

I.

REPORT OF THE COMMITTEE ON BUSINESS COURTS

A. BACKGROUND

The Committee was established by the Governor's Task Force on Civil Justice Reform to "explore the potential benefits and disadvantages of a business court system devoted exclusively to the resolution of commercial disputes." As discussed below, the Committee recommends the establishment of a business court for effectively dealing with commercial cases.

The Committee has also considered several other possible reforms related to the handling of commercial disputes. These include: (1) the enhanced use of the special masters in commercial cases to resolve questions of fact and law; (2) alteration of the practice of rapid rotation of judges among types of cases; (3) inauguration of simplified court procedures for cases involving less than \$100,000; (4) institution of procedures for improved case management, sometimes referred to as a "rocket docket"; and (5) application of digital and Internet technologies to court procedures. The Committee believes implementation of these proposals will enhance the ability of the courts to process commercial cases without adverse impact on the justice to be achieved in such cases.

B. JUSTIFICATION FOR FOCUS ON COMMERCIAL CASES

A vibrant business community is a positive asset for any state and has been actively promoted within Colorado with remarkable success. Such a community involves an intricate web of relationships that sometimes leads to disputes among its participants. For the good of the community, such disputes need to be resolved efficiently and consistently. It is the courts that resolve those disputes and create the common law that governs business relationships. Thus, a well-functioning business community is dependent on an effective judiciary equipped to handle the disputes of that community.

A commonality links the wide variety of disputes that may arise within the business community. They typically, although not exclusively, involve rights and duties arising out of contracts and other consensual arrangements. These include, for example, the documents by which corporations, partnerships, and other legal entities may be formed and their constituent members governed, as well as the contracts by which goods are sold, software is licensed, insurance is provided, and properties rented. These consensual arrangements are governed by court-made law and legislatively-adopted statutes that constitute a coherent body of "business law." This body of law stands distinct from areas of law that govern other aspects of society, such as the criminal law, tort law, and family law. There is, in short, an expertise in "business law" that lawyers practicing in the field may develop. Likewise, such expertise may be found in judges who come from private practices focused on business law, and are therefore more adept at hearing commercial cases.

For both these reasons — the importance of business to the well-being of the State and the existence of legal principles and areas of expertise that have specific application to business disputes — it is appropriate to focus on the adjudication of commercial cases.

C. BUSINESS COURTS

1. *Recommendation.*

The Committee recommends the State Judicial Department consider the establishment of a business court for the exclusive purpose of hearing commercial cases. Specifically, the Committee recommends the following:

- a. The business court should initially be established under a pilot project within the Denver District Court or another district court within the Metropolitan Denver area having sufficient numbers of qualifying cases to test the parameters of the business court.
- b. The pilot project should be commenced only if a review of cases filed in the Metropolitan Denver area within a recent period of time indicates there is a sufficient number of commercial cases to justify the project. If such a review does not presently justify such an undertaking, subsequent periodic reviews should be made to identify when there is an adequate number of commercial cases.
- c. The business court should operate under rules — referred to in this Report as an "operating statement" — that define the "commercial case," or type of case that may be heard by the business court, and establish case management and other procedures specifically applicable to the business court.¹
- d. If the pilot project proves successful, business courts should be established in other judicial districts or, in the alternative, the geographical venue of the Metropolitan Denver business court should be expanded.

2. *What Is a Business Court?*

For the purposes of this Report, a "business court" is a court established within the Colorado Judiciary to handle commercial cases under prescribed case management procedures and before judges selected for their experience in business matters and their desire to serve on the business court.

3. *What Kinds of Cases Are Appropriate for a Business Court?*

Defining what constitutes a "commercial case" is fundamental to the operation of a business court. While the court will be particularly suitable for complex cases, commercial cases of all levels of complexity will benefit from adjudication by experienced business jurists. In order to define a commercial case, the Committee considered several questions, including whether certain types of cases (for example, complex tort cases) should be included, and whether there should be a jurisdictional minimum amount. After extensive consideration of these issues, and a review of the experience in other states, the Committee

defined categories of cases it believes are suitable for filing in the business court. Those categories include disputes involving:

- a. The rights, duties, or liabilities of equity owners, managers, or agents of any form of business entity;
- b. The formation, sale or purchase, or merger or conversion of any form of business entity;
- c. Conduct invoking antitrust laws or law governing unfair competition or interference with business or contractual relations; or agreements or arrangements among businesses, or between businesses and their agents or employees restraining competition;
- d. Commercial transactions *not* involving a consumer party; or
- e. Intellectual property.

While some of these disputes involve the application of statutory rights, the majority require analysis of consensual relationships and the application of contractual and fiduciary principles or of concepts of property.

Cases involving the rights and duties of employers and employees under State or Federal statutes are not proposed for inclusion as "commercial cases" in the pilot project stage. Although closely debated, the Committee believes the number of such cases is likely to overwhelm the business court, thereby depriving it of the opportunity to prove its worth in handling of the types of cases listed above. Furthermore, such statutorily based cases do not necessarily draw on the same learning and expertise in judges and lawyers as the proposed categories of cases.

4. *Advantages of a Business Court*

Specialization is not new to the Colorado legal system. Lawyers have become increasingly specialized in the nature of their practices, so that one who handles financial transactions, for example, is not likely to take the defense in a personal injury case. Similarly, the judiciary has developed specialized resources to more effectively handle certain kinds of cases, such as water, probate, family, juvenile, drug crimes, and even traffic cases. This trend reflects the efficiencies that result from developing substantive and procedural expertise.

A specialized court is particularly appropriate for commercial cases because these cases frequently are very complex or draw upon a body of law developed in response to the unique nature of commercial disputes. A complex commercial case can clog a court's docket for months, tax the judge's substantive knowledge of the subject matter, and result in rulings that are inconsistent with established precedent.

Businesses in this country often express dissatisfaction with the judicial system not only because overburdened courts take months to decide cases, but also because outcomes are unpredictable. This unpredictability has led to the increased use of private dispute resolution forums provided by such organizations as the American Arbitration Association. The ability to choose arbitrators with particular expertise in business law is perceived as a distinct advantage. Devoting specialized judicial resources to commercial cases will likewise

lead to more consistency in the disposition of litigated cases and increased efficiency in the use of judicial resources. These matters are discussed in detail below.

a. Consistency of Decisions in Commercial Cases

As noted above, members of the business community are frustrated by the unpredictability of litigation results. Inconsistent decisions can be caused by a trial judge's lack of familiarity with the substantive area of law applicable to the commercial case. Specialization, on the other hand, allows judges to gain experience with particular kinds of cases and thereby develop expertise in that field. This enables judges who specialize to perform their functions more proficiently than judges who hear a wide range of cases. In addition, pending the development of published appellate authority, trial judges are often called upon to develop common law rules without previous experience with an issue. When judges are thoroughly familiar with a particular area of law, they can quickly focus on the important factual issues. Moreover, a specialized judge is more attuned to how a particular case disposition fits within the context of the substantive area and can apply the law to that case accordingly. As a result, the quality and consistency of decisions in commercial cases would improve.

This increased quality and consistency would provide the predictability of outcomes that businesses desire. Thus, creation of a business court would foster a more favorable climate for attracting and maintaining business in Colorado.

b. Greater Efficiency in the Use of Judicial Resources

Trial judges with specialized expertise have an intrinsic feel for moving complex cases along by setting and enforcing appropriate pretrial preparation deadlines, supervising disclosure and discovery, ruling on summary judgment and other dispositive motions. Trial judges are frequently called upon to rule verbally, with little time for research or consultation. A judge with substantial experience in complex cases can set a realistic course for the case and make the necessary decisions with less research and reflection than a judge unfamiliar with the area of law. Thus, creating a business court with judges who devote all of their efforts to processing commercial cases will lead to more efficient case management.

While the efficiencies realized through judicial specialization may seem difficult to quantify, New York's experience with specialized commercial courts provides a basis for measuring the time saved. In New York, a Commercial Division was created in the state's trial courts and certain justices were assigned to hear commercial cases. The introduction of this business court led to a 35 percent increase in the disposition of commercial cases. The translation into time saved is simple: *three specialized business judges can do the work of four generalist judges.*² Thus, devoting judicial resources to processing commercial cases will lead to a significant and tangible amount of time saved.

Further, these results were obtained without using any additional judicial resources. Rather than create a separate court, New York's commercial division was inserted into the state's trial level courts of general jurisdiction and assigned existing judges to become the initial contingent of business judges. Those judges used the same courtroom staff and administrative resources they would have used if they had continued to hear a broad variety of cases. However, the business judges became more efficient after specializing, and were

able to handle more commercial cases, freeing up judicial resources to be used in other areas of the court of general jurisdiction. The Denver District Court would benefit from this same increase in available judicial resources if a pilot program were implemented in accordance with the Committee's recommendation.

c. Developing a Body of Common Law for Commercial Cases

Another frustration businesses and their lawyers face in making decisions is the lack of any significant body of common law business decisions from Colorado courts. The preference of many business organizations for Delaware law is, in part, based on the trial level expertise of Delaware courts. The frustration increases during times, such as the present, when the development of entirely new forms of legal entities — the limited liability company and the limited liability partnership are two good examples — demands courts flesh out the meaning of statutory wording. Likewise, the Internet creates new relationships between the businesses that form its nodes and links and demands courts define the rights and duties of its participants. A dearth of decisions means a world of uncertainty for the business community.

The trend toward resolving commercial cases outside the judicial system exacerbates this scarcity of precedent. Associations such as the American Arbitration Association now process thousands of business disputes entirely outside of the judicial system. When cases are diverted from the judicial system and resolved by private parties, these cases are lost to the development of the common law because privately resolved cases do not create binding precedent.

Further, private resolution of disputes by arbitration is not necessarily a better dispute resolution mechanism for businesses, for it can present substantial expense and risk to the participants. Arbitration may require high docket fees and can involve as much time-consuming and expensive motions and discovery as litigation in courts. Moreover, arbitration typically allows only very limited opportunities for appeal, even if the award is legally or factually incorrect or arbitrary and capricious.

As discussed above, creating a business court would address many of these concerns by enhancing the consistency, and therefore the predictability, of commercial cases. Creating a business court could also provide an opportunity to develop a body of common law for commercial cases because a business court would present a natural repository of commercial case decisions. The business court could publish those decisions in a written publication, such as the *Brief Times Reporter*, and could also provide access to its decisions through the Internet. Business lawyers and their clients could then base their litigation and related business decisions on a more informed assessment of the likely outcome of litigation. A database of business court decisions would also enhance the development of common law interpretation of new business statutes.

5. *Operating Statement for a Business Court*

Set forth as EXHIBIT 1 to this report is a suggested "operating statement" for a business court. The operating statement is itself short enough that no advantage would be gained by providing a summary.

D. SPECIAL MASTERS UNDER C.R.C.P. 53

1. *Reason for Consideration by Committee*

The Committee understands its proposal to establish a business court may not come to fruition immediately. Accordingly, it considered other changes that could be implemented before the business court is established, or in the event it is never established, which would be efficacious for the resolution of business disputes. One such change relates to the use of "masters."

2. *Recommendation*

The Committee recommends that Rule 53 of the Colorado Rules of Civil Procedure ("C.R.C.P.") be amended to enlarge the opportunity of litigants to utilize the services of special masters within the existing court structure to resolve matters of fact or law.

3. *Discussion*

As noted in the discussion above, businesses are concerned the judicial system takes too long to resolve commercial disputes and that the absence of particular business expertise on the bench can lead to inconsistent and incorrect decisions. Those two problems can be mitigated by the use of "masters" under an existing rule, Rule 53, C.R.C.P.

Rule 53 presently permits a trial court to appoint a master to aid the court in certain circumstances, albeit with restraints. Rule 53(b) provides:

A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

Where the court can appoint a master, the court can provide the master with extensive powers under Rule 53(c):

The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues, or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to

put witnesses on oath and may himself (or herself) examine them and may call the parties to the action and examine them upon oath.

A master can be, say, an accountant with the accounting expertise pertinent to the factual matters that are to be resolved in a commercial case or a business lawyer having particular familiarity with the law applicable to the dispute.

Trial courts appear to have used masters only sparingly, in compliance with the text of the existing rule that the appointment of a master be the "exception" and not the "rule." One reason for the limited use of masters to date may be the cost. Under the present rule, a court may appoint a master and impose the associated costs on the litigants irrespective of their desires. A master is paid an amount determined by the court — an amount that must be sufficiently competitive with other opportunities to induce the accounting, technical, or other expert to undertake the assignment. This cost must be borne directly by some or all of the parties or indirectly by those parties by payment out of the fund that is the subject matter of the action. Where the master is imposed upon the parties by the court *sua sponte*, it is proper that the Rule constrain this process to extraordinary circumstances.

But litigants are proving willing to bear the costs associated with alternative dispute resolution even if they must forego the opportunity of appeal afforded by the judicial system. This is due to the recognition that arbitrators and mediators with expertise are particularly valuable. Litigants may voluntarily undertake to bear similar costs of acquiring the same expertise in the form of a master appointed under Rule 53 if they have the opportunity to do so. Parties may find that the availability of an expert master in a court proceeding gives them much of what they seek in private dispute resolution, while retaining the availability of appeal not present in the private proceeding.

There are several reasons why business litigants might well avail themselves of the option to have an experienced business lawyer, accounting expert, or other person with pertinent expertise be appointed as a master to aid in the resolution of their dispute. First, the parties may be willing to give a master the task of determining the facts of their dispute, just as they do when they submit a dispute to private arbitration. They may feel the expert is more likely to arrive at an accurate understanding of a complex situation. Likewise, they may feel that a private lawyer, experienced in the intricacies of commercial law, will be able to make accurate recommendations to the judge.

Secondly, the total cost of litigation might be reduced, rather than increased, by efficient use of a skilled master not saddled with a judge's crowded docket. Efficiency is the principal method of decreasing legal expenses, and business litigants accustomed to cost/benefit analysis may be persuaded to try such an alternative course.

Use of a single, neutral master might also avoid the cost of duplicative experts and speed the resolution of the case by avoiding the need for the presentation and cross-examination associated with a duel between plaintiff's and defendant's separate experts. Use of a master can also permit early resolution of critical facts, providing an agreed base for development and resolution of other aspects of the case.

These advantages inherent in the use of masters could be brought to bear in more cases if, as a part of a case management system, litigants were required to identify, early in the course of each case, issues that might be assigned to a master for resolution.

The Committee believes the text of Rule 53 should be amended to permit the appointment of a special master not only at the instigation of the judge but also upon the stipulation of the parties. The amendment should also make it clear that reference to a master is not to be an exception that is employed only in extraordinary circumstances, but should be used whenever the parties deem it appropriate. However, the Committee notes the court should retain the right to deny the appointment in its discretion, notwithstanding the parties' stipulation.

The Committee also notes that its proposal regarding Rule 53 and masters may also benefit non-commercial cases.

E. ALTERATION OF THE PRACTICE OF ROTATION OF TRIAL JUDGES AT THE END OF A JUDICIAL TERM

1. *Recommendation*

The Committee recommends the Colorado Judicial Department modify the practice of rotating judges among types of cases. The modification should be aimed at mitigating the inefficiencies that arise when a judge who has become familiar with a complex commercial case (or other complex case) is removed solely because of the passage of time and replaced by another who is unfamiliar with the case.

2. *Discussion*

Several judicial districts rotate trial judges every two or three years. For example, a judge who has presided exclusively over a criminal docket for two years may be re-assigned to a civil docket or a specialized docket such as domestic relations or drug court. The wholesale re-assignment of trial judges typically takes place at the beginning of a new judicial term. Valid reasons exist for the practice, particularly from the standpoint of the sitting judges. Rather than being "stuck" interminably in a division hearing repetitious cases involving narrow areas of law, the judge gets variety in the nature of disputes and applicable law. Undoubtedly, all judges prefer certain divisions to others, and to attract quality candidates to the bench it is probably important for applicants to know that their judicial careers will not be pigeon holed.

From the standpoint of most litigants, however, the process of rotating judges can be frustrating and costly. For business litigants, particularly in complex cases, losing a trial judge in the middle of litigation means the loss of a judge in whom the parties have "invested" time and energy. In all cases, it is incumbent upon the lawyers to develop the facts, cite the law, and narrow the issues that must be addressed by the trial judge. To the extent they succeed, the judge's role is simplified and improved. If the lawyers fail, the judge must work harder to familiarize himself or herself with the facts and the law governing the particular dispute. In either event, the trial judge who has lived with a complex commercial case and made some rulings as the case proceeds toward trial has become an extremely valuable resource in the resolution of that case. The parties and their attorneys know the

judge is familiar with the case over its entire history; and therefore can narrow the issues and focus their emphases and strategies appropriately. Indeed, even before trial, the judge may have decided dispositive or partially dispositive motions greatly affecting the eventual outcome of a case.

If a judge departs before completion of the trial, his or her learning is removed from the case and the parties are often left to "start all over" with the replacing judge. The new judge's learning curve may be steep. How the lawyers address and brief issues is necessarily made more difficult because of the judge must be brought up to speed. The parties must bear increases in attorney's fees through no fault of their own or their attorneys but only because of the system's requirements. More significantly, since no two judges are identical in the performance of their duties, the parties' perception of the consistency with which justice is administered may be adversely affected. Confidence in the judicial process will be eroded if the new judge does not follow through with the path previously laid out by the former judge. Most pertinent to the issue of business sophistication, the parties may believe they traded a judge familiar with the complex issues posed by their case for a judge comparatively unprepared to fairly and competently carry the case through trial.

One solution is to have a trial judge retain those commercial (or other complex) cases on which the court has expended sufficient judicial resources, even if the judge otherwise rotates to a different division. The judge should have discretion to determine which cases should be kept, but some objective criteria should be established to assist in the exercise of that discretion. While this proposal does not address the goal of the business court to assure that commercial cases are heard by trial judges experienced in commercial law, it does eliminate the "wasted investment" syndrome.

A couple designing a home would be distressed to learn that their architectural firm had arbitrarily decided to replace the architect with whom they had been working for six months with another (albeit competent) architect who had been designing bridges for the past two years. A good portion of their time and money spent on the first architect would have been wasted. That kind of waste can be avoided in litigation by curtailing the rotation of judges away from cases before their completion.

F. SIMPLIFIED PROCEDURES UNDER RULE 1.1

1. *Reason for Consideration by Committee*

In its effort to consider other matters, beside the business court, in which changes in court procedures might assist the business community in obtaining more efficient resolution of commercial disputes, the Committee learned that the Colorado Supreme Court is considering a new Rule 1.1 of the Colorado Rules of Civil Procedure which would provide a simplified procedure for handling cases involving \$100,000 or less. The Committee believes that the proposed rule is a worthy one.

2. *Recommendation*

The Committee recommends that the Judiciary adopt and implement Rule 1.1 of the Colorado Rules of Civil Procedure.

3. Discussion

In the past several years, the Colorado Supreme Court and the Colorado bar have become increasingly troubled by the fact that many citizens, including businesses, are denied effective access to the civil justice system because of delay in judicial proceedings and the high cost of pursuing financially modest yet important legal claims. In November 1998, Chief Justice Mary Mullarkey of the Colorado Supreme Court appointed a committee of Colorado attorneys, co-chaired by Justices Michael Bender and Rebecca Kourlis of the Colorado Supreme Court, to address the concern. That committee (referred to in this Report as the Bender-Kourlis Committee) determined there should be a way to facilitate the "just, speedy, and inexpensive determination" of claims — to increase effective access to the judicial system through a revision of the Colorado Rules of Civil Procedure.

One of the recommendations of the Bender-Kourlis Committee is a proposed Simplified Rule of Civil Procedure (Rule 1.1, Colorado Rules of Civil Procedure) that is likely to be an effective tool in increasing access to courts by reducing costs to litigants. Proposed Rule 1.1 would apply to all cases in which no claim is asserted against any party that exceeds \$100,000, inclusive of any statutory or contractual attorney fees, penalties, or punitive damages, but exclusive of interests and costs. Rule 1.1 would limit a claimant's recovery in such cases to \$100,000, together with prejudgment interest and allowable costs.

The proposed rule seeks to streamline the civil discovery process. Rule 1.1 eliminates the meetings and filing requirements of Rule 16, C.R.C.P., as well as most discovery options, including depositions, interrogatories, requests for production of documents, and requests for admission. Parties must disclose witnesses, exhibits, damages information, and insurance policies. The rule suspends the operation of Rules 16, 26 through 34, and 36, C.R.C.P., but maintains the applicability of all other provisions of the Colorado Rules of Civil Procedure. Hence, the pleading requirements, Rule 12³ motions, third-party practice, and all of the other rules relating to trial, summary judgment, and post-trial matters are unchanged. The rule permits mutually agreed-upon discovery but prohibits the parties from bringing discovery disputes before the court. Cases using the simplified procedure will receive early trial dates. As a result, trials should be held within six months of filing, although the simplified cases will not receive priority over older cases.

The simplified rules will be tested in two voluntary pilot projects in Colorado. These projects will last for eighteen to twenty-four months. The pilot projects will include all applicable civil cases filed on or after April 1, 2000, assigned Chief Judge Harlan R. Bockman of the Seventeenth Judicial District (Adams County) and Judge Christopher J. Munch of the First Judicial District (Gilpin and Jefferson Counties). Because these projects are voluntary, any party may opt-out of the project by filing a signed statement of the party that the simplified rules benefits have been explained to the client and that the party believes the simplified procedure would not further the interests of a just, speedy and inexpensive determination of the case. Orders will be issued in all cases subject to the Simplified Civil Procedure governed by proposed Rule 1.1, including a copy of the rule, an overview of the applicable procedures, and information relating to opting out of the rule. The Committee overseeing the pilot project will collect comparative information on a control group of cases that operate under the current rules in each court to gauge and to assess the proposed rule's

effectiveness in achieving a just, speedy and inexpensive resolution of civil cases. The Colorado Judicial Department will track these cases to assess:

- a. Case costs;
- b. Levels of satisfaction of attorneys and parties;
- c. Comparison of judge time/involvement per case in cases included in the pilot group versus a control group;
- d. Average length of time from case filing to termination;
- e. Comparison of rate of cases appealed in cases included in the pilot vs. control group;
- f. Rate cases going to trial; and
- g. Determining factors affecting cases opting in or out of the rule.

G. ROCKET DOCKET

1. *Reason for Consideration by Committee*

It is clear from the preceding portions of this Part I that the Committee favors case management techniques that improve the Judiciary's efficiency in handling commercial cases, if those techniques do not compromise the fairness that is imperative for the judicial system to retain the support of litigants. In the course of its deliberations, the Committee became aware of efforts made in this regard in other jurisdictions, including, in particular, the "rocket docket" approach of the U.S. District Court for the Eastern District of Virginia.

2. *Recommendation*

The Committee recommends that the Judiciary consider, develop, and apply "rocket docket" case management techniques that increase the efficiency with which complex cases are handled, so long as such techniques do not compromise the fairness and consistency of results.

3. *Discussion*

The United States District Court for the Eastern District of Virginia has adopted unique rules of court procedure that drastically reduce the amount of time and expense involved in civil litigation. It has been dubbed the "Rocket Docket" for its reputation as the fastest and most efficient judicial system in the Federal court system. The Rocket Docket was developed by judges who determined that punctilious adherence to the rules of procedure, and in particular to the schedule inherent in those rules, would improve court efficiency.

There are three basic elements that contribute to the Virginia court's success in attaining rocket speed and efficiency:

- a. Firm docket control by the judges.
- b. Streamlined local discovery rules.

- c. Strict insistence that attorneys appearing before that court comply with local and federal rules of procedure.

The Eastern District's rules are designed to keep cases moving. Judges routinely order — usually within 30 days of filing of an answer — a short scheduling conference. The scheduling order fixes firm dates for discovery, pre-trial conference, and trial. Cases are not assigned to a particular judge until the trial date is set, to avoid postponement because a pre-assigned judge's docket may be overloaded. Local rules limit the time for discovery as well as the amount and type of discovery available.

Short, efficient trials are the rule. The most complex cases are typically allocated five to ten days of trial time, and the court rigidly adheres to the trial schedule. Trials are also kept short because the court enforces strict rules of procedure. Testimony is expected to be tight and efficient. The court usually dispenses with testimony about the experts' qualifications; that information is provided to members of the jury beforehand. The next witness is expected to be in the on-deck circle at all times to avoid delay. Witnesses are often taken out of turn if there are scheduling problems. Courtroom theatrics by attorneys are not permitted. Attorneys are expected to remain behind the podium during their arguments and questioning (it is assumed attorneys wander less in their arguments if they wander less around the courtroom).

These examples of efficiencies could certainly be modified and adopted for use in the Colorado courts. Not all of these rules may be appropriate, but the underlying theme of strict adherence to a more stringent set of rules would benefit the court system as well as the business citizenry. The Rocket Docket has shown that ardent case management reduces the cost of litigation through efficiency and certainty. The Committee believes that such a process can be instituted and regularized in Colorado, with or without the establishment of a business court, if judges can be induced to enforce it with vigor.

H. ELECTRONIC FILING AND OTHER APPLICATIONS OF DIGITAL TECHNOLOGIES AND THE INTERNET

1. *Reason for Consideration by Committee*

In the course of its deliberations, the Committee became aware of a pilot project to permit the filing of court pleadings electronically. Electronic filing is being utilized by other governmental agencies — the Department of State is moving rapidly to permit the filing of Uniform Commercial Code documents, articles of incorporation and other documents establishing legal entities, and required reports electronically — and is proving to be both efficient to the filer and the record-keeper and also beneficial to all concerned in permitting ready, searchable access for users.

2. *Recommendation*

The Committee recommends that the Judiciary monitor the development of digital technologies and the Internet to spot opportunities for the application of those technologies to judicial processes. We further recommend that the statutes concerning dispute resolution be reviewed and modified as necessary to permit the application of digital technologies and the Internet to dispute resolution.

3. *What is Electronic Filing?*

Electronic Filing ("e-filing") is the process of transmitting documents and other court information electronically, rather than on paper, between litigants and the courts. Currently a pilot project is under way, under contract between the Judiciary and a private vendor named JusticeLink, Inc., which provides for—

- a. The electronic interface and transfer of information between the court information system (ICON) and the information in the electronic filing system.
- b. Payment of filing fees electronically and posting those fees to ICON electronic notification and service
- c. The beginnings of an electronic document management system using imaging and providing for Internet access to filed documents.

Initially, e-filing in Colorado will be limited to filings in civil, family, water, and probate cases at the district court level. With e-filing, the court clerks will be able to:

- ◆ View and print all electronically filed documents specific to their court from their personal computers;
- ◆ More easily create cases in ICON with electronically provided data, while being able to assign case numbers, division and room numbers, judicial officers, alternate judicial officers, and scheduled events;
- ◆ Accept or reject a filing or partial filing; and
- ◆ Adjust filing fees when necessary.

With e-filing, judges will be able to—

- ◆ Review all electronically filed documents specific to their court from their personal computers; and
- ◆ Issue orders electronically from any location with Internet access

A statewide deployment schedule has been developed, and it is anticipated that all districts will be providing for e-filing by June 2001. The Eighteenth Judicial District (Arapahoe, Douglas, Elbert, and Lincoln Counties) will be the first pilot location, followed next by the Denver Probate Court and then the First Division Water Court in Weld County. Following a period of stabilization, the remainder of the State's district courts and water courts will be systematically brought on line, starting with the Fourth Judicial District (El Paso and Teller counties) in July 2000 and ending with the Twelfth Judicial District (Alamosa, Conejos, Costilla, Mineral, and Saguache counties) in June 2001.

4. *Use and Accommodation of Other Technology*

Electronic filing is clearly just one of many applications that the Judiciary can make of the digital and Internet technological revolution. Other examples that have been bruited by those who make such forecasts are the "virtual courtroom," in which lawyers, jurors, witnesses, and judges alike may be located remotely but participating contemporaneously in trials and other proceedings using the Internet, and virtual mediation, in which Internet and even artificial intelligence technologies are used to resolve disputes that are essentially over the amount of money to be paid by one party to another.

Among the areas to which digital technologies and the Internet are already finding application is arbitration. The Committee is aware that Internet sites such as www.cybersettle.com, www.settleonline.com, and www.clicknsettle.com may offer convenient, efficient, fair, and economical systems for settlement of monetary disputes. Amendments to Colorado statutes governing arbitration and mediation, including the Colorado Uniform Arbitration Act⁴ and the Colorado Dispute Resolution Act,⁵ may be necessary in order that such "on-line" services can be included within the procedures that are protected by statutory provisions for confidentiality, for judicial referral, and enforceability of awards as judgments. Presently, requirements that the procedures be conducted by "neutral third parties," for example, may exclude computer-based procedures, unless perchance a computer is deemed to be a party. The Committee understands that caution must be applied in making changes, because it may be that not all digital techniques are in fact worthy of statutory protection and promotion, but it believes that the matter of extending the statutory provisions to some such procedures should be considered by a group comprising persons skilled in alternative dispute resolution and persons skilled in the appropriate digital and Internet technologies.

The Committee has not undertaken to research particular developments in this area, but its examination has been sufficient to make it aware that developments are indeed occurring quickly, many of which are likely to be useful for application to Colorado's judicial system as well as other areas of government and beneficial to the business community as consumer of government services and as respondent to governmental impositions. The Committee recommends that each of the three branches of government establish or strengthen committees, agencies, or other bodies, such as the Governor's Commission on Science and Technology, which are knowledgeable about technological developments and about the needs of the governmental, business, and other constituencies that may employ those developments, to monitor the developments and recommend and implement their application as appropriate.

I. CONCLUSION

Creating a business court system would improve both the quality and speed of civil justice in Colorado – and make our State a more attractive place in which to conduct commerce. The Colorado State Judiciary should take steps to create such a specialized "court within a court." It should also take steps to reform Colorado's existing court system and rules to become more business friendly, utilizing, among other things, modern case management practices and installing new information technologies where appropriate.

¹Such an operating statement is attached to this Report as EXHIBIT 1.

²“Business Courts: Towards a More Efficient Judiciary,” *The Business Lawyer*, Vol. 52, May, 1997, p. 957.

³Rule 12, Colorado Rules of Civil Procedure.

⁴Section 13-22-201 *et seq.*, Colorado Revised Statutes.

⁵Section 13-22-301 *et seq.*, Colorado Revised Statutes.