additionally, these courts will provide guidance for corporate lawyers, shareholders, suppliers, and customers of the company.³⁷ This predictability in the judiciary is one element that attracts

²⁹ *Id.* at 482-83.

³⁰ *Id.* at 484-85.

³¹ Andrew A. Powell, *It's Nothing Personal, it's Just Business: A Commentary of the South Carolina Business Court Pilot Program*, 61 S.C. L. REV. 823, 835 (2010).

³² *Id.*

³³ *Id.* at 835-36.

³⁴ *Id.*

³⁵ Nees, *supra* note 24, at 487.

³⁶ Carrie A. O'Brien, *The North Carolina Business Court: North Carolina's Special Superior Court for Complex Business Cases*, 6 N.C. BANKING INST. 367, 369 (2002).

³⁷ *Id.*

businesses to incorporate in a state.³⁸ The two most important requirements in ensuring predictability are: first, have experienced judges to apply the law, and second, providing a written opinion as to how and why the judge came to their conclusion.³⁹ Written opinions are a necessary part of a business court and are one of its main benefits.⁴⁰ As stated by Judge Tennille of the North Carolina Business Court, “[i]ndividuals 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.”⁴¹

An ideal court will be one that is established to best fit the core purpose of the specialized system.⁴² Core business objectives should include a business court that assigns “business cases to specialized judges in order to manage them more effectively and expeditiously and more efficiently uses judicial resources both within the business court and in the court system as a whole.”⁴³ It has also been suggested that business courts should have no minimum monetary requirements for assignment of cases, as the amounts tend to be arbitrary and may deny important issues from being resolved by judicial, business experts.⁴⁴ Additionally, judges should be assigned from the civil division and hear only business cases in an attempt to maximize the courts efficiency, render a quicker decision, and build the expertise of the particular judge.⁴⁵ Finally, in addition to having a specialized judge, a court should require and publish a case management plan in order to alert litigants as to when their cases will be disposed of and to keep them on an official timeline.⁴⁶

³⁸ Powell, *supra* note 31, at 836.

³⁹ *Id.* at 835-36.

⁴⁰ *Implementation of Courts of Chancery: Hearing on Assemb. Con. Res. 35 Before Nev. Leg. Legis. Comm’n’s Subcomm. to Study the Benefits, Costs, and Feasibility of the Implementation of Courts of Chancery*, 74th Interim Sess., 2d meeting, 6 (Nev. 2008), available at <http://perma.cc/UK8V-68EP>.

⁴¹ *Id.*

⁴² Tim Dibble & Geoff Gallas, *Best Practices in U.S. Business Courts*, 19 CT. MANAGER 25, 32 (2002), available at <http://perma.cc/Q554-Q9SB>.

⁴³ *Id.* at 33.

⁴⁴ *Id.* at 35.

⁴⁵ *Id.* at 36.

⁴⁶ *Id.* at 37.

III. AN EXAMINATION OF SELECT BUSINESS COURTS

Specialized business courts have gained extreme popularity since New York County instituted its Commercial Division Court within its Supreme Court in 1993.⁴⁷ As of 2010, there were 40 business court programs in 22 U.S. states.⁴⁸ Many of these state business courts are actually within the general jurisdiction trial court at the state level; however, the judges have been selected to hear business cases as well as other civil and criminal cases in some states.⁴⁹ The Delaware Chancery Court is a separate court system that hears only cases of equity.⁵⁰ This section will examine four states' business court programs: Delaware, New York, North Carolina and Nevada. The three states were selected because those were the court systems that Nevada modeled its current Business Court program on and have been viewed as the most successful business courts created.

A. Delaware Chancery Court

The Delaware Chancery Court was established in 1792 and is considered the “‘godfather’ of modern business courts.”⁵¹ As explained by the Delaware Supreme Court, “[t]he Delaware Court of Chancery is a court of equity. It has only that limited jurisdiction that the Court of Chancery in England possessed at the time of the American Revolution, or such jurisdiction as has been conferred upon it by the Delaware General Assembly.”⁵² While many states have merged law and equity into general jurisdiction courts,⁵³ Delaware has kept the two separate⁵⁴. Today the

⁴⁷ Bach & Applebaum, *supra* note 2, at 152.

⁴⁸ Lee Applebaum, *The Steady Growth of Business Courts*, in NATIONAL CENTER FOR STATE COURTS, *FUTURE TRENDS IN STATE COURTS* 70, 70 (Carol R. Flango, Amy M. McDowell, Charles F. Campbell & Neal B. Kauder eds., 2011).

⁴⁹ Bach & Applebaum, *supra* note 2, at 151.

⁵⁰ Powell, *supra* note 31, at 825.

⁵¹ Nees, *supra* note 24, at 480.

⁵² *El Paso Natural Gas v. Transamerican Natural Gas Corp.*, 669 A.2d 36, 39 (Del. 1995) (citing *DuPont v. DuPont*, 85 A.2d 724, 729-30 (Del. 1951)).

⁵³ Dreyfuss, *supra* note 3, at 6.

⁵⁴ DEL. CODE ANN. tit. 10, § 341 (1999).

Chancery's docket contains cases involving trusts and estates, fiduciary duties, guardianships, and civil rights actions seeking only injunctive relief.⁵⁵ The court also hears corporate governance cases that raise equity issues, such as the duty of disclosure and the duty of good faith, as well as corporate cases for demand, such as accounting, appointments of receivers, and orders to transfer corporate shares.⁵⁶ The Chancery Court also hears cases involving shareholder derivative actions and has been granted the power to award monetary damages in corporate disputes in an effort to fully resolve those cases in one court.⁵⁷

The Chancery Court has also been granted the power to hear technology disputes that involve at least one Delaware "business entity."⁵⁸ These technology cases are geared specifically towards business related disputes, as no party in a case can be a consumer.⁵⁹ Furthermore, if a monetary judgment is demanded, the amount in controversy must exceed \$1,000,000.⁶⁰ Finally, both parties must consent to have the case heard by the Chancery.⁶¹ The Chancery Court also has a "mediation only" docket that allows parties to mediate their business disputes before a judicial official, as opposed to litigating them.⁶² Generally, the same rules that

⁵⁵ Dreyfuss, *supra* note 3, at 7.

⁵⁶ *Id.*

⁵⁷ Harman v. Masoneilan, 442 A.2d 487, 499-500 (Del. 1982).

⁵⁸ DEL. CODE ANN. tit. 10, § 346(a) (1999). *See also* DEL. CODE ANN. tit. 10 § 346(c)(1) (1999) (defining the term technology dispute:

"[A] dispute arising out of an agreement and relating primarily to: the purchase or lease of computer hardware; the development, use, licensing or transfer of computer software; information biological, pharmaceutical, agricultural or other technology of a complex or scientific nature that has commercial value, or the intellectual property rights pertaining thereto; the creation or operation of Internet web sites; rights or electronic access to electronic, digital or similar information; or support or maintenance of the above.")

⁵⁹ DEL. CODE ANN. tit. 10, § 346(a)(1) (1999).

⁶⁰ DEL. CODE ANN. tit. 10, § 346(a)(1) (1999).

⁶¹ DEL. CODE ANN. tit. 10, § 346(a)(1) (1999).

⁶² Donald F. Parsons Jr. & Joseph R. Slight III, *The History of Delaware's Business Courts*, 17 BUS. L. TODAY 21, 23 (2008) ("Parsons [wa]s a Vice Chancellor on the Delaware Court of Chancery and Slight [wa]s a Judge on the Delaware Superior Court at the time of this publication."). *See also* DEL. CODE ANN. tit. 10, § 347 (1999).

govern technology disputes govern the court's jurisdiction over the mediation process. At least one party must be a Delaware business entity, the amount in controversy must be in excess of \$1,000,000, and the parties must consent to such litigation.⁶³ The rationale behind this mediation only docket was "to provide 'additional benefits for businesses choosing to domicile in Delaware' and to 'keep Delaware ahead of the curve in meeting the evolving needs of businesses, thus strengthening the ability of the state to convince such businesses to incorporate and locate operations in Delaware.'"⁶⁴

1. *The Delaware Chancery Court as the Gold Standard of Business Courts*

Delaware is seen as the gold standard of the business court model and several states have attempted to repeat Delaware's success. Several factors have led to the Delaware Chancery Court gaining this level of notoriety. The Delaware legislators have been very active in molding the court in an effort to keep the caseload manageable; one tool the legislators have provided is the ability for the court to hear cases without a jury.⁶⁵ The result of not having a jury decide cases means that the chancellors decide the disputes quickly and the parties know that their case will be handled and decided by a judicial expert.⁶⁶ With only five chancellors making up the court,⁶⁷ and their duty to decide cases on their own, the chancellors have developed an expertise in corporate and commercial cases⁶⁸. Additionally, the Court of Chancery has two masters who hear "guardianship cases, real property disputes among individuals, and trust administration cases, thereby enabling the Chancery judges to spend more time on corporate and

⁶³ DEL. CODE ANN. tit. 10, § 347(a) (1999).

⁶⁴ Parsons & Slight, *supra* note 62. See also S. 58, 142d Sess., (Del. 2003), at synopsis <http://legis.delaware.gov/>.

⁶⁵ Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 708 (2002).

⁶⁶ *Id.*

⁶⁷ William B. Chandler, III, *The Delaware Court of Chancery and Public Trust*, 6 ST. THOMAS L. REV. 421, 426 (2009).

⁶⁸ Kahan & Kamar, *supra* note 65.

commercial disputes.”⁶⁹ As described by former Chancellor Chandler, “[t]he five judges on the Court of Chancery know the great history and reputation of the court, built over two hundred years. We all consider our positions as a sacred trust that has been granted to each of us at this moment”⁷⁰ “The members of the Chancery Court also discuss complex issues among themselves and review opinions prior to release to the parties and the public to insure consistency.”⁷¹ The high-quality jurists that continue to serve the Chancery Court have been one constant that has defined the court.⁷² Often times the chancellors will move between the Delaware courts of law and equity, including Chancellor Daniel Wolcott, Howard Bramhall, and Joseph Walsh, who all moved from the Chancery to the Delaware Supreme Court.⁷³ In 2014, Chancellor Leo Strine was confirmed to serve as the chief justice of the Delaware Supreme Court from the Chancery Court.⁷⁴ An additional factor attributed to the Delaware Court of Chancery’s success has been “the opportunity to obtain quick and effective action, expertise, economies of scale that have lent themselves for efficiency, and perhaps most importantly, a refined body of law allowing businesses the prescience to avoid suits.”⁷⁵ Finally, the feature that most sets the Delaware Court of Chancery apart from other courts are the written opinions that are published in both the state and regional reporter, and the availability of such opinions on commercial databases.⁷⁶ The written opinions allow a lawyer or a businessperson to quickly research the published casework by the Chancery and come to a more informed decision at a lower cost than making a decision and litigating the matter later.

⁶⁹ Parsons & Slights, *supra* note 62, at 22.

⁷⁰ Chandler, *supra* note 67.

⁷¹ Bach & Applebaum, *supra* note 2, at 217 (quoting Maryland Business and Technology Court, *Maryland Business and Technology Task Force Report*, App. B at 23 (2000), <http://perma.cc/WX8E-QQ36>).

⁷² Dreyfuss, *supra* note 3, at 7.

⁷³ *Id.* at 7-8.

⁷⁴ Tom Hals, *Leo Strine Confirmed as chief justice of Delaware’s Supreme Court*, REUTERS (Jan. 29, 2014, 7:05 PM), <http://perma.cc/D2FR-MF99>.

⁷⁵ Bach & Applebaum, *supra* note 2, at 217.

⁷⁶ Kahan & Kamar, *supra* note 65.

a. An Empirical Examination of the Delaware Court of Chancery

Professor Rochelle C. Dreyfuss conducted an empirical examination of the Delaware Court of Chancery in an effort to provide an explanation as to what makes the Chancery the gold standard of business courts.⁷⁷ Professor Dreyfuss identified three factors as the best indication to measure a “good” court or “good” adjudication.⁷⁸ The factors were: (1) the quality of decision-making, (2) judicial efficiency, and (3) the perception of due process.⁷⁹ Based on Professor Dreyfuss’ examination, the Delaware Chancery Court excels in each of these three criteria.

The quality of decision making encompasses three parts. First is the accuracy of decisions, which explains whether the court produced the objectively correct decision.⁸⁰ Second is precision, which is “the extent to which the court reaches the same result in equivalent cases.”⁸¹ Finally, the third factor is coherence, which is how well a court has tied together various court policies that it seeks to advance.⁸²

The Delaware Court of Chancery has excelled in its quality of decision-making according to Professor Dreyfuss.⁸³ The Chancery sees the same issues presented repeatedly and the chancellors have both the time and the motivation to fully research the issues presented and resolve them accurately.⁸⁴ Another benefit to seeing the same issues is that the chancellors have the ability to write opinions that are coherent and the ability to correct mistakes

⁷⁷ Dreyfuss, *supra* note 3, at 16.

⁷⁸ *Id.* at 11.

⁷⁹ *Id.*

⁸⁰ *Id.* at 12. An objectively correct decision balances the needs of the litigants with a decision that is acceptable to public norms and social policy. Additionally, an accurate decision will be one that achieves the thinking of the legislature that enacted such laws. *Id.*

⁸¹ *Id.*

⁸² *Id.* at 13. A court can advance several policies, such as favoritism towards corporations, or an attempt to limit judicial resources. The coherence factors do not evaluate whether a certain policy is correct, only that the court is consistent in its application of this policy. *Id.*

⁸³ *Id.* at 16.

⁸⁴ *Id.*

that may have been made in past cases.⁸⁵ Additionally, the court's quality decision-making can be seen from the fact that many judges in other states often follow Delaware precedent in the area of commercial and corporate law.⁸⁶ In an effort to stay sharp on its decision-making ability, the court also interacts with academics, shareholder groups, corporate directors, mergers and acquisitions lawyers, and corporate litigants from all over the country.⁸⁷

Professor Dreyfuss also highlights the court's efficiency in rendering decisions as an important factor.⁸⁸ Efficiency in the court setting can take on a different meaning to those utilizing the system.⁸⁹ To litigants, efficiency means that "the court [can] decide its cases within the time frame the litigants require"⁹⁰ To the public, efficiency means disposing of cases so that they are decided properly and so that all factors are considered.⁹¹ Again, the Delaware Chancery Court excels in this area. Professor Dreyfuss notes that the court's "understanding of financial markets has enabled it to decide questions in the time frame required by the fast-paced transactions it regularly reviews."⁹² Professor Dreyfuss gives an example of this efficiency by looking at the court's work in *QVC Network Inc. v. Paramount Communications Inc.*⁹³ In *QVC*, the case was briefed in two and one half weeks with over 400 pages of briefs being reviewed in nine days by Vice Chancellor Jacobs.⁹⁴

In Professor Dreyfuss' review of a "good court," the perception of due process was the final factor that sets Delaware apart.⁹⁵ The perception of due process can be seen in the constitutional requirements of the court, including "notice, a meaningful opportunity to be heard, compulsory process, and a

⁸⁵ *Id.* at 17.

⁸⁶ Kahan & Kamar, *supra* note 65, at 708 n.94.

⁸⁷ Parsons & Slights, *supra* note 62, at 22.

⁸⁸ Dreyfuss, *supra* note 3, at 19.

⁸⁹ *Id.* at 14.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 20.

⁹³ 635 A.2d 1245 (Del. Ch. 1993), *aff'd*, 637 A.2d 34 (Del. 1994).

⁹⁴ Dreyfuss, *supra* note 3, at 21.

⁹⁵ *Id.*

neutral adjudicator.”⁹⁶ One factor that often inhibits specialized courts from the perception of due process is the question whether the adjudicator is in fact neutral.⁹⁷ Another factor contemplated by observers of specialized courts is the effect of the rules of these specialized courts and the ability of a seasoned expert lawyer to have an advantage over a novice lawyer.⁹⁸ Again, Delaware overcomes these possible obstacles in Professor Dreyfuss’ opinion. Professor Dreyfuss argues that those interested in becoming chancellors are both sophisticated and wealthy enough to balance out any lobbying efforts by third parties.⁹⁹ Additionally, “litigants are generally equal in terms of their financing and the quality of their representation.”¹⁰⁰ Lawyers who represent the litigants “tend to play both sides of an issue, depending on the [specific] dispute.”¹⁰¹ Finally, the nature of corporate law in general gives litigants and interest groups little incentive to attempt to bias judges, because parties may be on one side of the dispute at the present time, but could just as easily be arguing against their former positions in their next case.¹⁰²

b. Additional Factors that Distinguish the Chancery Court

The reason the Chancery is so well-respected goes beyond mere empirical observations. Chancellors do not need to stand for election or re-election, so they are not motivated by politics in their decisions.¹⁰³ Chancellors are appointed for a 12-year term by the Governor of Delaware and approved by a majority of the senate.¹⁰⁴ The chancellors selected to serve on the Chancery Court are

⁹⁶ *Id.* at 15.

⁹⁷ *Id.* at 21 Some parties may view a business court judge, who is a seasoned expert in business related matters, as having a bias towards the corporation in a case pending before him or her. *Id.*

⁹⁸ *Id.* at 22.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ DEL. CONST. art. IV, § 3.

¹⁰⁴ *Id.*

selected based on merit by a nominating commission.¹⁰⁵ The Judicial Nominating Commission of Delaware was established by an Executive Order by the governor in an effort to select the best, most qualified candidates for judicial vacancies.¹⁰⁶ The commission is made up of 11 members, ten appointed by the governor and one selected by the president of the Delaware State Bar with the consent of the governor.¹⁰⁷ The commission must have at least four lawyers and four non-lawyers and no more than six members can be of the same political party at the time of their appointment.¹⁰⁸ In the event of a judicial vacancy, the commission submits three candidates to the governor and the governor can either select a candidate from this list, or ask for a supplemental list; however, the governor must select a name from one of the two lists.¹⁰⁹ Once a candidate is selected, the Delaware Senate may then approve them by a majority vote.

Another factor that sets the Delaware Chancery Court apart is the overall attitude of the chancellors. With the chancellors' experience in corporate matters, they have taken on a unique understanding of corporate decision-makers, viewing them as having "a dual role of both entrepreneurial risk taker and fiduciary for his principals, the stockholders."¹¹⁰ This view is then "reflected in the court's ongoing effort to reach a reasonably efficient and appropriate balance between judicial intervention to protect the rights of shareholders, and judicial restraint to allow boards and officers to pursue corporate interests without meddlesome judicial interference."¹¹¹

The unique setup of the Delaware court system also leads to another advantage enjoyed by the Chancery Court. Delaware is

¹⁰⁵ Kahan & Kamar, *supra* note 65.

¹⁰⁶ *Methods of Judicial Selection: Delaware*, NAT'L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state=DE (last visited Oct. 18, 2014).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Parsons & Slights, *supra* note 62.

¹¹¹ *Id.*

one of ten states to not have an intermediate court of appeals.¹¹² The Delaware court system is comprised of a supreme court to hear all appeals from the trial courts, including the Court of Chancery.¹¹³ Any case that the Chancery hears can be taken on direct appeal to the Delaware Supreme Court.¹¹⁴ As noted above, the Delaware Supreme Court and the Court of Chancery have a close working relationship and many Chancery judges make the transition from serving on the Chancery to the Delaware Supreme Court.¹¹⁵ One commenter has noted that this closeness between the two courts plays an important role in the development of Delaware's corporate law and that "[o]ne reason Delaware's fiduciary duty law is both coherent and adaptive in the classic common law tradition is that it is made by an informed group of judges who are repeat players on matters of corporate law."¹¹⁶ In addition, the Delaware judges' "experiences, both prior to and after becoming judges, gives them an unmatched expertise in the field of corporate law."¹¹⁷ Finally, the Delaware Supreme Court and Chancery Court have worked so well together in coming to a similar understanding of corporate law, that Justice Steele, in a 2008 interview, stated, "for the last eight quarters, you would find that of the cases that are appealed . . . actual empirical data shows that the affirmance rate of our trial court judge's ruling is 90 percent."¹¹⁸ These factors, along with some not explored here, have all led to the Chancery Court becoming the gold standard of a business court within the United States.

¹¹² Sens. Tick Segerblom & Mark Hutchison, *Why Nevada Needs a New Appellate Court*, LAS VEGAS SUN, (Mar. 22, 2013, 2:02 AM), available at <http://perma.cc/YZD5-3FZ3> (noting Delaware, as one of ten states not to have an intermediate court of appeals). See DEL. CONST. art. IV, § 1 ("The judicial power of this State shall be vested in a Supreme Court, a Superior Court, a Court of Chancery, a Family Court, a Court of Common Pleas, a Register's Court, Justices of the Peace, and such other courts . . .").

¹¹³ See, e.g., DEL. CONST. art. IV, § 11.

¹¹⁴ Parsons & Slights, *supra* note 62.

¹¹⁵ Dreyfuss, *supra* note 3 at 7-8; Parsons & Slights, *supra* note 62, at 22.

¹¹⁶ Robert B. Thompson, *Piercing the Veil: Is the Common Law the Problem*, 37 CONN. L. REV. 619, 628 (2005).

¹¹⁷ *Id.*

¹¹⁸ Delaware: *Where the Best Lawyers Aspire to Become Judges*, METRO. CORP. COUNS., at 23, 45 (Feb. 2008), <http://perma.cc/9FDG-96KX>.

B. Supreme Court of New York Commercial Division

In 1993, New York County's Supreme Court¹¹⁹ instituted a pilot commercial program within the trial court system where a single judge was assigned to hear business and commercial cases¹²⁰. In total there were four judges appointed to this pilot program.¹²¹ Before the pilot program's implementation, business litigants were unlikely to want their cases heard in state court.¹²² The goal of the pilot program was an attempt at "alleviating backlog [within the court as a whole], as well as . . . expediting cases, reducing expenses, creating consistency in case management, and creating judicial expertise in business and commercial matters."¹²³

In 1995, the chief judge of the State of New York, with a report by the Commercial and Federal Litigation Section of the New York State Bar Association recommending the establishment of a commercial court, created the Commercial Courts Task Force.¹²⁴ The pilot program was extremely successful from the onset of its implementation as seen by the thirty-five percent increase in the amount of cases disposed of in just the court's first year of existence.¹²⁵ Of special note, "[t]he efficiencies attributed to judicial specialization permitted three specialized business judges to handle the work of more than four generalist judges using the same resources."¹²⁶ Later in 1995, the Commercial Division began hearing exclusively commercial cases in New York County with the selection of five judges.¹²⁷ Between 1995 and June 30, 1996, more than 4,000 cases were filed in the Commercial

¹¹⁹ In New York, the Supreme Court is a general jurisdiction trial court, while the highest court in the state is the New York Court of Appeals. See *Structure of the Courts*, NYCOURTS.GOV, <https://perma.cc/77VK-PCYF> (last visited Oct. 21, 2015).

¹²⁰ Bach & Applebaum, *supra* note 2, at 152.

¹²¹ Sen. Ember Reichgott Junge, *Business Courts: Efficient Justice or Two-Tiered Elitism?*, 24 WM. MITCHELL L. REV. 315, 319 (1998).

¹²² Bach & Applebaum, *supra* note 2, at 152.

¹²³ *Id.* at 152-53.

¹²⁴ The Ad Hoc Comm. on Business Courts, *supra* note 1, at 957.

¹²⁵ Bach & Applebaum, *supra* note 2, at 153.

¹²⁶ *Id.*

¹²⁷ The Ad Hoc Comm. on Business Courts, *supra* note 1, at 957.

Court.¹²⁸ “The Overall objective of the commercial division is to concentrate expertise in commercial litigation, so that business disputes can be resolved better and more efficiently.”¹²⁹ Along with these goals, the court was designed to “expedite the process of cases and develop judicial expertise in doing so, and to return the New York courts to a leadership role in adjudicating major commercial disputes.”¹³⁰

Today there are ten Commercial Divisions within New York’s Supreme Courts located in ten different New York counties.¹³¹ Some of the cases that the division can hear are: “breach of contract or fiduciary duty, fraud, misrepresentation, business tort, or statutory and/or common law violation where the breach or violation is alleged to arise out of business dealings;” “transactions governed by the Uniform Commercial Code;” “transactions involving commercial real property;” “shareholder derivative actions;” “commercial class actions;” “business transactions involving . . . commercial banks;” “internal affairs of business organizations;” “malpractice [claims against] . . . accountants or actuaries;” “environmental insurance coverage;” “commercial insurance coverage;” “dissolution of corporations, partnerships, limited liability companies, limited liability partnerships and joint ventures;” and “applications to stay or compel arbitration and affirm or disaffirm arbitration.”¹³² Additionally, all cases must meet a “monetary threshold” as provided by the court rules and these thresholds differ from county to county.¹³³ The thresholds range from \$50,000 in Albany County to \$500,000 in New York County.¹³⁴

Using Professor’s Dreyfuss’ approach to reviewing business courts, New York’s Commercial Division seems to capture all three criteria proposed. The court allows for voluntary

¹²⁸ *Id.*

¹²⁹ Bach & Applebaum, *supra* note 2, at 153.

¹³⁰ *Id.* at 154 (quoting *NYS Unified Court System’s Comprehensive Civil Justice Program* at 111.1 (Mar. 24, 1999)).

¹³¹ N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70 (2015), available at <http://www.nycourts.gov/rules/trialcourts/202.shtml>.

¹³² N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70(b)(1)-(12).

¹³³ N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70(a).

¹³⁴ *Id.*

meditation and for a case management conference within 45 days of transfer to the Commercial Division in an effort to maintain efficiency.¹³⁵ To enhance the quality of the courts and improve predictability, the opinions of the Commercial Division are available on the court's website¹³⁶ and are available on Lexis and Westlaw.¹³⁷ Finally, with regards to due process features, the Commercial Division has a unified statewide system for all divisions and substantially similar procedural rules as the non-commercial division courts.¹³⁸

While the New York Commercial Division Court is considered to be the precursor to the modern development of business courts throughout the country,¹³⁹ it is not without some criticism¹⁴⁰. In comparing the Commercial Divisions to the Delaware Court of Chancery there are several differences. First, the judges who preside over the Commercial Division are elected in partisan elections¹⁴¹ while a selection committee appoints Chancery judges. Second, the jurisdiction of the Commercial Division is extremely broad when compared to the Chancery Court's.¹⁴² The Commercial Division's cases consist of both equity and matters at law including contract disputes while the Chancery's jurisdiction consist of equity matters and some matters where monetary relief is sought. Finally, "the Commercial Divisions were established only in some counties and no equivalent division was established in New York's intermediate appellate court, making it difficult to develop a coherent body of

¹³⁵ Nees, *supra* note 24, at 516.

¹³⁶ *Commercial Division Law Report*, NYCOURTS.GOV, <http://perma.cc/8XT3-AFBQ>(last visited Oct. 20, 2014).

¹³⁷ Kahan & Kamar, *supra* note 65, at 711.

¹³⁸ Nees, *supra* note 24, at 516.

¹³⁹ Bach & Applebaum, *supra* note 2, at 152.

¹⁴⁰ See Kahan & Kamar, *supra* note 65, at 709-10.

¹⁴¹ *Id.* at 709. Judicial candidates for the Supreme Court must first compete in a party convention system to determine who will represent that party in the general election. Judicial candidates are chosen by party delegates, and the delegates are selected by primary voters. See *Judicial Selection in the States; New York*, AM. JUDICATURE SOC'Y, <http://perma.cc/5JLD-GE33>(last visited Dec. 30, 2014).

¹⁴² Kahan & Kamar, *supra* note 65, at 709-10.

corporate law precedents.”¹⁴³ Delaware, on the other hand, has the trial court divisions and the Supreme Court, and the two-division work closely together to develop a coherent body of corporate law.

Even with these circumstances, the Commercial Division has been extremely successful and has been a model for business courts established since. A measure of success can be seen in its disposition rate of contract cases. In 1998, the average disposition rate in contract cases was 552 days, compared to an average of 648 days for similar disputes before the division was established.¹⁴⁴ By the end of 2000, the disposition rate had fallen to 412 days, and, by 2002, the rate was down to an impressive 364 days, a 44 percent decrease since 1992.¹⁴⁵

C. North Carolina Business Court

North Carolina created a business court in 1995 in an attempt to make the state friendlier to businesses.¹⁴⁶ The Business Court was the recommendation of the North Carolina Commission on Business Laws and the Economy as their finding led them to the conclusion that the Business Court “will attract out-of-state businesses to the state.”¹⁴⁷ The North Carolina Supreme Court created the Business Court by amending existing state rules concerning the State’s superior and district courts.¹⁴⁸

The North Carolina Business Court has jurisdiction to hear cases from all over the state.¹⁴⁹ The Business Court must hear cases that involve antitrust laws, corporation law, securities law, electronic commerce, intellectual property law, tax law, and unfair competition law.¹⁵⁰ The chief justice of the North Carolina Supreme Court may also designate any case to be heard by the Business Court as a complex business case, thus, the Business

¹⁴³ *Id.* at 710.

¹⁴⁴ Bach & Applebaum, *supra* note 2, at 154.

¹⁴⁵ *Id.*

¹⁴⁶ O’Brien, *supra* note 36, at 374-75.

¹⁴⁷ *Id.* at 367.

¹⁴⁸ Bach & Applebaum, *supra* note 2, at 166-67.

¹⁴⁹ Powell, *supra* note 31, at 828.

¹⁵⁰ *Id.* at 828-29.

Court's subject matter jurisdiction is flexible.¹⁵¹ There are two ways in which the chief justice can assign a case to the Business Court.¹⁵² "First, a superior court judge can recommend that the Chief Justice assign the case to the Business Court if the judge believes that the case presents a 'complex business' issue at stake."¹⁵³ Second, "one or both of the parties can request that the Chief Justice designate the case as a complex business case."¹⁵⁴ When creating the court's rules, the North Carolina Supreme Court decided not to define what exactly a complex business case was, instead allowing litigants to seek the special court if they felt they would benefit from it.¹⁵⁵ The chief justice also has wide discretion in determining what is a complex business case having only to ask, "whether 'the outcome will have implications for business and industry in making their business decisions.'"¹⁵⁶ There are three judges currently sitting on the Business Court and once a case has been designated to the Business Court, the chief justice of the Business Court assigns the case to a judge based on geography, as well as, the current caseload of the judge and possible conflicts of interest.¹⁵⁷ The judges selected to the Business Court are not elected,¹⁵⁸ instead they are appointed by the North Carolina Supreme Court to serve for five years.¹⁵⁹

Looking at Professor Dreyfuss' criteria for a "good" court, North Carolina hits most of the marks.¹⁶⁰ In an effort to promote efficiency, the Business Court rules require a case management meeting within thirty days of the case being transferred to the Business Court.¹⁶¹ Additionally, all cases pending in the Business

¹⁵¹ *Id.* at 829.

¹⁵² O'Brien, *supra* note 36, at 383.

¹⁵³ *Id.* (citing N.C. SUPER. & DIST. CT. R. 2.1(a)).

¹⁵⁴ *Id.* (citing N.C. SUPER. & DIST. CT. R. 2.1(a)).

¹⁵⁵ *Id.* at 384.

¹⁵⁶ *Id.* (quoting *History of the North Carolina Business Court*, N.C. BUS. CT., <http://perma.cc/5FJH-Q8XW> (last visited Oct. 20, 2014)).

¹⁵⁷ *NC Business Court Frequently Asked Questions*, N.C. BUS. CT., <http://perma.cc/STT6-54MV> (last visited Oct. 20, 2014).

¹⁵⁸ Kahan & Kamar, *supra* note 65, at 711.

¹⁵⁹ Powell, *supra* note 31, at 828.

¹⁶⁰ Nees, *supra* note 24, at 516.

¹⁶¹ *Id.*; N.C. BUS. CT. R. 17.1, available at <http://perma.cc/L29H-ABKQ>.

Court are subject to mandatory mediation.¹⁶² On the subject of quality, North Carolina requires the judges of the Business Court to write and publish opinions online in all non-jury matters.¹⁶³ All opinions are available and searchable at the court's website¹⁶⁴ and have added to the predictability of the court which helps businesses in making decisions¹⁶⁵. Additionally, the Business Court has a low reversal rate and provides judges with the training necessary to become experts in the subject matter.¹⁶⁶ Finally, North Carolina's Business Court encourages collaboration with the State Bar and the State Supreme Court.¹⁶⁷ The final qualification proposed by Professor Dreyfuss is the appearance of due process. The North Carolina Business Court does have some procedural rules that deviate from the general superior courts, such as statewide jurisdiction in business cases, which is not the case for the general courts.¹⁶⁸ However, North Carolina does have a unified statewide system for its Business Court and it seeks feedback from both the parties and the attorneys involved in the litigation.¹⁶⁹ Overall, North Carolina's Business Court meets all three criteria established by Professor Dreyfuss and has been a model for other states, including Nevada.¹⁷⁰

The North Carolina Business Courts does face some criticism in its operation.¹⁷¹ The fact that North Carolina has such a broad subject matter jurisdiction, has allowed juries to hear cases, and that its opinions are not published on Westlaw and Lexis, are

¹⁶² Nees, *supra* note 24, at 516; N.C. BUS. CT. R. 19.1; N.C. BUS. CT. R. 19.2 (Parties are not required to select a mediator off the Business Court's list, however, if the parties are unable to agree to a mediator, the court will appoint one from its list.)

¹⁶³ Nees, *supra* note 24, at 516.

¹⁶⁴ Powell, *supra* note 31, at 829; *Court Opinions*, NORTH CAROLINA BUSINESS COURT, <http://perma.cc/P7R5-NPP2> (last visited Oct. 20, 2014) (all of the North Carolina Business Court's opinions are available on this website).

¹⁶⁵ Powell, *supra* note 31, at 829.

¹⁶⁶ Nees, *supra* note 24, at 516.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Nev. Sec'y of State, *supra* note 19 (noting that the Nevada Business Court was modeled on North Carolina's Business Court, among others).

¹⁷¹ Kahan & Kamar, *supra* note 65, at 713.

just some of the criticisms the court has faced.¹⁷² Additionally, the funding for the North Carolina Business Court is very low, which has led the court to suffer from a shortage of chamber, legal, and clerical support.¹⁷³

The North Carolina Business Court has seen promising statistics since its inception. Notably, during its first seven years, the court had closed 116 cases, 73 of which were settled, 24 reached judgment, 16 were voluntarily dismissed, and 3 were removed to federal court.¹⁷⁴ Additionally, one feature that has set North Carolina apart from other states is that “their business court opinions, in the absence of contradictory appellate court opinions, [have] precedential value over [] other pending trial matters in the state” as dictated by the State Supreme Court.¹⁷⁵

D. Nevada Business Courts

In 2000, the Nevada Supreme Court approved the creation of business courts for the Second and Eighth Judicial Districts.¹⁷⁶ The Second and Eighth Judicial Districts are the largest districts by population and have the highest caseloads of all the districts in Nevada.¹⁷⁷ The Business Court was established when the Nevada Supreme Court approved rule changes to the two district courts’ existing rules.¹⁷⁸ The court was a recommendation of the Legislative Subcommittee to Encourage Business Development in

¹⁷² *Id.* at 711-13.

¹⁷³ *Id.* at 713. See also Leah Beth Ward, *Business Court Pleads Poverty*, CHARLOTTE OBSERVER (Mar. 24, 1998), <http://perma.cc/PJ6G-T6FK>.

¹⁷⁴ Powell, *supra* note 31, at 830.

¹⁷⁵ Nees, *supra* note 24, at 521.

¹⁷⁶ Bach & Applebaum, *supra* note 2, at 184.

¹⁷⁷ NEV. SUPREME COURT, ANNUAL REPORT OF THE NEVADA JUDICIARY, FISCAL YEAR 2014, 35 (Administrative Office of the Courts ed., 2014), available at <http://perma.cc/2PSC-HNM8>. For a comparison, the Second Judicial District Court had 17,381 total non-traffic cases disposed and the Eighth Judicial District Court had 93,579 total non-traffic cases disposed of, compared to the next highest district, the Fourth Judicial District Court, which had 2,410 total non-traffic cases disposed. *Id.*

¹⁷⁸ Bach & Applebaum, *supra* note 2, at 184.

Nevada.¹⁷⁹ The purpose of the subcommittee was to find ways to encourage businesses to come to Nevada and to stay there, and creating a business court was one way to achieve this goal.¹⁸⁰ The subcommittee found that the additional effects of a business court would amount to an increase in additional revenue for the state; an increase of gross state product from legal, accounting, banking, financing, trust, investment management, and administration activities; and a higher paid workforce.¹⁸¹ It was also presented to the subcommittee that other states, including Delaware, “could not compete with Nevada’s favorable tax structure and minimal incorporation requirements.”¹⁸² With Nevada’s favorable business climate, the subcommittee found that a business court would increase Nevada’s presence in the business world.¹⁸³ Based on the findings of the subcommittee, it recommended that Nevada create a business court system by amending the local rules of the district court and that the legislature should amend the Nevada Constitution to create a separate court system in the future.¹⁸⁴ The Nevada Senate passed a resolution endorsing the amendment of local rule changes to create a division of business courts within the general district courts.¹⁸⁵

With the Business Courts being located in two separate districts, each district has its own rules for its business court.¹⁸⁶ The Business Court’s rules for the Second Judicial District Court are found under Rule 2.1¹⁸⁷ and the rules for the Eighth Judicial District Court are under Rule 1.61¹⁸⁸. Cases included in the Second

¹⁷⁹ *Id.*; *Nev. Leg. Comm’n’s Subcomm. to Encourage Corps. & Other Bus. Entities to Organize and Conduct Bus. in this State*, 71st Sess., at 2 (Nev. 2000), available at <http://perma.cc/WS7B-UUQA>.

¹⁸⁰ *Nev. Leg. Comm’n’s Subcomm. to Encourage Corps. and Other Bus. Entities to Organize and Conduct Bus. in this State*, *supra* note 12.

¹⁸¹ *Id.*

¹⁸² *Id.* (statements of Mr. La Gatta, private citizen).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 9-11.

¹⁸⁵ S. Con. Res. 11, 71st Sess. (Nev. 2001), available at <https://perma.cc/WA5F-YCEW>.

¹⁸⁶ Bach & Applebaum, *supra* note 2 at 185-86.

¹⁸⁷ NEV. 2D J. DIST. CT. R. 2.1.

¹⁸⁸ NEV. 8TH J. DIST. CT. R. 1.61.

Judicial District Business Court include issues concerning corporate governance and shareholder derivative suits; trademarks or names; statutory claims for trade secrets; securities action; deceptive trade practices or investment securities; or any dispute among business entities if the presiding judge of the business court docket determines that the case would benefit from enhanced case management.¹⁸⁹ The rules for the Eighth Judicial District are similar; however, those rules include U.C.C. claims, where the Second Judicial District Court's rules lack any mention of U.C.C. related cases.¹⁹⁰ There are no minimum requirements for the amount in controversy set by the business court itself;¹⁹¹ however, in order for a case to be heard at the district court level the claim must be in excess of \$10,000¹⁹².

Judges assigned to serve on the business court are appointed in relatively the same manner in both districts. Under the Second Judicial District Court Rules, the chief judge of the district is to appoint at least two judges, each "judge[] so selected shall have experience as a judge or practitioner in the subject matters listed [in the business court rules] and shall serve for a term of two years unless reappointed."¹⁹³ In the Eighth District, the chief judge selects the judge to serve as a business court judge; however, there are no qualifications in the rules for judges, and there is no set minimum number of judges.¹⁹⁴ There are no training programs provided for judges to serve on the Business Court, and there is no data available on the reversal rate of cases appealed to the Nevada Supreme Court.¹⁹⁵ When the business courts were established, they were not expected to have full business calendars, so the business judges would also hear non-business cases,¹⁹⁶ and this is still true today. In fiscal year 2014, a total of 259 new cases were filed in both districts, with an average time to disposition in

¹⁸⁹ NEV. 2D J. DIST. CT. R. 2.1(a)-(c); Bach & Applebaum, *supra* note 2, 186.

¹⁹⁰ NEV. 8TH J. DIST. CT. R. 1.61 (a)-(b); Bach & Applebaum, *supra* note 2, 186.

¹⁹¹ Nees, *supra* note 24, at 507.

¹⁹² NEV. REV. STAT. ANN. § 4.370 (West 2013).

¹⁹³ NEV. 2D J. DIST. CT. R. 2.1(5).

¹⁹⁴ NEV. 8TH J. DIST. CT. R. 1.61(c)(1).

¹⁹⁵ Nees, *supra* note 24, at 522. (Only Delaware and North Carolina have provided information on their reversal rates.)

¹⁹⁶ Bach & Applebaum, *supra* note 2, at 186.

the Second Judicial District being twelve months and twenty-three months in the Eighth Judicial District during that year.¹⁹⁷ Also in fiscal year 2014, a total of 369 cases were disposed of and a total of 599 cases were still pending in both districts.¹⁹⁸

Looking at Professor Dreyfuss' criteria for a "good" court, the Nevada Business Court falls behind its predecessors. On the topic of efficiency, the court does not have any features to meet this criterion.¹⁹⁹ The efficiency measures look at factors such as consumption of judicial resources and the amount of time to case resolution.²⁰⁰ As seen above, the Nevada Business Courts have a long time towards disposition. The courts do not require case management programs nor do they provide for or require alternative dispute resolution programs.²⁰¹ On the subject of predictability, Nevada does provide for judicial requirements in one district, but the Supreme Court does not provide for or allow for the publishing of opinions in business cases.²⁰² Finally, with regards to due process, Nevada does provide similar procedural rules between the general courts and Business Courts, but it allows for some deviation from the general district court rules.²⁰³ The Nevada rules allow for cases to be transferred into either district's Business Court from a district that does not have a business court, which is different from other cases in the state.²⁰⁴

Criticism of the Nevada Business Courts has noted the features above, as well as some others. The main concerns of the Business Courts have been its broad subject matter jurisdiction, retention of juries, and unpublished opinions.²⁰⁵ Additionally, the judges on the Business Court either rotate every two years or are randomly assigned civil or criminal cases to go along with their

¹⁹⁷ NEV. SUPREME COURT, ANNUAL REPORT OF THE NEVADA JUDICIARY, FISCAL YEAR 2014, 39 (Admin. Office of the Courts ed., 2014), *available at* <http://perma.cc/7JWM-SQPV>.

¹⁹⁸ *Id.*

¹⁹⁹ Nees, *supra* note 24, at 518.

²⁰⁰ *Id.* at 520.

²⁰¹ *Id.*

²⁰² *Id.* at 518, 520.

²⁰³ *Id.* at 518.

²⁰⁴ *Id.* at 515.

²⁰⁵ Kahan & Kamar, *supra* note 65, at 712-13.

business matters.²⁰⁶ This setup has led to an uneven amount of time being spent on either criminal cases or Business Court cases. Judge Gonzalez of the Eighth Judicial District Court stated in 2008 that fifty percent of her time was spent on business matters while the business cases made up only twenty-five percent of her caseload.²⁰⁷ There are several other features that have led to criticism of the Nevada Business Court and those will be discussed in the next section.

IV. PROBLEMS WITH NEVADA'S BUSINESS COURT

In 2008, the Nevada Legislature Legislative Commission's Subcommittee to Study the Benefits, Costs, and Feasibility of the Implementation of Chancery Courts ("Chancery Subcommittee") met to discuss the current structure of the Nevada Business Courts and to determine whether it was time to implement a Nevada Chancery Court. Any new, separate court system in Nevada would have to be established by amending the Nevada Constitution.²⁰⁸ The Chancery Subcommittee was established to examine whether the current Business Court system needed to be expanded to better serve the original mission and to view the impact and benefits to the state if such a court was established.²⁰⁹ The overall topics and areas of concern for the Chancery Subcommittee were: (1) publishing of Business Court opinions; (2) backlog of current judges of the Business Court, along with the mixed calendar of business cases and non-business cases; (3) expertise of business judges; and (4) the establishment of judicial precedent for the entire state.²¹⁰ Each of these four areas of concern will be discussed in this section.

The first area of concern for the current Nevada Business Court was the lack of published opinions. The Nevada Business Court does not publish the opinions of the cases it decides.²¹¹ A

²⁰⁶ *Id.* at 716.

²⁰⁷ *First Meeting*, *supra* note 22, at 10.

²⁰⁸ *Id.* at 6.

²⁰⁹ *Id.* at 2 (statements of Jennifer Chisel, Senior Research Analyst, Leg. Counsel Bureau).

²¹⁰ *Id.* at 6.

²¹¹ Kahan & Kamar, *supra* note 65, at 711.

lack of published opinions deprives a business court from meeting one of its goals, that of predictability.²¹² The Nevada Business Court's lack of predictability is problematic because businesspeople have no precedent to look to in attempting make informed business decisions.²¹³ Additionally, the North Carolina Business Court was established primarily to provide written opinions to better inform the businesspeople of the state.²¹⁴ The publishing of opinions has led North Carolina to be one of the more successful business courts in the country.²¹⁵ In the opinion of Mr. Haig, a panelist to the Chancery Subcommittee, "if a state does not have a well-developed body of opinion in state law, the ability to accurately predict outcomes is lessened."²¹⁶ The publishing of opinions also saves litigants and attorneys time and money.²¹⁷ Published "opinions could be cited; therefore, business attorneys would not have to engage in legal research and re-argue issues that had already been decided in prior opinions."²¹⁸ Finally, the lack of published opinions is actually harming Nevada's ability to attract businesses to incorporate in the state.²¹⁹ Several companies have cited the lack of published opinions and lack of predictability as a

²¹² *Implementation of Courts of Chancery: Hearing on Assemb. Con. Res. 35 Before Nev. Leg. Legis. Comm'n's Subcomm. to Study the Benefits, Costs, and Feasibility of the Implementation of Courts of Chancery*, 74th Interim Sess., 2d meeting, 6 (Nev. 2008) [hereinafter *Second Meeting*] (statement of J. Ben F. Tennille, N.C. Bus. Ct.), available at <http://perma.cc/L64C-PA8F>.

²¹³ O'Brien, *supra* note 36, at 370.

²¹⁴ *Second Meeting*, *supra* note 212, at 6.

²¹⁵ *Id.*

²¹⁶ *Id.* (statement of Robert L. Haig, Attorney, Kelley Drye & Warren Limited Liability Partnership).

²¹⁷ *Implementation of Courts of Chancery: Hearing on Assemb. Con. Res. 35 Before Nev. Leg. Legis. Comm'n's Subcomm. to Study the Benefits, Costs, and Feasibility of the Implementation of Courts of Chancery*, 74th Interim Sess., 4th meeting, 9 (Nev. 2008) [hereinafter *Fourth Meeting*] (statement of Kevin C. Powers, Senior Principal Deputy Legislative Counsel, Legal Division), available at <http://perma.cc/K9X7-24EV>.

²¹⁸ *Id.*

²¹⁹ *Id.* at 6 (statement of Robert C. Kim, attorney, Bus. L. Sec. Chair, Nev. Bar Assoc.).

reason not to incorporate their business in Nevada, especially when such factors are available in other states.²²⁰

The caseloads of current judges have also been noted as a detriment to the current Nevada Business Court. Judge Gonzalez, of the Eighth Judicial District Court of Nevada and a current Business Court judge, explained, “to effectively serve the needs of the business community caseloads need to be managed efficiently and decisions must be written for predictability.”²²¹ However, based on the high caseload of the judges in that district, these goals cannot be met, as a judge cannot spare the time to write an opinion.²²² This presents two main problems: first, judges do not have time to write opinions because they are working on many non-business cases, and, second, the average time to disposition of a case is much longer than other business courts in the country.²²³ Business cases are more complex than non-business cases, and this is reflected in the time that the Business Court judges in Nevada spend on these cases. Judge Gonzalez stated that twenty-five percent of her cases are Business Court cases, but fifty percent of her time is spent on those business cases.²²⁴ Judge Gonzalez noted that Delaware Chancery judges have 250 cases on their docket per year.²²⁵ Having to hear both business and non-business cases is an inefficient use of judicial resources and damages the entire district.²²⁶ The most efficient model of a business court is one where the judges hear only business cases, thus allowing them to publish opinions and become experts in the subject matter.²²⁷ In the opinion of Mr. Haig,

²²⁰ *Id.*

²²¹ *First Meeting*, *supra* note 22, at 9.

²²² *Id.*

²²³ *Id.* at 6.

²²⁴ *Id.* at 10.

²²⁵ *Implementation of Courts of Chancery: Hearing on Assemb. Con. Res. 35 Before Nev. Leg. Legis. Comm’n’s Subcomm. to Study the Benefits, Costs, and Feasibility of the Implementation of Courts of Chancery*, 74th Interim Sess., 3d meeting, 6 (Nev. 2008) [hereinafter *Third Meeting*] (statement of J. Elizabeth Gonzalez, Eighth Jud. Dist. Ct. of Nev.), available at <http://perma.cc/4X5X-YPB4>.

²²⁶ *Id.* at 10 (statement of J. Brent Adams, Second Jud. Dist. Ct. of Nev.).

²²⁷ Dibble & Gallas, *supra* note 42.

[T]he 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 . . . the judge is not being immersed in business case law, which may not be as useful to the business community.”²²⁸

Nevada is currently lacking in this area with its current set up of mixing its Business Court judge’s calendars with business and non-business cases.

The Nevada Business Court system sets up the possibility of its judges lacking the judicial expertise in the subject area that other judges have. Currently, judges who serve on the Business Court are elected as general jurisdiction judges and then are appointed by the chief judge of the district to serve on the business court.²²⁹ However, the appointment setup could lead to a situation where there are no experienced judges in the district court to serve as business judges.²³⁰ There is also a concern that a judge who serves on the Business Court may not be re-elected to the general court, which could lead to instability within the Business Court, something that is extremely detrimental to the business industry.²³¹

Finally, having the Business Courts located in two different districts of the state may lead to some laws being interpreted differently, or the two districts coming to different results in similar cases. Under the Nevada Constitution, “[t]he district courts . . . have equal and coextensive jurisdiction; therefore, the various district courts lack jurisdiction to review the acts of other district courts.”²³² Since the district courts are not required to follow the rulings of other district courts, there can be no precedent set throughout the state, unless the Nevada Supreme Court rules on the issue and publishes its decision, thus making it binding on all

²²⁸ *Second Meeting*, *supra* note 212, at 5.

²²⁹ NEV. 2D J. DIST. CT. R. 2.1.

²³⁰ *See Third Meeting*, *supra* note 225, at 4 (statement of Paul R. Hejmanowski, Attorney, Lionel Sawyer & Collins).

²³¹ *Id.*

²³² *Rohlfing v. Second Jud. Dist. Court*, 803 P.2d 659, 662 (Nev. 1990); NEV. CONST. art. VI, § 6.

district courts.²³³ This lessens the predictive nature of cases from district to district and frustrates one of the goals of business courts. Additionally, if a business-related case is filed in a district outside either the Second or Eighth Judicial District Courts that district would not be required to follow the rules established by the Business Courts of the state. This could lead to forum shopping around the state.

At the end of the Chancery Subcommittee hearing, the members put forth the recommendation that a constitutional amendment to the Nevada Constitution be added to create a Chancery Court in lieu of the current Business Court system.²³⁴ The Chancery Subcommittee made five recommendations in total: (1) encourage the Nevada Supreme Court to direct the business courts to issue written opinions to be published online with a proper citation; (2) increase the budget for the business courts to publish its opinions; (3) if recommendation (1) is approved, direct the clerk of the district court to publish the written opinions on the internet; (4) draft a joint resolution amending the Nevada Constitution to authorize the legislature to establish courts having jurisdiction over business matters; and (5) support the implementation of the Nevada Court of Appeals.²³⁵ Only one of these recommendations was presented to the legislature in the 2009 session, requiring the Business Courts to publish its opinions.²³⁶ This bill failed to get out of the committee based on the recommendation of the Nevada Supreme Court chief justice.²³⁷ At

²³³ LEGIS. COUNSEL BUREAU, RESEARCH DIV., LEGISLATIVE COMM'N'S SUBCOMM. TO STUDY THE BENEFITS, COSTS, AND FEASIBILITY OF THE IMPLEMENTATION OF COURTS OF CHANCERY IN NEV., WORK SESSION DOCUMENT, EXHIBIT A, 5-6 (July 8, 2008), available at <http://perma.cc/K7WB-FJVV>.

²³⁴ *Implementation of Courts of Chancery: Hearing on Assemb. Con. Res. 35 Before Nev. Leg. Legis. Comm'n's Subcomm. to Study the Benefits, Costs, and Feasibility of the Implementation of Courts of Chancery*, 74th Interim Sess., 5th meeting, 7 (Nev. 2008) [hereinafter *Fifth Meeting*], available at <http://perma.cc/K7WB-FJVV>.

²³⁵ *Id.* at 3-10.

²³⁶ S. Comm. on Judiciary, S. 5-BDR 1-179, 75th Sess., at 5-8 (Nev. 2009), <https://perma.cc/QVV7-8YRM>.

²³⁷ *Minutes of the S. Comm. on Judiciary*, 75th Sess. 5 (Nev. 2009), available at <https://perma.cc/8SVM-SSK4>.

present, the Business Court is setup as it was when it was created, except for an increase in the number of judges.

V. RECOMMENDATION ON HOW TO IMPROVE NEVADA'S BUSINESS COURTS

The Nevada Business Court has been built on the proper foundation; however, the current system is not as efficient in reaching the goals envisioned for it by the Nevada Legislature. The Business Court's current setup does not meet the goals of other business courts, those of providing expert judges who are skilled in the area of law who can give quick and predictive justice to those seeking it, establishing a cohesive body of case law to guide businesspeople in making their decisions, and enticing businesses to select Nevada as the state of incorporation.²³⁸ These goals can be met by Nevada if the legislature takes the appropriate steps to create a new statewide business court to hear specialized business cases.

With business courts in over 20 states, Nevada has the opportunity to pick and choose the best parts of other state's business courts. The first feature of the New Business Court should be to establish statewide jurisdiction for the court to hear all cases in the state. This would be a model set up similarly to the Delaware Court of Chancery and the North Carolina Business Courts.²³⁹ This would allow the Nevada courts to establish one set of binding case law throughout the entire state. A litigant would no longer have the option of what district to choose to file their case based on the possibility of inconsistencies between different districts. Having one business court for the entire state eliminates this possibility. In Nevada, precedent is binding on the district court that issues the ruling, not on other courts.²⁴⁰ Having one court would alleviate this problem and create one coherent, predictive body of case law, reviewable only by the Supreme Court. This would also serve to meet Professor Dreyfuss' standard in creating a good court. One

²³⁸ See *supra* Section II.

²³⁹ See *supra* Part III.1–2 (noting that Delaware and North Carolina courts hear cases from all over the state).

²⁴⁰ See, e.g., *Rohlfing v. Second Jud. Dist. Ct.*, 803 P.2d 659, 662 (Nev. 1990).

court for the whole state will increase the quality of decision making and enhance the appearance of due process within the business court.

In order for this coherent body of case law to meet its predictive goal, opinions of the business court must be published.²⁴¹ Published case law gives litigants and businesspeople a guide on how the court has ruled on actions that they are seeking to take.²⁴² Without it, litigants and businesspeople are lost and could end up spending more time litigating cases or withhold from making any decisions. For this reason, the New Business Court of Nevada should require the publishing of its opinions in all non-jury matters, similar to the practice of North Carolina and New York.²⁴³ The fact that Nevada does not have published case law has led to businesses being unable to make informed decisions regarding their activity in the state and has led some businesses to incorporate in other states.²⁴⁴ Publishing the decisions of this New Business Court will lead to a more predictive body of case law and will help the New Business Court achieve one of the main purposes of business courts.

One problem the current Nevada Business Court has experienced is the lack of judicial time to craft opinions.²⁴⁵ The current Business Court judges hear both business and non-business cases, which takes away the time needed to write business case opinions.²⁴⁶ In order to accommodate the need to write and publish opinions, the New Business Court should hear only business related cases. This type of system has been used in successful business courts throughout the country.²⁴⁷ Allowing judges to hear only business related cases would allow the judges time to draft their opinions and allow for them to completely immerse

²⁴¹ Dibble & Gallas, *supra* note 42, at 31.

²⁴² *Fourth Meeting*, *supra* note 217, at 6.

²⁴³ *See supra* Part III. 2–3.

²⁴⁴ *Fourth Meeting*, *supra* note 217, at 6 (statement of Robert C. Kim, Attorney, Business Law Section Chair, Nev. Bar Assoc.).

²⁴⁵ *Second Meeting*, *supra* note 212.

²⁴⁶ *Id.*

²⁴⁷ *See supra* Part III.1–3 (noting that Delaware, North Carolina, and New York business court judges hear only business court cases, leaving more time to spend on those matters).

themselves in the subject area. Allowing the New Business Court judges to be completely immersed will increase their expertise, just as it has done in the Delaware Court of Chancery, the New York Commercial Division, and the North Carolina Business Court.²⁴⁸ This will allow judges to hear the same types of cases over and over again, thus allowing them to gain a better understanding and expertise in the subject area. Hearing cases restricted to one subject will also increase the quality of decision making as identified by Professor Dreyfuss.

Allowing the New Business Court judges to hear only business related cases would reduce the current caseload, as well as speeding up the disposition of cases. One of the goals of business courts is to give quick, informed, and accurate decisions.²⁴⁹ The current set up in Nevada leads to an extremely long disposition time, one of the highest of the courts examined in this article.²⁵⁰ One reason for this long disposition rate is that Nevada is the only business court examined in this paper that allows for its Business Court judges to hear both business and non-business related cases. Eliminating the non-business related cases should significantly decrease the disposition rate.

The current Business Court structure in Nevada allows for judges to hear cases that are business related, such as shareholder derivative suits, cases relating to trademarks or names, and statutory claims for trade secrets as well as any other cases that involve business disputes.²⁵¹ This structure is common in the new business court system as seen in New York and North Carolina.²⁵² The New Business Court in Nevada should keep its current subject matter jurisdiction as it allows for judges to hear a wide range of cases that relate to businesses and those cases can benefit from a specialized judge. Court rules of Nevada should also be amended to require all cases that fall into the purview of the New Nevada Business Court to be filed in that court, just as the rules require in Delaware. Having the cases originally filed in the New Business

²⁴⁸ Dreyfuss, *supra* note 3, at 16-23.

²⁴⁹ O'Brien, *supra* note 36, at 369.

²⁵⁰ See *supra* Part III.

²⁵¹ See *supra* notes 189 & 191.

²⁵² See *supra* notes 135 & 149.

Court will free up precious time for other judges, as they will not need to brief the issues and then transfer the case to the New Business Court upon a finding that the New Business Court should hear it. The New Business Court should keep its merged jurisdiction over both law and equity cases, just as New York and North Carolina have.²⁵³ Nevada is different from Delaware in that Delaware's constitution of 1792 provided for a court of equity, and it has kept this court even as other states have merged the two courts.²⁵⁴ Nevada provided for courts of law and equity from its formation and thus has a long history of having juries involved in cases. This system should stay in place under the New Business Court system. The New Business Court should provide for juries in issues that are matters of law and provide rules to prohibit juries in cases of equity. The New Business Court system should also provide for a waiver of juries if both parties agree, similar to the system in North Carolina. Finally, the New Business Court should add a case management program, such as is seen in North Carolina and New York. Having a case management program will allow litigants to stay on schedule. This will increase the efficiency of the New Business Court.

The selection process for the current Nevada Business Court has provided excellent jurists since its formation. However, this may not always be a possibility under the current system of appointing elected judges from the general jurisdiction courts. Under the New Business Court of Nevada, judges should be appointed from a committee of judges, legislators, businesspeople, and lawyers of the Nevada Bar Association. Such a nominating committee has led to some of the most well respected and most qualified judges to serve on the Delaware Court of Chancery.²⁵⁵ The committee members of the new nominating committee should be made up of members similar to the Delaware Nominating committee, four lawyers and four non-lawyers; however, the committee should also consist of the chief justice of the Supreme Court, the Lieutenant Governor and a member selected by the Nevada State Bar. This system is similar to the Delaware system,

²⁵³ *Id.*

²⁵⁴ *See supra* notes 51-56.

²⁵⁵ *See supra* notes 103-110.

except for the addition of the chief justice and the Lieutenant Governor.

Nevada has a long history of electing judges, and while this could be a detriment to the New Business Court, the tradition should continue in the new court system. With history and tradition in mind, the New Business Court judges should be appointed by the Governor from the recommendation of the nominating committee and should stay for a six-year term, similar to district court judges in the state. However, the re-election vote should only be a vote to approve or disapprove of the judge and not a partisan competition between two candidates, as is allowed for in New York. Finally, the nominating committee should recommend three judges to serve on the New Business Court, similar to the number of judges used in North Carolina. The current caseload is smaller than North Carolina, but in order to assure a quick disposition time, three judges should be used, in which one judge will hear an individual case. Based on 699 business court cases pending in Nevada during 2014, a three-judge court would be assigned 233 cases per-judge, which is less than the number of cases assigned to the Chancery Judges in Delaware.

In November 2014, the voters of Nevada approved an amendment to the state constitution creating an intermediate appellate court.²⁵⁶ This new court will review cases from the district courts for errors and the Nevada Supreme Court will maintain the jurisdiction to hear matters that fall within its exclusive jurisdiction.²⁵⁷ The cases that the Nevada Supreme Court will continue to hear will be death penalty and life sentence cases; appeals raising constitutional claims; all original extraordinary writ petitions within its jurisdiction, appeals raising issues of first impression; appeals that would result in the development of Nevada's common law; and appeals that require interpretation of

²⁵⁶ NEV. SUPREME COURT, ANNUAL REPORT OF THE NEVADA JUDICIARY, FISCAL YEAR 2014, 1, 7 (Administrative Office of the Courts ed., 2014), available at <http://perma.cc/RDB2-Y6ED>.

²⁵⁷ Timothy Summers & Seth Floyd, *Establishing a Nevada Court of Appeals Means Greater Access to Justice and Greater Stability to Nevada's Businesses*, NEV. LAW. Feb. 2013, at 28, 30.

Nevada statutes having statewide application.²⁵⁸ With the new court of appeals, all cases that are appealed from the district courts are filed at the supreme court, and then the court will either hear the case or assign the case to the court of appeals.²⁵⁹ With the creation of a New Business Court in Nevada, the Supreme Court should amend its rules so that it has exclusive jurisdiction to hear all cases appealed from the New Business Court. This would lead to a similar model as the Delaware Judicial System, where the Delaware Supreme Court hears all appeals from the Chancery Court. Having only one court to hear appeals leads to an increase in predictability and allows a state to establish a more coherent body of corporate law and commercial law.

In order for this New Business Court to be established in Nevada, an amendment must be made to the Nevada Constitution. In Nevada, an amendment must be introduced by either the Assembly or the Senate, be approved by both chambers, and finally placed on the ballot of the November election, where the voters must approve the measure in two consecutive elections.²⁶⁰ This process was recently used in Nevada to create the new court of appeals. Opposition to changes in the current business court system was not expressed by any person or party, but it is likely that changes to the court were placed on the backburner while the supreme court sought the approval of a court of appeals. With the court of appeals approved by the voters, changes to the business court of Nevada should be the next priority of the legislators and Supreme Court.

In review, Nevada should establish a New Business Court to hear only business related cases from around the entire state. The cases should be heard by business experts appointed by the Governor of Nevada based on the recommendation of a new nominating committee whose membership is similar to the Delaware Judicial Nominating Committee. The New Business Court should keep the jurisdiction of the current Business Courts of the state, but require that all cases be filed with the New Court

²⁵⁸ *Id.*

²⁵⁹ *See supra* note 256.

²⁶⁰ NEV. CONST. art. XVI.

and add a case management program. Finally, the court must publish its opinions on the Internet for businesspeople and lawyers to view. The court should be created by a constitutional amendment, thus giving it more legitimacy. Establishing a court such as this one will help Nevada achieve its goal of having a business court that not only keeps its corporations within the state, but also attracts businesses that were once weary of its lack of predictability within business law.

VI. CONCLUSION

Business specialization has been a growing area of the legal field for several decades now and the judiciary has been continuing down the same path. Today, specialty courts can be seen in the areas of family law, drug law, veteran's courts, and DUI courts. Specialty business courts have been following this same path since 1993. In 1993, New York County established the first business only court in an effort to keep business litigation in its state courts at a time businesspeople had become hostile to litigating cases there. Since then, business courts have been established in twenty-two other states, including North Carolina and Nevada. All of these courts have been hoping to imitate the Delaware Chancery Court, which has been the gold standard for business courts since its establishment. Nevada established its business courts in an effort to attract businesses to its state. While the number of incorporations has increased since the formation of the Nevada Business Court, the current court is not without problems. Forming a new court to address these problems, such as the lack of published opinions, will help to keep and attract new businesses to Nevada. Anything worth achieving is worth fighting for, and Nevada should fight to establish the most business friendly business court in the country.

