

The ABA's Contribution to the Development of Business Courts in the United States

By Christopher P. Yates*

More than a quarter-century ago, the ABA Business Law Section made a commitment to the development of business courts across the United States. From the formation of its Ad Hoc Committee on Business Courts in 1994 through the engagement with state officials and business-court judges for more than two decades, the Section has become a driving force behind the adoption and refinement of the business-court concept by an overwhelming majority of the states. In this article, the innovators and champions of business courts who took up the cause on behalf of the Section tell the story of how the Section played a central role in the success of business-court initiatives and how the Section works diligently today to maintain and build upon that success.

I. INTRODUCTION

From the 1990s through today, the growth of business courts across the country has been rapid and remarkably beneficial to judges and attorneys alike. That growth has been fueled to a large extent by the Business Law Section of the American Bar Association, which has provided guidance, leadership, and a clearinghouse for information for business-court judges. In recent years, the Business Law Section has intentionally drawn a substantial number of business-court judges into its ranks through initiatives such as the program for Business Court Representatives, the diversity clerkship program, and the commitment to finding leadership roles in the Section for judges who wish to develop a deeper understanding of the substantive law and procedural concerns that affect business courts. Indeed, the relationship between the Section and business-court judges has evolved to the point that it can best be described as symbiotic. This article tells the story, in the words of Section leaders and business-court judges, of how that relationship was formed and how it is carefully nurtured in the present.

* Circuit Court Judge, Kent County, Michigan; B.A., Kalamazoo College, 1983; J.D. & MBA, University of Illinois, 1987.

II. THE ROLE OF THE AMERICAN BAR ASSOCIATION AND ITS SECTION OF BUSINESS LAW

A. THE FORMATION OF THE RELATIONSHIP

From the very beginning, the ABA Business Law Section has taken an active role in the promotion and development of business courts. As Philadelphia practitioner Lee Applebaum wrote: “In 1994, the Section created an Ad Hoc Committee on Business Courts[,]” which issued a report in August 1996 “(i) identifying the reasons why some jurisdictions are considering or have adopted business courts of special jurisdiction or specialized business courts of general jurisdiction; (ii) summarizing the use of specialized courts in the federal courts and in other countries; and (iii) surveying each of the fifty states to determine the status of efforts to create any such separate courts or specialized departments.”¹ Members of the ad hoc committee augmented that 1996 report with a series of groundbreaking publications. Attorney Robert Haig—a driving force behind business-court development in the United States—published a scholarly review of the New York experience entitled, *New York Creates Business Courts: If They Can Make It There, Can They Make It Anywhere?*² In addition, ad hoc committee co-chairs R. Franklin Balotti and Roland Brandel penned a prescient contribution called *Business Bench: Are Special Courts the Future?*³ Brandel also took the lead in drafting the ad hoc committee’s seminal article, *Towards a More Efficient Judiciary*.⁴

Haig describes with fondness the successful effort to convince the State of New York to institute a commercial division in 1995 and the nationwide trend to embrace business courts engendered by the success story in New York. The project began with a conscious effort “to attract business litigation to New York,” which involved “communicating on behalf of the state and its citizens the availability of a cost-effective and predictable forum for business cases in New York.” Each year, the state hosted a celebration of the commercial division, “and we invited people from states all over the country to come to those anniversaries” of the commercial division. As a result of those annual events, Haig received “lots of calls from lawyers in other states who said they were thinking of starting up a business court” and enlisted Haig’s help. Invariably, he took part in other states’ business-court projects and began travelling “across the country at the invitation of bar associations and courts,” spreading the word about New York’s innovations. Haig testified and communicated with the state legislatures in Pennsylvania, New Jersey, Maryland, and “all over the place about what the advantages

1. Lee Applebaum, *ABA Section of Business Law & Business Courts—A 25 Year Connection*, BUS. & CORP. LITIG. COMM. NEWSLETTER (ABA Bus. Law Section, Chicago, IL), Spring 2019 (quoting ABA Ad Hoc Comm. on Bus. Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947, 947 (1997)).

2. Robert L. Haig, *New York Creates Business Courts: If They Can Make It There, Can They Make It Anywhere?*, BUS. L. TODAY, Sept./Oct. 1996, at 32.

3. R. Franklin Balotti & Roland E. Brandel, *Business Bench: Are Special Courts the Future?*, BUS. L. TODAY, Jan./Feb. 1995, at 24.

4. ABA Ad Hoc Comm. on Bus. Courts, *supra* note 1.

were” of implementing business-court systems. And, in short order, his tireless efforts paid dividends, as state after state seriously considered the adoption of business courts.

Nearly a decade after the August 1996 report was issued, *The Business Lawyer* published a significant article entitled, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*.⁵ As author Lee Applebaum explains with justifiable pride, that work has been referenced extensively in scholarly articles about business courts. Indeed, in describing various business-court models and structures in detail, the article was an essential resource for states interested in forming business courts. In the ensuing years, the idea of business courts became a well-accepted element of many states’ plans for modernizing their court systems. Commercial dockets began to spring up across the country, and in time the widespread adoption of business courts fulfilled the Section’s goal in championing commercial dockets as a means to improve the quality of business litigation in state courts.

Applebaum and his longtime collaborator, Philadelphia attorney Mitchell Bach, envisioned business courts as a valuable tool for commercial litigators, and in time their vision became reality. Bach sought out Judge Ben Tennille, who pioneered the business-court model in North Carolina, and persuaded Judge Tennille to take part in CLE panels for the Section. Judge Tennille became the first, and most important, liaison between the Section and the judges involved in the burgeoning business-court movement. Judge Tennille encouraged the Section to undertake initiatives aimed at increasing judicial involvement, which blossomed into the Judges Initiative Committee, the Business Court Representative program, and the enduring commitment of the Business and Corporate Litigation Committee (“BCLC”) to find new leadership roles for Business Court Representatives upon the completion of their two-year terms. Judge Tennille describes the synergy between the Section and business-court judges “as a matter of luck and timing,” noting that the Section “took a liking to the business courts” and decided “to think about what was happening in states other than Delaware.” At the same time, “Delaware folks were especially supportive of getting other judges involved,” so it became “a community effort.”

Phoenix litigator Heidi McNeil Staudenmaier, who has served as the chair of the BCLC, describes the Business Court Representatives—a small group of judges chosen by the ABA Business Law Section to become active in Section events—as “vitaly important” to the Section’s educational programs and “very helpful” in running the Section’s heralded diversity clerkship program. Speaking of the importance of placing Business Court Representatives in leadership roles in the Section, Staudenmaier notes that many attorneys who attend Section meetings find it “invaluable” to get “input from those judges who run successful business courts.” Additionally, she has seen that keeping business-court judges involved in the Section adds significant depth to the “substantive work of the

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

committees and subcommittees within the Section.” Consequently, she made a “conscious effort to keep judges involved and find places within the Section where those judges can provide the greatest benefit to the organization.”

Meanwhile, the Section’s Ad Hoc Committee on Business Courts “evolved into the Business Courts Subcommittee within the Section’s Business and Corporate Litigation Committee.”⁶ Although jurists such as United States Circuit Judge Thomas Ambro and United States District Judge Alvin Thompson had already become so active that they had risen to the position of Section chair, the Section concluded that the business-court judges who chose to remain active in the Section needed their own home. Therefore, the Section created the Judges Initiative Committee as the judges’ flagship operation, populated with state and federal judges with a strong interest in commercial litigation. Over time, that committee has come to serve as the gateway to leadership roles in the Section for judges. Commercial litigator Patrick Clendenen, the Section’s 2019–2020 chair, hopes that more judges will follow that path, commenting that “it is important for all of the voices involved in the administration of justice for business to be at the table” and encouraging judges “to continue up the leadership ladder to broaden their involvement in the Section.”

B. THE SECTION OF BUSINESS LAW’S COMMITMENT TO THE RELATIONSHIP

Through interviews with Section leaders past and present, the importance of business courts and business-court judges to the Section’s activities comes into focus. Former Section chair Bill Johnston credits “the inspired and tireless efforts on the part of Mitchell Bach, Lee Applebaum, and Judge Ben Tennille for trumpeting the benefits to judges, litigants, and the public at large in establishing and adequately maintaining business courts.” And moving forward, Johnston foresees the collaboration between the Section and business-court judges having “substantive benefits, with business-court judges sharing best practices with one another and with lawyers and law students who are Section members.” Indeed, he counts at least four important benefits from the relationship that will ensure its durability and vitality. First, “the involvement of judges enhances the standing of the Section in the eyes of members and potential members.” Second, “the involvement in turn provides a draw for current and potential Section members to attend meetings and to engage in the work of the Section between meetings.” Third, “the involvement materially contributes to ensuring the gold-standard quality of Section CLE programs, non-CLE programs, and published works.” Finally, “the involvement of judges in the Section makes it that much more pleasant for all in the Section to get to know the judges as real people and develop lifelong relationships.”

Patrick Clendenen echoes those sentiments, observing that judges who have participated enthusiastically have enriched the Section “in terms of educational

6. Applebaum, *supra* note 1.

programming, improvements in the administration of justice, and scholarship.” He attributes the robust engagement of judges in the Section’s activities to the commitment of Section leaders to find roles for Business Court Representatives to play after the completion of their two-year terms, and he maintains that continuing involvement of judges on committees and subcommittees is of paramount importance. Similarly, former BCLC chair Heidi McNeil Staudenmaier emphasizes the value in having business-court judges active in the Section because it provides the perspective of business-court judges “to the people who will be coming before them in the course of their practice.” Beyond that, she regards judges as instrumental in making the diversity clerkship program function well because judges furnish guidance and experience to the type of extraordinary law students that the Section hopes to attract when they become practitioners. Indeed, as Mitchell Bach sees it, the diversity clerkship program is an essential component of the Section’s concerted effort to increase diversity in the ABA and in commercial practice.

In Lee Applebaum’s view, the mutual benefits to the business bench and bar of judicial participation in Section activities are manifest. Judges can share “a unique perspective on how the law works,” and judicial involvement “allows attorneys to communicate their ideas and concerns to judges.” Predictably, bringing judges and attorneys together in the informal settings of Section events provides “fertile ground going both ways” and has “changed the learning culture across the Section.” In the same vein, Wilmington attorney Richard Renck has found in his role as co-chair of the Judges Initiative Committee that judicial participation in the Section is imperative. He believes that young lawyers “benefit from hearing from the judges on the practical aspects of courtroom practice,” and he has noticed that attendance at CLE programs is always enhanced by judicial participation on panels because lawyers “get to hear what matters from the proverbial horse’s mouth.” These factors have cemented the Section’s commitment to keeping judges deeply involved in meetings, training programs, and committee work, and that commitment now seems enduring.

C. BUSINESS COURT JUDGES’ PERSPECTIVES ON THE RELATIONSHIP

Following the lead of Judge Ben Tennille, business-court judges from across the nation have flocked to the ABA Business Law Section in the last fifteen years. The ranks of the Section’s Business Court Representatives program have been filled with a veritable who’s who of business benches, and nearly all of those business-court judges have chosen to remain active in the Section upon completion of their two-year terms as Business Court Representatives. Of course, much of that success in retaining business-court judges is the direct result of the Section’s leadership and its commitment to providing opportunities for judicial officers to remain engaged in meaningful work. But the judges themselves have made the decision to spend a significant amount of their limited free time off the bench participating in the Section’s activities. What drives those decisions are the

many benefits that business-court judges receive from being active Section members.

Judge Gail Andler of California was one of the first nationally renowned complex civil-court judges to become involved in the Section. After serving as the president of the American College of Business Court Judges, Judge Andler knew of many leaders in the business-court movement who wanted “to help other states and other judges with the development of business courts, and it led to some great relationships in states like Indiana and West Virginia that now have very active business courts.” Observing that the “ABA Business Law Section was instrumental in the growth of business courts throughout the nation,” Judge Andler served as the chair of the ABA Judicial Division’s Subcommittee on Business Courts and collaborated with the ABA Business Law Section’s Business Courts Subcommittee to “make available the vast amount of work and resources on the ABA Business Law Section’s website to the judges in the Judicial Division so that they wouldn’t have to reinvent the wheel.” Judge Andler notes that the judges who participate in Section activities “are available to talk about best practices in the business and commercial courts” and “informally share information” with Section members who “might not want to raise their hands when judges are speaking on a panel.” Although Judge Andler has retired from the bench to become involved in mediation and arbitration, she remains profoundly committed to the Section because she believes “that her involvement in the ABA Business Law Section made [her] a better judge” by giving her “substantive education that was not as readily available through other groups.” And even today, the Section enhances her “understanding of the challenges facing the lawyers” with whom she interacts as a mediator.

Similarly, Delaware Vice Chancellor Donald Parsons, who retired from the bench in 2015, brought his wisdom and stature to the ABA Business Law Section first as a Business Court Representative, then as co-chair of the Judges Initiative Committee, business law advisor, and member of the Section council. Vice Chancellor Parsons describes his formative experience as “predominantly patent litigation,” so he sought out the ABA Business Law Section to fill in his knowledge of corporate litigation. He began his involvement with the Section by attending “events for merger and acquisition lawyers,” and then he “started to be invited to meetings to speak on topics relating to corporate litigation.” As his engagement in the Section increased, he found that the Section was “very useful” in providing continuing legal education and enabling him to “meet other judges and hearing about what was happening in other business courts.” And today, after his retirement from the bench, Vice Chancellor Parsons still finds the Section invaluable in promoting diversity and inclusion in the legal profession through initiatives such as the diversity clerkship program, which pairs law students with business-court judges for a funded summer of mentoring in chambers.

Judge Stephen Schuster of Georgia followed in the footsteps of Vice Chancellor Parsons by serving first as a Business Court Representative and then as a co-chair of the Judges Initiative Committee. Simply put, Judge Schuster believes that

he “could not properly do my job without what I have been given by the Business Law Section.” He has had the opportunity, through the Section, “to meet with, speak with, and learn from other business-court judges” and “essentially be mentored by them.” Beyond that, the Section has afforded him the chance to “learn from practitioners nationwide who do complex commercial litigation” and who can “show me what goes on behind the door and what it takes to get a case to trial.”

The illustrious Judge Clifton Newman of South Carolina, who succeeded Judge Schuster as a Business Court Representative and as co-chair of the Judges Initiative Committee, shares the views of Judge Schuster on the range of benefits to judges involved in Section activities and committees. According to Judge Newman, the Section “has proven to be extremely valuable in my everyday work in that the resources in the form of CLE programs are something that I often utilize when I face complex issues.” Judge Newman attributes his continued engagement in the Section to “receiving so many benefits from being involved.” He also appreciates experiencing “a high level of scholarship” in the Section.

Judge Ben Tennille’s successor as the leader of the North Carolina Business Court, Judge James Gale, has played a central role in the ABA Business Law Section’s program content and operations. After serving as a Business Court Representative, Judge Gale received a leadership assignment on the Business Courts Subcommittee of the Judges Initiative Committee, where he has developed and presented a substantial number of educational programs at Section events. As Judge Gale has explained, “a combination of things” motivated him to become engaged in the Section. First, “any judge who suffers from isolation from time to time” benefits from being “in a situation of camaraderie and true friendships with the people you consider as your peers and the people you look up to as the best of the best of peers.” Second, the Section’s activities “give you so much encouragement to do what you do in your job back home.” Third, the Section offers “state-of-the-art CLE” and “advanced thinking from the bench and the best practitioners in the field” of commercial litigation.

From the perspective of New York Supreme Court Justice Timothy Driscoll, who became involved in the Section as a Business Court Representative, Section and committee meetings are thoroughly enjoyable and have encouraged him to “take an active role” in educational programs. Justice Driscoll firmly believes that his engagement with the Section has made him a much better commercial-court judge because of the interaction he has with other judges and practitioners “not in the often-tense environment of the courtroom, but in the intellectual ivory tower environment,” where judges and attorneys can get together informally to “talk about best practices and our work and what we’re writing about.” Justice Driscoll singles out electronic discovery as an area where discussions within the Section are extraordinarily sophisticated and far out in front of the practice itself. Summing up the prevailing view of judges involved in the Section, Justice Driscoll notes that the Section enables business-court judges to interact with one another and with practitioners in settings “without the barriers that usually exist between the bar and the bench.” That type of interaction will always attract

judges to the Section, and the judiciary seems profoundly grateful for the opportunity to engage in the meaningful dialogue that the Section fosters among all those who care deeply about business courts and commercial litigation.

D. BUILDING THE RELATIONSHIP FOR THE FUTURE

Reminiscing about the development of business courts, Mitchell Bach recalls the days when commercial litigators would do almost anything to avoid state courts, preferring to litigate their matters in federal courts whenever possible. With the advent of business courts, that entire approach has changed dramatically, as many commercial litigators now feel comfortable in state-court systems that offer business courts. He describes the development of business courts as “far beyond my wildest dreams in terms of what we’ve accomplished,” and he notes that the early efforts of the Section drew the attention of Judge Ben Tennille, opening the door to a long, fruitful relationship between the business bench and the Section. But he acknowledges that there remains work to be done, noting that some business courts have been shut down temporarily or even permanently. In that continuing endeavor, he regards the relationship between the Section and business-court judges as essential to nationwide success. Lee Applebaum likewise emphasizes the ongoing importance of the Section’s relationship with business-court judges and the educational role that the Section can play in the development and refinement of business courts. Through innovations such as Business Court Representatives, the Judges Initiative Committee, and the diversity clerkship program, the Section has much to offer the business-court movement, and the judges who serve on established business courts appear poised to continue the work of spreading and improving business courts that began with visionary leaders like Judge Ben Tennille, Lee Applebaum, Mitchell Bach, Robert Haig, and everyone who served on the Section’s Ad Hoc Committee on Business Courts.

III. CONCLUSION

As states across the country embrace the business-court model with enthusiasm and reap the benefits of commercial dockets, the Business Law Section can legitimately claim a full measure of credit for that success. From the Section’s formation of the Ad Hoc Committee on Business Courts in 1994 through the recognition of Business Court Representatives and the funding of the diversity clerkship program over the last decade, the Section has given birth and vitality to the business-court movement. Now, business-court judges throughout the nation look to the Section for leadership, guidance, and education, and practitioners who attend Section meetings and training programs have unique opportunities to gain invaluable insight into the thought processes and courtroom practices of business-court judges. In sum, the seeds planted by the Section more than a quarter-century ago have grown into an intellectual and collegial superstructure supporting commercial courts that grows stronger with each passing year.