

November 1, 2018

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# THE INDIANA COMMERCIAL COURT WORKING GROUP FINAL REPORT AND RECOMMENDATIONS

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## Introduction

On January 21, 2016, the Indiana Supreme Court issued its Order authorizing a Commercial Court Pilot Project beginning June 1, 2016. A detailed history of the pilot project is contained in the [Indiana Commercial Court Handbook](#). Since June 2016, the six pilot court judges have been presiding over commercial court cases, meeting with the supporting committee (the “Working Group”), and attending and conducting related judicial, attorney, and public educational programs to further the pilot project. The Working Group has submitted a status report to the Supreme Court on December 28, 2017, and the pilot project judges have joined and collaborated with the American College of Business Court Judges. As anticipated, the Commercial Court pilot project has been an exciting and challenging adventure in transforming the way Indiana’s courts address commercial and business litigation in our State. This project has been a unique and fruitful collaboration of the Supreme Court, the trial bench, in-house corporate counsel, commercial litigators who represent small businesses and large corporations, Indiana’s law schools, the Indiana legislature, the National Judicial College, and nationally renowned business court judges.

This report and recommendation is the result of that collaboration and is submitted in compliance with the January 21, 2016 order of the Indiana Supreme Court. The nine specific recommendations of the working group are:

1. The Indiana Supreme Court should permanently establish Indiana Commercial Courts effective June 1, 2019.
2. Further study of caseloads in other counties is needed prior to expanding commercial courts to additional counties.
3. A commercial court case type, “CL” (“Commercial Litigation”), should be added to Indiana Administrative Rule 8(b)(3).
4. The Working Group should gauge interest in additional counties’ future voluntary participation.
5. The Indiana Supreme Court should appoint a new commercial court judge when a commercial court judicial vacancy occurs.
6. The Indiana Supreme Court permanently establish and support an “Indiana Commercial Court Committee.”
7. The Commercial Court law clerks should become State employees.
8. Commercial Court Interim Rules should be made permanent rules of the court effective June 1, 2019.
9. A database of searchable, substantive commercial court decisions should be available in pdf format via the [in.gov/judiciary/commercial](http://in.gov/judiciary/commercial) website.

These are more fully discussed below.

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## Recommendation 1: The Indiana Supreme Court Should Permanently Establish Indiana Commercial Courts Effective June 1, 2019.

In its January 20, 2016 Order Establishing the Indiana Commercial Court Pilot Project, the Indiana Supreme Court set forth the purpose of the Commercial Courts to:

- Establish judicial practices that will help all court users by improving court efficiency;
- Allow commercial disputes to be resolved efficiently with expertise and technology;
- Enhance the accuracy, consistency, and predictability of judicial decisions in commercial cases;
- Enhance economic development in Indiana by furthering the efficient resolution of commercial law disputes; and
- Employ and encourage electronic information technologies, and early alternative ADR interventions.

The Working Group is happy to report that the Commercial Courts have been able to advance the benchmarks set forth by the Indiana Supreme Court in the following ways:

### Pilot Project Goal: Establishing judicial practices that will help all court users by improving court efficiency.

The Commercial Court has found success employing prompt initial case management conferences and preliminary attorney conferences to set court expectations on conduct during hearings and to settle any outstanding ancillary issues between the parties to focus on the parties' substantive claims. The Commercial Courts have made themselves available for expedited hearings in matters involving temporary restraining orders ("TRO") and preliminary injunctions on restrictive employment contracts and trade secrets.

The numbers across all Commercial Courts reflect the Commercial Courts' ability to issue substantive orders in an expedited manner. Parties seeking orders on preliminary injunctions, motions to dismiss, and summary judgment motions can expect thoroughly researched opinions that are typically returned by, and often in advance of the 30-day deadlines set forth in the Indiana Trial Rules. The orders generally contain thorough legal analyses explaining the Court's reasoning.

The Commercial Court was established to be a better, more consistent docket for complex commercial litigation; and by both anecdotal and analytical metrics, the Commercial Courts are accomplishing this goal.

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### Pilot Project Goal: Resolve commercial cases efficiently via expertise and technology

Telecommunication and eDiscovery technology have assisted the Commercial Courts in adjudication. Appearance by conference call has assisted with the resolution of injunctive matters on several occasions.

eDiscovery has proven an essential aspect of many Commercial Court cases. Sophisticated litigants often have years of records and communications relevant to the matters before the Commercial Court. The Commercial Courts have been able to judiciously resolve discovery disputes by mandating the use of cutting-edge eDiscovery measures such as predictive coding to pare down an overwhelmingly voluminous number of records to a manageable and relevant pool.

### Pilot Project Goal: Enhance accuracy, consistency, and predictability of commercial cases

Cases before the Commercial Courts tend to fall under a few discrete categories of business disputes, and the Commercial Courts have been able to rely on analyses in earlier cases to inform rulings on similar matters. In particular, the Commercial Courts have made great efforts in establishing when a business may be entitled to injunctive relief, when a defendant can fall under the personal jurisdiction of the Commercial Courts, and how Indiana's summary judgment and motion to dismiss standards will be applied to commercial disagreements.

The Commercial Court judges and law clerks are also in the final drafting stages of a Commercial Court Bench Book, which will distill the collective knowledge of the Commercial Courts into a resource which judges across the State of Indiana may employ to settle commercial disputes on their own dockets.

Since the Commercial Court's inception, three Commercial Court orders that have been appealed to the Indiana Court of Appeals resulting in published opinions from the Court of Appeals of Indiana: two opinions affirming Commercial Court decisions, and one opinion reversing a Commercial Court decision. *See, Vickery v. Ardagh Glass, Inc.*, 85 N.E.3d 852 (Ind. Ct. App. 2017) (affirming Commercial Court's grant of preliminary injunction in trade secret misappropriation case), *reh'g denied, trans. denied; Prof'l Billing, Inc. v. Zotec Partners, LLC*, 99 N.E.3d 657 (Ind. Ct. App. 2018) (reversing Commercial Court's finding that personal jurisdiction existed over Alabama company); *Whitesell Precision Components, Inc. v. Autoform Tool & Mfg.*, No. 18A-PL-848, LEXIS 307 (Ind. Ct. App. Aug. 31, 2018) (affirming Commercial Court's denial of motion to dissolve preliminary injunction), *trans. Pending*. Additionally, in an unpublished opinion, *Joshi v. Apollo Med. Grp., LLC*, No. 82A01-1612-CT-2842, Unpub. LEXIS 1331 (Ind. Ct. App. Oct. 5, 2017), the Court of Appeals affirmed the Commercial Court's grant of a preliminary injunction.

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Five other cases have issues currently pending on appeal. The Commercial Courts' ability to thoroughly research issues and provide well-reasoned decisions for appellate review has helped develop Indiana law in areas such as venue, service, injunctive relief, and trade secrets.

### Pilot Project Goal: Enhance Indiana economic development through efficient commercial case resolution

According to a U.S. Chamber of Commerce report, since the inception of the pilot project, Indiana has risen from 17<sup>th</sup> to 15<sup>th</sup> best court system for business litigants in the country. Judges for the Commercial Courts make themselves available to litigants in time-sensitive matters and have been able to produce orders in as little as a day in emergency circumstances. Looking at a sample of the raw data since June 1, 2016, the Commercial Courts issue Orders on Motions to Dismiss in an average of 26 days, Motions for Preliminary Injunction in 15 days, and Motions for Summary Judgment in 24 days.

Practitioners also seem to share this optimism for the future of the Commercial Courts, as filings since June 1, 2017 outpace filings for the Commercial Courts' first year of existence when compared year-to-year. Commercial Courts are building a positive reputation based on the results they have produced in the resolution of commercial disputes.

### Pilot Project Goal: Use of electronic information technologies and early ADR

As discussed with eDiscovery and initial case management conferences, the Commercial Courts have found success in advancing these directives from the Indiana Supreme Court.

The Commercial Courts are employing ADR techniques in attempts to settle almost all of their cases, specifically matters of employee non-compete and trade secret cases. At early case management conferences, with the input of counsel, the Commercial Courts thoughtfully explore early ADR, and also the optimal timing for cost-effective ADR that will most likely benefit the parties and enhance the likelihood of successful mediations. Where parties cannot negotiate a resolution, the Commercial Courts have provided the same efficient and mindful docket for the parties to adjudicate their commercial claims fully, but the Commercial Courts can be proud of their track record in the timely resolution of suits through ADR interventions.

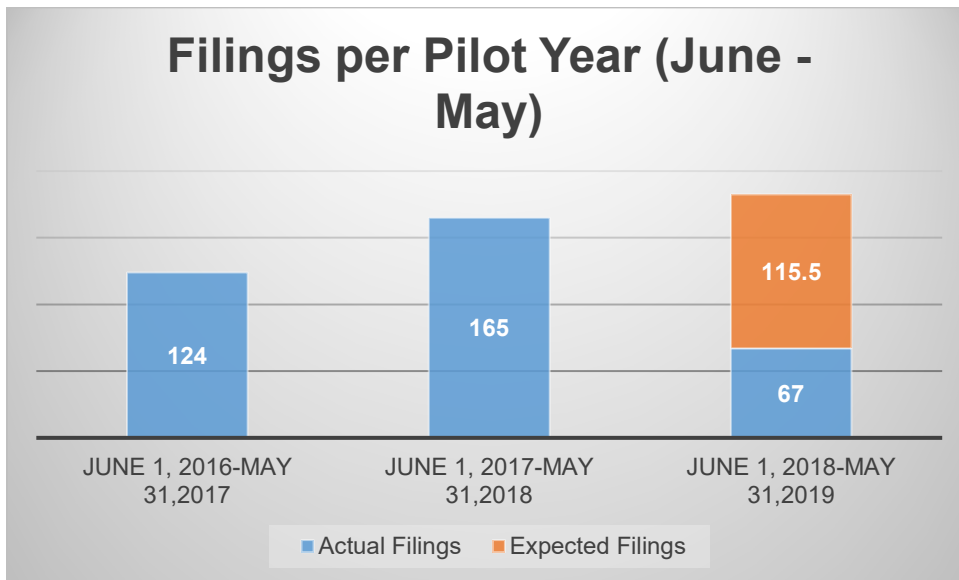
### Commercial Court docket growth

One key takeaway from the Commercial Court pilot period is that the use of the Commercial Court is growing. The absolute number of new cases being placed on the Commercial Court docket is increasing, and the difference year-over-year shows the growth is occurring at an accelerating pace. Year One (June 1, 2016, to May 31, 2017) had 120 cases on the Commercial Court docket, and Year Two (June 1, 2017, to May 31,

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2018) had 151 new cases on the Commercial Court docket. The second year of the pilot project saw a 26% increase in filings from Year One to Year Two. If the trend continues, with 61 cases filed already for Year Three (June 1, 2018- Oct. 10, 2018), the Commercial Court is on pace for even greater growth.

Chart: Case filings per pilot year

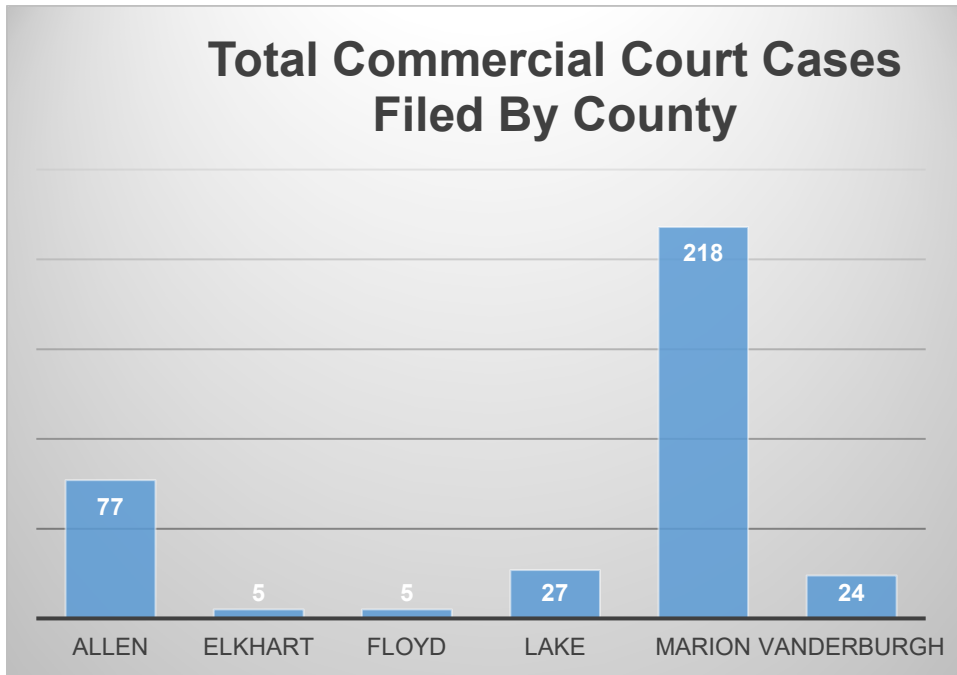




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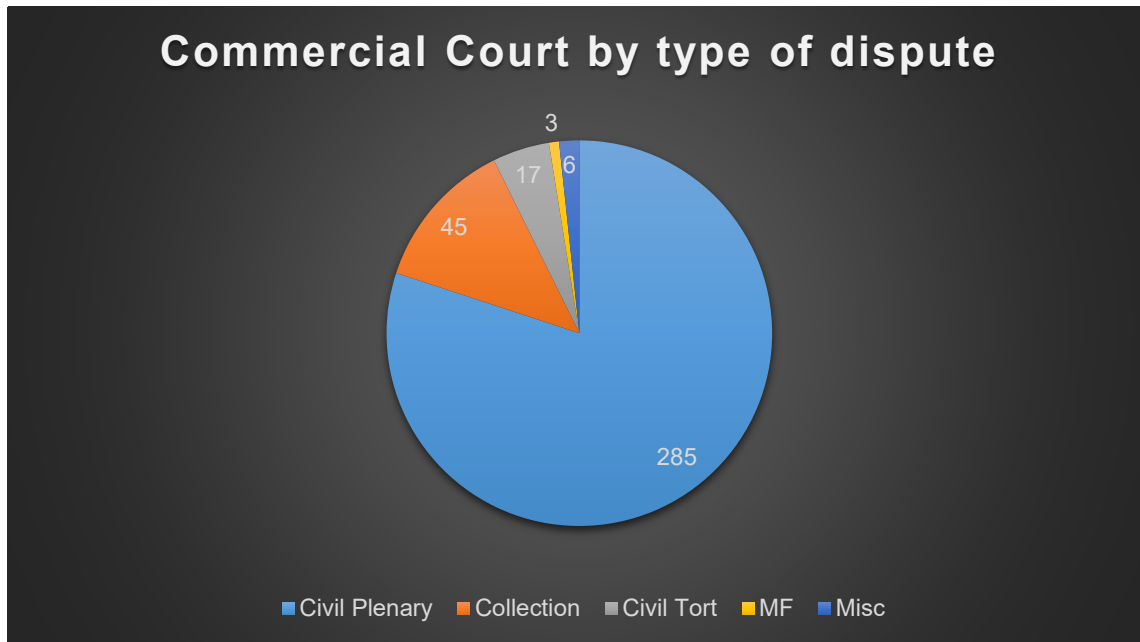
### Chart: Case filings by county

Breakdown of where the cases are being filed:



County	Total Filings	Percentage of Commercial Court Docket
Allen	77	22%
Elkhart	5	1%
Floyd	5	1%
Lake	27	8%
Marion	218	61%
Vanderburgh	24	7%

Chart: Case filings by case type



Civil Plenary	285	80.06%
Civil Collection	45	12.64%
Civil Tort	17	4.78%
MF	3	2.11%
Misc	6	1.69%

Civil Plenary cases concerning breaches of contract are by far the most common type of case that ends up on the Commercial Court docket, constituting over 80% of the docket. Civil Collection cases are also reasonably common as plaintiffs seek to recover unpaid debts that occur in a commercial relationship. Finally, Civil Tort cases concern breaches of fiduciary duty, and allegations of fraud with respect to business operations. Many times, a case will encompass two or more of these theories of recovery.

Below is a breakdown of Commercial Court filings by county per calendar year. (Note: The 2016 statistics start on June 1, 2016, when the pilot began, and the 2018 statistics reflect only those cases filed from June 1, 2018, through October 10, 2018):

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Allen County

Case Type	2016	2017	2018
Plenary (PL)	8	23	27
Civil Collection (CC)	1	8	1
Civil Tort (CT)	0	2	2
Miscellaneous (MI)	0	2	0
Mortgage Foreclosure	0	1	1
Small Claims	1	0	0
TOTAL	10	36	31

Lake County

Case Type	2016	2017	2018
Plenary (PL)	6	14	7
Civil Collection (CC)	0	0	0
Civil Tort (CT)	0	0	0
Miscellaneous (MI)	0	0	0
Mortgage Foreclosure	0	0	0
Small Claims	0	0	0
TOTAL	6	14	7

Elkhart County

Case Type	2016	2017	2018
Plenary (PL)	2	1	1
Civil Collection (CC)	0	1	0
Civil Tort (CT)	0	0	0
Miscellaneous (MI)	0	0	0
Mortgage Foreclosure	0	0	0
Small Claims	0	0	0
TOTAL	2	2	1

Marion County

Case Type	2016	2017	2018
Plenary (PL)	33	79	66
Civil Collection (CC)	9	9	7
Civil Tort (CT)	4	6	2
Miscellaneous (MI)	0	0	3
Mortgage Foreclosure	0	0	0
Small Claims	0	0	0
TOTAL	46	94	78

Floyd County

Case Type	2016	2017	2018
Plenary (PL)	1	1	2
Civil Collection (CC)	0	1	0
Civil Tort (CT)	0	0	0
Miscellaneous (MI)	0	0	0
Mortgage Foreclosure	0	0	0
Small Claims	0	0	0
TOTAL	1	2	2

Vanderburgh County

Case Type	2016	2017	2018
Plenary (PL)	2	7	5
Civil Collection (CC)	1	3	4
Civil Tort (CT)	1	0	0
Miscellaneous (MI)	0	0	0
Mortgage Foreclosure	0	0	1
Small Claims	0	0	0
TOTAL	4	10	10

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## Efficiency of the Pilot Program

The pilot program has given the Commercial Court Working Group some opportunity to evaluate the performance of the Commercial Court docket, using the most recent data available, timeline for resolution:

### **Motion to Dismiss**

Average: 26 days

Median 27 days

### **TRO/Preliminary Injunction**

Average: 15 days

Median: 7 days

### **Summary Judgment**

Average: 24 days

Median: 23 days

## Commercial Courts approval in the legal community

Finally, the Commercial Courts have received high levels of approval and support from the legal community. Lawyers practicing primarily in the areas of business and commercial litigation have voiced their support to the Commercial Court judges both in the courtroom and out of the courtroom at various seminars and educational programs. A collection of letters of recommendation highlighting the Indiana legal community's support for the Commercial Court is attached to this Report as Appendix A. The Working Group recommends that each of the six (6) pilot project courts should be converted to permanent commercial courts, with each current pilot court judge serving as the commercial court judge for each of their counties.

## Recommendation 2: Further Study of Caseloads in Other Counties is Needed Prior to Expanding Commercial Courts to Additional Counties.

The Working Group has discussed at length the possibility and practicability of expanding the Commercial Court to additional counties. There is little doubt that expanding Commercial Courts to other counties will be beneficial to achieving the overall goals of the specialized commercial docket. However, the Working Group approaches the opportunity to create new Commercial Courts with deliberation and informed thoughtfulness. At present, there is little to no reliable evidence—empirical or otherwise—regarding the need for additional courts, or the potential for additional courts to be successful.

For the goals and benefits of the Commercial Court to be realized (namely, a court that provides expertise and efficiency in resolving commercial disputes), each additional

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Commercial Court would need a sufficient volume of commercial litigation to be handled by each new Commercial Court judge. Without evidence that significant commercial litigation currently exists or would have the potential to exist in any given county, the Working Group is hesitant to recommend the Indiana Supreme Court establish a Commercial Court where a Commercial Court does not already exist. Establishing a Commercial Court in a county where very few cases are eligible for the Commercial Court could be futile and possibly detrimental to the development of Indiana's Commercial Courts.

A subcommittee of the Working Group made an effort to study the various trends in filings by case type across the state in the years 2016, 2017, and 2018 by gathering data on the total number of Civil Plenary ("PL") filings in the six current Commercial Court pilot counties, and comparing that number to the number of PL filings identified as "Commercial Court" cases in those respective counties. The subcommittee then gathered data on "PL" filings from a sample of various counties *not* currently part of the Commercial Court pilot program. A few of the counties sampled were Hamilton, Tippecanoe, St. Joseph, Hendricks, and Vigo. Taking the average percentage of Commercial Court "PL" filings in the six pilot counties compared to the overall "PL" filings in the six pilot counties, the subcommittee arrived at an estimated percentage of Commercial Court cases that could potentially be filed in the sample counties. The conclusions based on this preliminary study showed the number of yearly filings in hypothetical Commercial Courts in the sample counties varied considerably county-by-county, but were not sufficiently certain to warrant recommending the establishment of a Commercial Court in those counties at this time.

Thus, the Working Group wishes to conduct further study and evaluate whether potentially viable counties exist for adding a Commercial Court based on reliable methods. To effectively study this issue, the Working Group proposes a Commercial Court "case type" to be added to the Indiana Administrative Rules, as discussed in detail below.

### Recommendation 3: A Commercial Court Case Type, "CL" ("Commercial Litigation"), Should be Added to Indiana Administrative Rule 8(B)(3).

The Working Group recommends the Indiana Supreme Court amend Admin. Rule 8(B)(3) to establish the "CL" ("Commercial Litigation") case type to be used for filing all Commercial Court eligible cases, which are delineated in Commercial Court Rule 2. All cases eligible for Commercial Court, even when filed in a court other than a Commercial Court, must be filed under this case type. The Commercial Court case type will serve two very important purposes: (1) It will allow the Working Group to gather reliable data on the volume of cases eligible for Commercial Courts by county, state-wide; and (2), it will help the Working Group (along with the Judicial Administration Committee) to conduct a weighted caseload study in determining the weight to be assigned to Commercial Court

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cases, permitting a review of how many non-Commercial Court cases should be assigned to each Commercial Court judge. The Working Group will work with bar associations and the Judicial Education Committee to increase awareness and help provide continuing legal education regarding this new case type. The Working Group will also provide a draft defining the new case type for the Case Type Quick Reference Guide by March 1, 2019. The Working Group recommends this be effective January 1, 2020.

## CL case type will help gather data on the volume of cases eligible for Commercial Courts

There is currently no specific case type for either (1) Commercial Court cases or (2) cases of which the gravamen is commercial in nature and that are eligible for the Commercial Court docket. In practice, cases filed in the Commercial Court may be filed as PL, CC, CT, MF, and MI, and perhaps others. The current system for ensuring that these cases are placed on the Commercial Court's docket is that a party files a "Commercial Court Identifying Notice."

When a case is filed today, the clerk reviews the initial pleadings to see if a Commercial Court Identifying Notice has been filed with the complaint. If one has, then the file is placed on the docket of the Judge who is designated as a Commercial Court Judge. The case file is simply marked with a "flag" in the e-filing system to alert the viewer that the case is a Commercial Court case. Cases that originate in other venues but are transferred to a Commercial Court docket receive the same flag, as do cases where the responding party files a Commercial Court Identifying Notice.

While the court staff are overall effective at directing cases, there has still been much confusion resulting in instances where a case has been improperly assigned to the wrong court. While infrequent, this presents an issue to parties who believe their deadlines are running while the Commercial Court remains unaware that the case even exists.

Additionally, as discussed above, compiling data for the Commercial Court Pilot Project has proven difficult because there is a lack of readily available, accurate data on which to base conclusions. In addition to the issues presented in the preceding section, a roadblock for the Working Group in collecting reliable data has been the fact that various Commercial Court cases are classified as one of several different civil case types (for example, PL, CC, CT, MF, MI). Identifying larger trends from the data is difficult when no one can easily identify Commercial Court cases from out of all the cases filed in Indiana's courts each year.

Moving forward, the implementation of a specific, uniform case type will assist the clerk's office in its ability to readily ascertain Commercial Court-eligible cases and assign the cases accordingly. The "CL" case designation will trigger an easy, two-step analysis for the clerk performing intake of the case. First, if the case is marked "CL" the case is eligible for the Commercial Court docket in counties where a Commercial Court has been established. Second, if there is also a Commercial Court Identifying Notice filed, the case shall be assigned to the Commercial Court Judge in that county. If there is no Identifying

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Notice, the case may be assigned to any civil judge's docket in that county, according to local rules.

The ease of properly assigning cases to the Commercial Court docket will in turn produce a more accurate portrayal of what types of cases are being filed, and where. This will allow the Working Group to easily gather statistics on where the CL cases are being filed. Then, the Working Group will be able to study the data and recommend that Commercial Courts would be viable in specific additional counties based on a high volume of CL filings in those counties.

### CL case type will enable a Commercial Court weighted caseload study.

The CL case type will allow for a weighted caseload study to be employed to determine the weight to be assigned to Commercial Court cases, permitting a review of how many non-Commercial Court cases should be assigned to each Commercial Court judge.

Additionally, moving forward, a specific and uniform case type will allow the Working Group along with the Judicial Administration Committee to ascertain how much of the Commercial Court judges' time is allocated to their Commercial Court case load. For caseload balance purposes, it is important to determine whether any Commercial Court judge should have a reduced number of non-Commercial Court cases assigned cases. Currently, it is difficult to determine how much of a pilot judge's time is allocated to Commercial Court cases versus other cases. In the busier Commercial Courts, the judge spends a significant amount of time on Commercial Court cases as opposed to other cases, even though the actual number of Commercial Court cases on the docket accounts for only a small percentage of overall caseload.

The Working Group recommends this be effective January 1, 2020, so that sufficient opportunity for state-wide training regarding this amendment be provided to counsel, clerks, and courts.

### Recommendation 4: The Working Group Should Gauge Interest in Additional Counties' Future Voluntary Participation.

Much of the success of the pilot project has been due to the judges' interest in and dedication to the Commercial Court. The Working Group should reach out to counties to gauge interest in having a Commercial Court judge. Voluntary participation by courts and judges helps ensure the participating courts and judges are interested in and committed to the Commercial Court. This is a basic recommendation regarding all successful, specialized commercial and business court dockets that have been established throughout the country.

## Recommendation 5: The Indiana Supreme Court Should Appoint a New Commercial Court Judge When a Commercial Court Judicial Vacancy Occurs.

The Working Group recognizes there will be instances where sitting Commercial Court judges leave the bench due to retirement or other reasons. When there is such a vacancy, the Working Group should recommend a replacement judge from that same county who volunteers to serve as a Commercial Court, to be appointed by the Indiana Supreme Court.

## Recommendation 6: The Indiana Supreme Court Should Permanently Establish and Support an “Indiana Commercial Court Committee.”

Once the pilot is made permanent, the Commercial Court Working Group will need to continue to study best practices, consider successes and failures of the Commercial Court as it grows, and work to make recommendations and implement changes, so the model improves. The Commercial Courts require some degree of centralized oversight to accomplish these goals. The support of the Office of Judicial Administration will be necessary in this regard.

Membership of the Committee would continue to consist of individuals experienced in business litigation and the judicial system. The Committee should consist of:

- Commercial Court Judges – one representing each Commercial Court
- Lawyers
  - Litigators representing small and large businesses
  - Transactional attorneys representing small and large businesses
  - In-house counsel representing large and small businesses
- A Legislative Representative
- A Chamber of Commerce Representative

The Committee will need to replace Representative Washburne when he retires at the beginning of the next legislative session. The Committee should be diverse and should reflect the gender, racial, ethnic, and geographic diversity of the State.

## Recommendation 7: The Commercial Court Law Clerks Should Become State Employees.

The Commercial Court pilot project judges have noted the positive impact law clerks have had on alleviating work burdens. The more seasoned and longer time the law clerks spend in their role, the more helpful they can be to the Commercial Court judges.



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The Commercial Court law clerks must be attorneys licensed in Indiana. Similar to traditional appellate law clerks, the Commercial Court law clerks perform legal research, draft memoranda, and assist in preparing preliminary orders. The law clerks work individually, together as a team, and directly with the judge. The clerks must be comfortable discussing cases and applicable legal precedent.

In addition to tasks similar to those of appellate court law clerks, the Commercial Court law clerks assist in the administration of courtroom procedure and must understand and apply the Indiana Trial Rules and Rules of Evidence in real time. During hearings and trials, it is not uncommon for law clerks to assist the judges in reviewing proffered evidence to determine admissibility and in ruling on procedural motions.

Additionally, the Commercial Court law clerks join a discrete group of attorneys who have helped build the Commercial Court history and practices. The law clerks undoubtedly add an immense amount of value to the Commercial Court and are integral to the Commercial Court's continued success.

Currently, the Commercial Court law clerks are independent contractors with a beginning annual salary of \$61,200. The law clerks do not currently receive benefits.

The Working Group recommends the law clerks become State employees. While the independent-contractor structure for law clerks proved workable for the Pilot period, the Working Group believes salaried positions similar to those enjoyed by judicial law clerks at the Indiana Court of Appeals, Indiana Tax Court, and Indiana Supreme Court are necessary to retain quality attorneys to serve as law clerks for the Commercial Court. These salaried positions should also include benefits such as retirement, health insurance, a limited amount of paid CLE, and annual attorney registration fees. The salaries should also be on a similar salary increase schedule as the judicial law clerks of the Indiana courts mentioned above, so that the salary increases in the second year of the law clerk's service. The Court's ability to retain a law clerk for a second year greatly enhances the efficiency of the judge's work, as the judge need not expend the time and energy to retrain a new law clerk every year, and as the law clerk's skillset as an attorney will have increased over the two-year period.

The Working Group firmly believes the above compensation, benefits, and incentives are necessary to attract and retain talented attorneys as law clerks. The Working Group recommends the Indiana Supreme Court retain the current number of four (4) law clerks at this time.

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## Recommendation 8: Commercial Court Interim Rules Should be Made Permanent Rules of the Court Effective June 1, 2019.

The effective date for the rules should be June 1, 2019. The Working Group will submit the proposed Commercial Court Rules by March 1, 2019.

Certain Commercial Court Interim Rules should be modified prior to the adoption of the permanent rules, as indicated below.

### Commercial Court Interim Rule 4 Revision

The Working Group recommends Interim Rule 4 be made permanent subject to the minor modifications described below. Voluntary participation in the Commercial Courts has proven to be viable and the Working Group recommends no modifications in that regard. However, the Working Group recommends a change in the procedure to be followed if a party to a case assigned to a Commercial Court Docket elects to refuse to participate. At present, the clerk is instructed to transfer and assign such a case to a non-Commercial Court Docket in accordance with the applicable local rule for assigning civil cases. See Interim Rule 4(D)(3) and (F)(3).

The Working Group has concluded that this is a cumbersome procedure and that because the local rules for assigning civil cases do not contemplate these situations, clerks are uncertain as to the procedures they should follow. Instead, the Working Group recommends that Interim Rule 4(D)(3) and (F)(3) be amended to provide that if a party timely files a Refusal Notice, the clerk be instructed to transfer and assign the case to the non-Commercial Court Docket of the Commercial Court Judge. This provides the clerk with clear directions and does not prejudice the rights of the refusing party because the refusing party retains any change of judge rights that it would otherwise have under T.R. 76. The Working Group recommends the following modifications to Interim Rule 4(D)(3) and (F)(3); the Working Group does not believe that any changes to the Commentary are warranted by these modifications.

#### **Rule 4. Assignment of Case to the Commercial Court Docket**

.....

(D) If an Identifying Notice is filed by the party initiating the case and no other party has appeared in the case: (1) the clerk of the court shall assign the case to the Commercial Court Docket, which assignment is deemed a provisional assignment; (2) if no Refusal Notice is timely filed by any party that has appeared in the case, the assignment of the case is deemed permanent; and (3) if a Refusal Notice is timely filed, the clerk shall transfer and assign the case to **the non-Commercial Court docket in accordance with applicable Rule of the Commercial Court Judge.**

....

(F) If, after a case has been permanently assigned to a Commercial Court Docket pursuant to subsections (D)(2) or (E)(2), a new party appears in the case as a result of a cross-claim, counterclaim, third-party complaint, amendment, or otherwise: (1) the

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assignment of the case to the Commercial Court Docket becomes provisional, subject to the new party's right to file a Refusal Notice pursuant to subsections (B) and (C)(2); (2) if no Refusal Notice is timely filed by the new party, the assignment of the case is permanent; and (3) if a Refusal Notice is timely filed, the clerk shall transfer and assign the case to **the non-Commercial Court docket in accordance with applicable Rule of the Commercial Court Judge.**

## Commercial Court Interim Rule 5 Revision

Under current Commercial Court Interim Rule 5, “[a] Commercial Court judge *may* appoint a Commercial Court Master in a pending Commercial Court Docket case, *if all parties* to the case consent to the appointment of the Commercial Court Master.” (Commercial Court Interim Rule 5) (emphasis added). This requirement that the parties must consent to the appointment of a Commercial Court Master was a hotly debated and closely decided topic among the Working Group members in drafting the recommended initial Commercial Court Interim Rules.

The Working Group recommends Interim Rule 5 be changed to reflect that Commercial Court Masters may be appointed at the discretion of the Commercial Court Judge. Under the current Interim Rule 5, the Commercial Court masters have not been widely used during the pilot project.

The Commercial Court judges have experienced cases with distinct procedural scenarios in which the appointment of a master would have been extremely beneficial to the Court and the parties. For example, in one case, the Marion County Commercial Court found a Master would have been appropriate in a dispute over ownership of a company. There, the Court could have benefitted from a CPA to perform a forensic accounting of the company's assets and sales and to help the Court determine which parties owned what percentages of the company. However, the Court was unable to appoint a Master because the parties would not agree on an individual; the parties wanted their own experts. In a recent Allen County case, counsel did agree to just such an appointment at the court's suggestion, and have agreed to an early mediation to be conducted as soon as that Master's evaluation is complete.

In another instance, the Court experienced four contemporaneous Motions to Compel extensive amounts of discovery including eDiscovery. Sorting through dozens of email communications in order to determine what evidence was relevant and whether the parties were making good faith efforts to schedule depositions and turn over discovery was extremely time consuming for the Court. A substantial amount of time was spent by both the judge and law clerk on a non-legal issue that may have been more appropriately in the control of a Discovery Master.

Trial Rule 53 is not a viable means of appointing a master because it is a lengthy process that does not increase the Court's efficiency. Ideally, parties are in Commercial Court because they are seeking the expertise of the Judge and the efficiency of the Court. Appointment of Masters in certain cases furthers this goal.

The Working Group concludes that a Commercial Court's discretionary ability to appoint a Master is consistent with the continued prerequisite that the parties must voluntarily agree to the assignment of their cases to the Commercial Court, as required under Rule 4. The Working Group recommends the following modification to Interim Rule 5:

**Rule 5. Commercial Court Masters \***

**(A) Appointment and Compensation.**

1. As used in these rules, "Commercial Court Master" includes without limitation an attorney, a senior judge, or a non-attorney who has special skills or training appropriate to perform the tasks that may be required. A Commercial Court Judge may appoint a Commercial Court Master in any case pending on the commercial court docket if:
  - a. All parties consent to appointment of a Commercial Court Master; or
  - b. If all parties do not consent, the Court, after giving notice to the parties and an opportunity to be heard finds it probable that:
    - i. Appointment of a Commercial Court Master will materially assist the Court in resolving the case in a just and timely manner;
    - ii. The anticipated costs associated with the appointment of a Commercial Court Master are proportionate to the value of the case; and
    - iii. The anticipated costs associated with the appointment of a Commercial Court Master will not be unduly burdensome to any party.
2. The compensation allowed to the Commercial Court Master must be reasonable. The rate of compensation and the allocation of the cost between the parties shall be established by the Court, with consideration of input provided by the parties and the Commercial Court Master. However, if the parties seek appointment of a senior judge as a Commercial Court Master, the appointment must be approved by the Supreme Court, and compensation determined under Trial Rule 53(A).
3. The order of reference to the Commercial Court Master must specify the Master's powers. The order of reference may also direct the master to report only upon particular issues, to perform particular acts, or to receive and report evidence only, and fix the time and place for beginning and closing hearings, and for the filing of the Master's report. Subject to the specifications and limitations stated in the order of reference, the Master has the power to regulate all proceedings before the Master, and to take all measures necessary or proper for the efficient performance of the duties assigned under the order.

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\* Since this rule was substantially rewritten, strike through and underline is not used below for the ease of reading. The rule with track changes is attached as Appendix B.

4. The Commercial Court Master may require the production of evidence on all matters embraced in the order of reference, including the production of records and documents of all kinds, including electronic media. The Master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to place witnesses under oath. The Master may examine witnesses, including the parties to the action, under oath. The Master may permit the parties to examine witnesses under oath, and may place reasonable limits on the examination of witnesses by the parties.
5. If a party so requests, the Master must make a record of the evidence offered and excluded in the same manner, and subject to the same limitations, as provided for a court sitting without a jury.

*Commentary: The Commercial Court Judge must issue an Order specifying the powers delegated to the Commercial Court Master. The Court may direct counsel for the parties to submit a proposed order setting forth those proposed powers, and/or the Court may wish to craft the Order in conference with counsel. However, the ultimate scope of the Order is dictated by that which is necessary and appropriate under the circumstances, and is left to the sound discretion of the Court.*

**(B) Proceedings.**

- (1) Meetings.** When a reference is made, the clerk must forthwith furnish the Commercial Court Master and the parties with a copy of the order of reference. Upon receipt of the order of reference, the Commercial Court Master must forthwith set a time and place for the first meeting of the parties or their attorneys, to be held within twenty (20) days thereafter, unless the order of reference provides otherwise. The Master must forthwith notify the parties or their attorneys of the date of such meeting. It is the duty of the Master to proceed with all reasonable diligence. Either party, on notice to the parties and Master, may apply to the Commercial Court Judge for an order requiring the Master to expedite the proceedings and to make a report. If a party fails to appear at the time and place appointed, the Master may proceed *ex parte* or, in the discretion of the Master, may postpone the proceedings to a future day, giving notice to the absent party of the postponement.
- (2) Witnesses.** The parties may procure the attendance of witnesses before the Commercial Court Master by the issuance and service of subpoenas as provided in Trial Rule 45. If, without adequate excuse, a witness fails to appear or give evidence, the witness may be punished for the contempt by the Commercial Court Judge and may be subjected to the consequences, penalties, and remedies provided in Trial Rules 37 and 45.
- (3) Statement of Accounts.** When matters of accounting are in issue, the Commercial Court Master may prescribe the form in which the accounts must be submitted, and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus

submitted or upon a showing that the form of statement is insufficient, the Master may require a different form of statement to be furnished, or the accounts or specific items thereof to be provided by oral examination of the accounting parties, or upon written interrogatories, or in such other manner as directed.

**(C) Report.**

- (1) Contents and Filing.** The Commercial Court Master must prepare a report upon the matters submitted by the order of reference and, upon request of any party or the Commercial Court Judge, must submit the report before hearing or the taking of evidence. The Master must file the report with the clerk of the court; and in an action to be tried without a jury, must file with it a transcript of the proceedings and of the evidence and the original exhibits, unless otherwise directed by the order of reference.
- (2) In Nonjury Actions.** In an action to be tried without a jury, the Commercial Court Judge must accept the Commercial Court Master's decision or findings of fact unless clearly erroneous. Within ten (10) days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application of the Commercial Court Judge for action upon the report and upon objections thereto must be by motion and upon notice as prescribed in Trial Rules 5 and 6. After hearing, the Commercial Court Judge may adopt the report, reject it in whole or in part, receive further evidence, or recommit it to the Master with instructions.
- (3) In Jury Actions.** In an action to be tried by a jury, the Commercial Court Master must not be directed to report the evidence. The Master's findings upon the issues submitted are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the Commercial Court Judge upon any legal objections made to the report.
- (4) Stipulation as to Findings.** If the parties stipulate that a Commercial Court Master's findings of fact are to be final, only questions of law arising upon the report may thereafter be considered.
- (5) Draft Report.** Before filing the report, a Commercial Court Master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

## The Commercial Court Discovery Guidelines should become a Commercial Court Rule

The Commercial Court Interim Rules have a discovery section entitled "Discovery Guidelines." This was developed based upon more modern approaches to discovery, as is generally reflected in the Federal Rules of Civil Procedure and related case law, as is explained in the "Statement of Purpose" set out in that interim Guideline, section 1. Those Guidelines and the Statement of Purpose explain that Commercial Court discovery must be "proportional to the needs of the case." The Working Group recommends those

November 1, 2018

Guidelines, as amended, be incorporated into the Commercial Court Rules as a rule, and not as a mere guideline, as follows:

## **Rule 6. Discovery**

**(A) Scope.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional to the needs of the case**, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible as evidence to be discoverable.

### **(B) Initial Discovery / Required Initial Disclosures.**

- (1) The information and documents identified in the Initial Disclosures are those most likely to be automatically requested by experienced counsel in a similar case and which will most likely to be useful in narrowing the issues. These Initial Disclosures are not intended to be exhaustive of what should be shared by the parties or to preclude other necessary discovery.
- (2) A party must, without awaiting a discovery request, provide the other parties the following:
  - (a) The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
  - (b) A copy or description by category and location of all documents, electronically stored information, and tangible documents/items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
  - (c) A computation of each category of damages claimed by the disclosing party who must also make available for inspection and copying the documents or evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;
  - (d) A copy of any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in an action or to indemnify or reimburse for payments made to satisfy the judgment; and,
  - (e) Documents that support any irreparable harm being alleged by the Plaintiff or any concerning any damages that Plaintiff is seeking in the Complaint.

November 1, 2018

A party must make the above Initial Disclosures no later than twenty-one (21) days before the initial case management conference, unless a different time is set by agreement of the parties or court order.

- (3) The parties should also submit a discovery plan within 14 days after the parties' initial case management conference, unless a different time is set by agreement of the parties or court order.
- (4) Generally, the relevant time period for all Initial Disclosures is a period of six (6) years prior to the date of the adverse action that forms the basis of the claim/counterclaim or defense, unless a different time is set by agreement of the parties or court order.

**(C) General Discovery Requirements.**

- (1) If a party objects to a discovery request, either in whole or in part, the objecting party must concisely state in detail the basis for the objection. If a party provides a partial or incomplete answer or response to a discovery request, the responding party must state specifically the reason that the answer or response is partial or incomplete.
- (2) All Discovery, including Initial Disclosures, shall be supplemented in accordance with Rule 26(E) of the Indiana Rules of Trial Procedure.
- (3) Requests to seal information from public access must conform with Administrative Rule 9(G).

**(D) Limitations on Discovery.**

- (1) No party shall serve more than 25 interrogatories, including sub-parts, unless otherwise agreed to by agreement of the parties or court order.
- (2) Each party is limited to not more than ten depositions, with a seven-hour limit for each deposition, unless otherwise agreed to or ordered by the Court.

**(E) Electronically Stored Information Preservation.** Consistent with Rule 37(e) of the Federal Rules of Civil Procedure, the following applies to the duty of litigants to preserve electronically stored information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
  - (a) presume that the lost information was unfavorable to the party;



(b) instruct the jury that it may or must presume the information was unfavorable to the party; or

(c) dismiss the action or enter a default judgment.

**(F) Resolving Discovery Disputes.**

(1) Strict compliance with the Ind. T.R.26(F) meet and confer requirements in resolving discovery disputes is mandatory. This includes actual face-to-face or telephonic meetings. An exchange of emails or letters alone is insufficient. Prompt ruling on discovery disputes deters unreasonable and obstructive conduct, and prevents the frustration of existing discovery deadlines and the delay of ongoing discovery while a ruling is pending. The discovery plan must include specific provisions for the fair and efficient resolution of discovery disputes, including:

(a) A requirement that counsel seeking relief first specify to opposing counsel a concise statement of the alleged deficiencies or objections and then meet in good faith to try to effectuate a written resolution of the dispute before submission to the court for resolution.

(b) A mechanism for the expedient submission to the court of discovery disputes which counsel were not able to resolve, including submissions via conference call or email.

(c) Restrictions on the length of motions, memoranda and supporting materials, and time limits for their submission.

(d) Prohibiting, in all but extraordinary circumstances, the conduct of discovery with respect to a discovery dispute itself.

(e) The appointment of a special master to resolve discovery disputes.

(2) Before seeking a protective order from the court, the parties must confer in an effort to agree to a stipulated protective order regarding the disclosure and exchange of any discovery documents. The court will not consider any protective order unless:

(a) the parties verify to the court that they have personally or telephonically conferred regarding the need for and form of the protective order, or

(b) the party seeking the protective order can demonstrate that through good faith efforts it was not possible to confer and time is of the essence in considering the need for a protective order. An exchange of emails or letters alone is insufficient.

November 1, 2018

## Recommendation 9: A Searchable Database of Substantive Commercial Court Decisions Should be Available in PDF Format Via the [IN.gov/Judiciary/Commercial Court Website](http://IN.gov/Judiciary/Commercial_Court_Website).

This is the sole original recommendation that has yet to be implemented during the pilot project. Many practitioners in the legal community have voiced the opinion that this would be helpful. Currently, the only way to view a trial court's decisions is on mycase.gov by looking up a court's Chronological Case Summary ("CCS"). On the CCS, any given order by the Court may or may not be uploaded in PDF format. This system is cumbersome, and unsearchable for business and other litigators (and the public) wishing to view Commercial Court decisions.

A database furthers the Commercial Court stated purpose No. 4 of "enhance[ing] economic development in Indiana by furthering the efficient, predictable resolution of business and commercial law disputes." Specifically, potential litigants can go online and view a decision to determine how the Court addressed an issue similar to the one they are contemplating filing. This is likewise a basic recommendation regarding all successful, specialized commercial and business court dockets that have been established throughout the country.

Respectfully Submitted,

**Judge Craig J. Bobay**  
Allen Superior Court  
Commercial Court Working Group Chair

**Judge Stephen Bowers**  
Elkhart Superior Court 2  
Commercial Court Judge

**Judge Richard D'Amour**  
Vanderburgh Superior Court  
Commercial Court Judge

**Judge Maria Granger**  
Floyd Superior Court 3  
Commercial Court Judge

**Judge John Sedia**  
Lake Superior Court  
Commercial Court Judge

**Judge Heather Welch**  
Marion Superior Court, Civil 1  
Commercial Court Judge

**Amanda Wishin**  
Indiana Office of Court Services  
Commercial Court Staff Attorney

November 1, 2018

# Appendix A: Letters of Recommendation

September 12, 2018

Ms. Amanda Wishin  
Staff Attorney for the Commercial Courts Pilot Program  
Indiana Office of Court Services  
251 N. Illinois Street, Suite 800  
Indianapolis, IN 46204

**RE: Commercial Courts Pilot Program**

Dear Ms. Wishin:

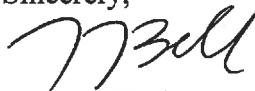
Thank you for the opportunity to offer comments regarding the Commercial Courts Pilot Program. In preparation for this letter, we requested feedback from our business and general litigation groups, as well as our Board of Directors. I can report that all responses were positive.

To illustrate, some of the comments we received included the following:

- “The Commercial Court has been an astounding success that should absolutely be continued and/or more formally codified. I litigate about 30-40% of my time there, and it is wonderful to have a forum familiar with complex, business litigation issues.”
- “I find the Commercial Court to be of significant value as a more expedient and less costly way to litigate business disputes.”
- “The parties benefitted greatly from Judge Welch's accessibility, her law clerk support, and her willingness to tackle promptly several novel issues of Indiana business law and civil procedure.”
- “I have heard generally positive things about the Court.”

The Court’s foresight in offering the pilot is appreciated by the bar. We encourage the continuation of the Commercial Court and are happy to offer additional input or assistance should you request it.

Sincerely,



James J. Bell  
President  
Indianapolis Bar Association

cc: Indianapolis Bar Association Board of Directors



924 South Calhoun Street • Fort Wayne, IN 46802

September 7, 2018

Indiana Supreme Court  
C/O Amanda Wishin  
Indiana Office of Court Services  
251 N. Illinois Street, Suite 800  
Indianapolis, IN 46204

Re: Commercial Courts Pilot Program

To The Honorable Justices of the Indiana Supreme Court:

The Civil Litigation Section (“CLS”) of the Allen County Bar Association submits this letter in support of the Indiana Commercial Court Pilot Program. The CLS would favor having the Indiana Supreme Court continue the Commercial Court program.

Before offering some specific feedback, the CLS is proud to state that it has over 100 members in its section making it the second largest section within the Allen County Bar Association. Given the many benefits to membership, there is an ongoing push to add even more civil litigation lawyers to the section.

In May of 2016, the CLS hosted a CLE program reviewing Indiana’s new Commercial Courts program and the Interim Rules. Since then, the section has engaged in regular discussion about the new court.

In terms of specific observations, the CLS would first offer that clients have been very receptive to the idea of a court that specializes in commercial and business matters. From the client’s perspective, the prospect of having its case receive special attention early in the process eases the transition to litigation. While more time is spent early on addressing a host of procedural and substantive issues, clients understand that this investment is being made with the goal of reducing the overall expense and timeline associated with the case.

Another benefit to the new Commercial Courts has been the focus from the beginning on resolution. Since parties and counsel have an opportunity to appear before the Commercial Court judge much earlier than in a standard civil litigation case, the topic of resolution is being addressed at an earlier stage. In many cases, the initial case management orders have required the exchange of settlement offers. Again, by encouraging resolution early on, the Commercial Court system is being responsive to client needs.

Many practitioners are beginning to realize that the Commercial Courts have fairly broad jurisdictional reach. Admittedly, there may be some confusion within the bar in terms of a judge

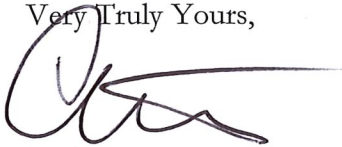
Indiana Supreme Court  
September 7, 2018

sitting in a particular county having jurisdiction to hear commercial disputes from outside that county. In that same vein, some clients outside of Allen County have expressed concern about choosing to litigate a matter in Allen County which is outside of the client's home county. Ultimately, the parties have a choice between the familiarity of the local courts versus the swift attention and specialized knowledge of the Commercial Court. This should not be viewed as a complaint but simply a recognition that a choice has to be made.

One other observation relates to the counties that do not host a Commercial Court judge. Right now, each Commercial Court has state-wide jurisdiction. Many counties that do not host a Commercial Court are located within a reasonable distance of two or three different Commercial Courts. That gives the initiating party a chance to choose its preferred Commercial Court. If the other party does not like that choice for some reason, that party can simply file a Refusal Notice taking the whole case from the Commercial Court system. While this issue was likely considered before implementation, there may be value to having each Commercial Court's jurisdiction limited to a specific geographic area with recusals and changes of judge as exceptions.

Overall, the CLS is pleased with the new Commercial Courts. If you would like more detailed feedback from CLS members, please let us know and we would be happy to undertake that task.

Very Truly Yours,



Craig Patterson  
On behalf of Executive Committee,  
Civil Litigation Section of the Allen County Bar Association

**Resolution of the Board of Directors  
Evansville Bar Association**

Comes now, the Evansville Bar Association, by its Board of Directors, and for its resolution in favor of continuing the Indiana Commercial Court Program, and in favor of continuing to host one of its locations in Vanderburgh County, Indiana.

**WHEREAS**, the Evansville Bar Association is comprised of over 500 attorney and paralegal members, many of whom advise and represent commercial clients.

**WHEREAS**, approximately twenty-five, complex, commercial cases have been litigated in the Vanderburgh County Commercial Court since its inception.

**WHEREAS**, the members of the Evansville Bar Association have witnessed the enhanced expertise and resources of the Commercial Court – leading to thoroughly-explained, accurate, consistent, and predictable decisions.

**WHEREAS**, the members of the Evansville Bar Association have witnessed and appreciated the enhanced structure of the Commercial Court – managing cases, employing early alternative dispute resolution interventions, and leading to an overall increase in efficiency.

**WHEREAS**, the members of the Evansville Bar Association have witnessed and appreciated the prioritization of the Commercial Court’s docket – enabling critical requests for preliminary equitable relief to be set, and heard, in a timely manner.


**THEREFORE**, IT IS HEREBY RESOLVED BY THE EVANSVILLE BAR ASSOCIATION recommends that the Indiana Supreme Court and/or the Indiana General Assembly, make additional resources and funding available to continue the Indiana Commercial Court Program and its location in Vanderburgh County, Indiana.

  
\_\_\_\_\_  
Yvette M. LaPlante, President

**Certification**

I, Andrew **C.** Ozete, duly appointed and Secretary of the Evansville Bar Association do hereby certify that the above is a true and correct copy of a resolution passed and approved by the Evansville Bar Association on the 13<sup>th</sup> day of September, 2018.

Date: 9/18/2018

  
\_\_\_\_\_  
Andrew C. Ozete, Secretary



# LAKE COUNTY BAR ASSOCIATION

1078 W. 84<sup>th</sup> Drive, Merrillville, IN 46410

Telephone: (219) 738-1906 Fax: (219) 736-6400

Email: [executive@lakecountybar.com](mailto:executive@lakecountybar.com) website: [www.lakecountybar.com](http://www.lakecountybar.com)

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Vice President  
Bonnie C. Coleman  
Treasurer  
Angela M. Jones  
Secretary  
Adam J. Sedia  
Past President  
Debra G. White  
Executive Director

September 5, 2018

(via email delivery to: [amanda.wishin@courts.in.gov](mailto:amanda.wishin@courts.in.gov))

Indiana Supreme Court  
315 Indiana State House  
200 W. Washington Street  
Indianapolis, IN 46204

Dear Honorable Justices:

On behalf of the Lake County Bar Association, I would like to enclose three letters of support from local business litigators/litigation groups which form the basis of this letter of support which I am submitting on behalf of the Lake County Bar Association. As stated, the Commercial Court here in Lake County Indiana has been received positively by members of the Lake County Bar Association. Members cite efficiency of the process, expertise of the court, and the expedited reaching of resolutions.

Thank you for your consideration of our submission in support of the Commercial Courts.

Very sincerely yours

Steven J. Sersic  
President, Lake County Bar Association



**HOEPPNER  
WAGNER &  
EVANS LLP**  
ATTORNEYS AT LAW

**John E. Hughes**  
E-mail: [jhughes@hwelaw.com](mailto:jhughes@hwelaw.com)

**Porter County Office**  
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Fax: (219) 738-2349

[www.hwelaw.com](http://www.hwelaw.com)

September 5, 2018

Indiana Supreme Court  
Attn: Amanda Wishin  
Indiana Office of Court Services  
251 North Illinois Street  
Suite 800  
Indianapolis, IN 46204

Re: Indiana Commercial Courts Pilot Program

Dear Honorable Justices:

Our firm, and myself personally, have had the pleasure of participating in cases that have been assigned to the Lake County Commercial Court over the past two years. My experience has been in cases involving disputes among members of a limited liability company and secured parties regarding control, transfer of interest, management and valuation of member interests. The commercial court has helped expedite the proceedings for a prompt resolution of the core issues in the case. Without the opportunity to efficiently frame the issues and resolve critical legal issues in a timely manner, the case would take considerably more time if it were part of the normal civil docket. The flexibility that the commercial court has with respect to appointment of the court master and/or other specialists to assist in the resolution of valuation issues was helpful in the parties resolving contested issues.

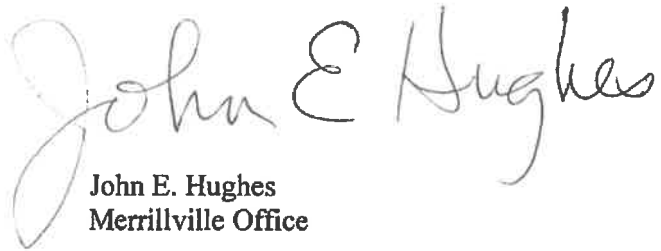
The commercial courts are important in providing a forum to allow resolution of business disputes, particularly where there are deadlocks in corporate entities where there is equal decision making authority. The issues involved in disputes among shareholders, members, directors, officers and managers can be ruinous for the continuation of viable business entities. Commercial courts provide not only the forum to resolve these issues but the court develops an expertise with respect to these unique problems that are not easily solved within the normal functioning of a court with a full civil docket.

I strongly feel that the commercial courts, particularly in Lake County, should continue. It has been a useful forum for more prompt resolution of disputes among businesses and

shareholders, members, directors, managers and officers. Like any specialized court, the expertise developed in the law in dealing with recurring fact patterns is essential to the prompt and fair resolution of otherwise seemingly unsolvable problems. The tools that the commercial courts are given further enable the courts to fashion paths for resolution unique to a particular situation. It is my recommendation that the commercial courts continue and become permanent like criminal, domestic relations, probate and other specialized courts.

Very truly yours,

**HOEPPNER WAGNER & EVANS, LLP**

  
John E. Hughes  
Merrillville Office

JEH:js



John R. Terpstra  
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September 4, 2018

Indiana Supreme Court  
200 W Washington St  
Indianapolis, IN 46204

**Re: Commercial Courts Working Group Pilot Program; Lake County**

Dear Justices:

I am Chair of the Business Law Section of the Lake County Bar Association herein Lake County, Indiana, and fully support the continuation of the Commercial Courts in the State of Indiana. In its limited tenure, the Commercial Court in Lake County, presided over by the Honorable John M. Sedia, has impacted commercial practice in a positive way.

Attorneys argue complicated matters routinely to our esteemed judges, and a committed Commercial Court has only increased the fluidity, understanding, timeliness of response or opinion, and comfort of business litigation matters in Lake County. My clients are also comforted in knowing the presiding judge in the Commercial Court concentrates in the types of matters to be resolved therein.

A criticism remains, however, in that each party must consent to jurisdiction before the Commercial Court. In most instances, opposing counsel are unwilling to move away from random allocation toward a beholden arena for business litigation matters. A potentially better way to proceed includes allowing litigation of a commercial or business nature be initially filed with, or moved in venue to, the Commercial Court with a party opposing such filing or change in venue the opportunity to object and show cause as to why the contested matter is not primarily driven by commercial or business interests such that random assignment should be preserved.

With that change, the positive impact the Commercial Court has had on Lake County litigation will continue and be an integral part to effective and efficient resolution of business and commercial litigation.

Very truly yours,

HINSHAW & CULBERTSON LLP



John R. Terpstra



# KORANSKY, BOUWER & PORACKY, P.C.

Attorneys and Counselors at Law

Paul B. Poracky  
[PPoracky@KBLegal.net](mailto:PPoracky@KBLegal.net)

425 Joliet Street, Suite 425  
Dyer, Indiana 46311

Telephone: 219.865.6700  
Facsimile: 219.865.5840

August 28, 2018

Indiana Supreme Court  
315 Indiana State House  
200 W. Washington Street  
Indianapolis, IN 46204

Re: Commercial Court Pilot Program in Lake County

To Whom It May Concern:

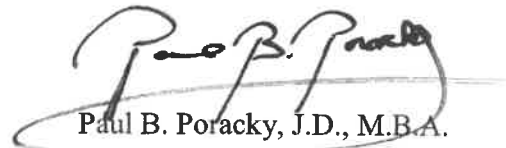
I am an attorney who has practiced in Indiana over the last 30 years. My practice is diverse but does touch upon commercial litigation. As a result of that, I have had the pleasure of accessing the benefits from the Commercial Court Pilot Program which is nearing the end of its pilot period. It is my understanding that the Commercial Working Group is preparing a final proposal recommending continuation of the Commercial Courts in Indiana. I wanted to provide this brief note on why I would recommend that program to continue.

As in many areas of the law, commercial litigation speaks its own particular language and has its own specialized statutory and common law requirements. Having judges with breath of knowledge in commercial matters is an advantage that all litigants can benefit by and appreciate. The program as constructed in Lake County offers counsel a range of experience and expertise which is not always possible when judges must be generalists with wide ranging experience in running court rooms in the state of Indiana on a wide variety of topics.

I appreciate the opportunity to provide an opinion and look forward to continuing support for the concept of commercial courts in the state.

Very truly yours,

**KORANSKY, BOUWER & PORACKY, P.C.**



Paul B. Poracky, J.D., M.B.A.

PBP/wkc



LORCH NAVILLE WARD LLC

August 29, 2018

Chester V. Lorch  
(1900-1972)  
Frank E. Lorch, Jr.  
(1905-1951)  
Basil H. Lorch, Jr.  
(1925-1997)  
Herbert F. Naville  
(1919-2010)  
Michael G. Naville  
(1951-2014)

Michael F. Ward  
George W. Gesenhues, Jr.  
Linda B. Lorch  
Robert P. Hamilton  
Timothy J. Naville\*  
Pamela S. Perkinson  
Lisa Garcia Reger  
Gregory M. Reger\*  
Cary J. Hurst  
J. David Agnew\*  
Christopher L. King\*  
Stephen T. Naville  
Claire Lorch Hagedorn  
Maxwell W. McCrite

Retired  
William C. Moyer\*

\*Also admitted in KY

Indiana Supreme Court  
c/o Amanda Wishin  
Staff Attorney for the Commercial Courts Pilot Program  
Indiana Office of Court Services  
251 N. Illinois Street, Suite 800  
Indianapolis, IN 46204


Gentlemen/Ladies:

The purpose of this letter is to provide my recommendation for continuation of the Indiana Commercial Court program. I represented a client in one of the first cases before the Commercial Court in Judge Maria Granger's court in Floyd County, Indiana. It involved a dispute between business partners that had been filed in Clark County Circuit Court, and the parties agreed to have it transferred.

My experience with the pilot program was excellent. The case was heard quickly and ultimately resolved by settlement. It was extremely helpful to have a presiding officer who was focused on commercial issues and guided the litigation to an efficient resolution. If I were to make any recommendation for improvement to the program, it would be to utilize the Supreme Court's and Indiana Bar Association's resources to more widely publicize the availability of this forum. There are many attorneys in my geographic area who concentrate their practices on business issues who could benefit from making use of the Commercial Court.

Thank you for your attention.

LORCH NAVILLE WARD LLC



J. David Agnew  
dagnew@lnwlegal.com

JDA/cls

September 5, 2018

WRITER'S DIRECT NUMBER: (317) 236-2137  
DIRECT FAX: (317) 592-4604  
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Indiana Supreme Court  
c/o Ms. Amanda Wishin  
Staff Attorney for the Commercial Court Pilot Program  
Indiana Office of Court Services  
251 North Illinois Street  
Suite 800  
Indianapolis, IN 46204

Re: Indiana Commercial Courts  
Letter of Recommendation

May It Please The Court:

In response to the Court's request, I write in support of the continuation of the Commercial Courts in the State of Indiana.

Since the commencement of the pilot project on June 1, 2016, I have had the privilege of appearing in no fewer than eight civil actions under the commercial court dockets. Two of these civil actions were filed in 2016; one in 2017; and five in 2018. Of the eight, one was subsequently transferred to a county of preferred venue pursuant to the opposing party's notice of refusal and motion for change of venue, and one was removed by the opposing party to the United States District Court for the Southern District of Indiana. Yet another of these civil actions was transferred by agreement of the parties to the commercial court docket from the county specified in a contractual venue provision. The remaining five civil actions were originated under a commercial docket and have remained on the commercial court docket.

The civil actions that I have litigated under the commercial dockets include business disputes involving restrictive covenants, trade secrets, replevin, fraud, negligence, breach of contract, breach of lease agreements, and promissory estoppel. Three of them included claims seeking injunctive relief.

The Commercial Courts are important, and should continue, for several reasons.

Reasoned Decisions

It has been my experience thus far that the Commercial Courts tend to enter orders containing reasoned decisions rather than a summary grant or denial, even if the motion decided does not require it. This is important because (a) it lets the client know why it won or lost the motion at hand; (b) it informs the attorneys what was persuasive, what was not persuasive, and

Indiana Supreme Court  
c/o Ms. Amanda Wishin  
Staff Attorney for the Commercial Court Pilot Program  
September 5, 2018  
2 | Page

how the Court views at least certain aspects of the case, all of which enables the attorney to refine strategy and develop arguments in order better to advocate the client's case; and (c) it provides a more complete record for the appellate courts. Over time, the Commercial Court's collective body of work should inform practitioners, streamline procedures and discovery, and enhance predictability in commercial cases.

Moreover, given a steady diet of complex commercial disputes, and specialized training, the judges who preside over the commercial court dockets have developed, and continue to develop, a working knowledge of business issues and the case law governing them. This leads to greater efficiencies and enhanced predictability.

#### Efficiency

According to the December 28, 2017 Commercial Courts Pilot Project memo to the Indiana Supreme Court, the Commercial Courts are issuing orders on average in relatively short timeframes. That has certainly been my experience as well. Clients (both business people and in-house counsel) in more than one commercial docket case have remarked favorably to me on the speed at which the Commercial Courts are able to issue orders and render opinions.

In addition, the Commercial Court's insistence on an early, comprehensive case management plan coupled with an emphasis on early dispute resolution helps to focus the issues at the outset of the case, all of which can lead to a more efficient and orderly disposition of the dispute.

#### Proactive, Trained, and Experienced Court Personnel

The Commercial Courts employ highly capable and well trained court reporters, bailiffs, and other personnel who understand the mission of the commercial court docket. These are high performers who expedite the intake of new matters, facilitate management of the docket, and assist litigants with everything from courtroom logistics to transcripts and records of proceedings. I would be remiss if I did not mention LaToya Boothe and Ruth Bibbs of Marion Superior Court, and Trish Gratz of Allen Superior Court, as just three examples of commercial court personnel who uphold these high standards, and provide exceptional service to all litigants.

#### Employment of Law Clerks

The law clerks serving the commercial court dockets are an invaluable asset and an integral part of what makes this program a success. The clerks whom I have met and observed in hearings, case management conferences, and other court settings have been -- to a person -- bright, engaged, and eager. Their work enables the presiding judge to consider and resolve the issues before the Court more expeditiously and thoroughly. That is a benefit not only to the Court, but also to the parties and counsel who appear before the Court.

Indiana Supreme Court  
c/o Ms. Amanda Wishin  
Staff Attorney for the Commercial Court Pilot Program  
September 5, 2018  
3 | Page

There is another, and perhaps equally important, benefit. The clerk positions in the Commercial Courts provide a unique opportunity for young aspiring attorneys to train under the experienced and talented judges who preside over the commercial court dockets. That training is an important investment in the future of our legal community.

Thanks to the dedication and hard work of the judges who preside over them, and with the support of the Indiana Supreme Court, the Commercial Courts have proven to be a success. It is my hope that the program will be expanded, and will be made a permanent part of our judicial system in Indiana.

Very truly yours,

ICE MILLER LLP



Adam Arceneaux



**STEVE BARBER**  
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September 6, 2018

*Via Email Only to*  
[Amanda.Wishin@courts.in.gov](mailto:Amanda.Wishin@courts.in.gov)

Indiana Supreme Court  
c/o Amanda Wishin  
Staff Attorney for the Commercial Courts Pilot Program  
Indiana Office of Court Services  
251 N. Illinois Street, Suite 800  
Indianapolis, IN 46204

RE: Commercial Court

Dear Chief Justice:

My clients were very early litigants in the Vanderburgh County Commercial Court. Their case involved a dispute between members of a Limited Liability Company and raised a host of complex and highly litigated issues. From the beginning of the case until it was resolved, this was a business dispute that needed special expertise. The Honorable Richard D'Amour heard the case. Judge D'Amour is an excellent jurist in handling many civil and criminal cases. Because of the resources of Commercial Court (including the availability of a law clerk to assist him), he was able to devote the necessary time to research and to manage this challenging case. The Court issued an injunction which was affirmed by the Indiana Court of Appeals. Numerous discovery disputes were timely heard and decided.

Certainly, Commercial Court serves a valuable function for business litigants. It has proven to be a very successful project and I would strongly recommend this project become a permanent Court in Vanderburgh County.

Thanking you for your attention in this matter, I remain

Very truly yours,

BARBER & BAUER, LLP

Steve Barber  
[steve@barlegal.net](mailto:steve@barlegal.net)

SB/cf

September 14, 2018

*Via U.S. Mail and Email*

Indiana Supreme Court  
c/o Amanda Wishin  
315 Indiana State House  
200 W. Washington Street  
Indianapolis IN 46204  
[Amanda.Wishin@courts.in.gov](mailto:Amanda.Wishin@courts.in.gov)

RE: Commercial Courts Pilot Program

To Whom It May Concern:

I write to strongly support continuation of the Indiana Commercial Court Pilot Project. For the last few years I have had the opportunity to litigate several cases in Commercial Court. About 80% of my practice is commercial disputes. Prior to Commercial Court, the ability to get courts focused on the distinctions between commercial disputes and other types of disputes, and to be well versed in the nuances of commercial disputes (versus other types of disputes), could be a challenge. That challenge led to inefficiencies and sometimes inconsistent applications of legal standards, particularly injunctions. Injunctions are often used (relatively speaking) in the commercial context; applying the same standard differently could lead to unpredictability for businesses.

Secondly, having a Court that is well versed in business-centered law such as contract disputes, employment law, and the UCC, has proven particularly effective in getting cases narrowed down and resolved. Finally, the flexibility granted to the Commercial Court in terms of prioritizing and/or streamlining certain issues within a case has proven to be an efficient way of litigating sizeable commercial cases. Staging cases, and narrowing discovery to certain issues before moving on to other issues, has proven to be both cost effective for the client, as well as effective on getting cases focused on resolution (thought dispositive proceedings or settlement).

I would strongly recommend continuing the Commercial Court Pilot Project, if not expanding it. I am available at your convenience for any follow up questions you might have.

Sincerely,

LEWIS WAGNER, LLP



A. RICHARD M. BLAIKLOCK

**Tonya J. Bond**  
tbond@psrb.com

September 7, 2018

**Via email: Amanda.Wishin@courts.in.gov**

Indiana Supreme Court  
200 W. Washington St.  
Indianapolis, IN 46204

Re: Commercial Courts Pilot Program

Dear Honorable Justices:

I write in full support of the Indiana Commercial Courts Pilot Program. Our firm represents three commercial entities in a bad faith litigation against their insurance company currently pending before the Marion County Commercial Court. Shortly after the case was assigned to the Commercial Court, the attorneys met with Judge Heather Welch in chambers for the initial case management conference. The parties met again with the Court after they were unable to resolve a discovery dispute. Anticipating that the issues to be decided were going to be novel and complex, Judge Welch asked the parties to brief the issues. The Court promptly filed a detailed order after briefing was completed, which allowed the parties to move forward with the lawsuit without delay.

The Commercial Courts are an incredibly important tool for attorneys litigating complex commercial disputes. In Marion County in particular, the Commercial Court is presided over by one of the state's keenest judges. During my client's bad faith litigation, the Court has been able to effectively and efficiently manage its busy docket with excellent work product. Additionally, the Commercial Court Handbook provides detailed rules and expectations that help attorneys navigate the subtle but important differences in Commercial Court. In our bad faith litigation, the Commercial Court's unique procedure has allowed the parties to understand the other's view of the case in the earliest stages of the lawsuit. Of further help is that the Court is available to meet with the parties at any time during the lawsuit to discuss any issues that arise.

I believe the Commercial Courts should continue. My experience with the Marion County Commercial Court has been very positive, and I look forward to litigating future matters in the Commercial Courts.

Indiana Supreme Court  
September 7, 2018  
Page | 2

All my best,

*Tonya J. Bond*

Tonya J. Bond

**Alan S. Brown**  
Member  
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317.237.3900 (f)  
abrown@fbtlaw.com

September 6, 2018

Indiana Supreme Court  
State House, Room 315  
Indianapolis, IN 46204

Re: Commercial Court Pilot Program

Dear Justices:

I send this letter in response to your request for input regarding the Commercial Court Pilot Program. I have had several substantial matters in the commercial courts in both Marion and Allen Counties. These matters have been handled efficiently and the courts have operated with a level of responsiveness and professionalism on par with what one sees in the Southern District of Indiana. I have had similar reports from colleagues who have matters in other commercial court venues.

I believe the program has been a success and strongly encourage its continuation and expansion. My primary suggestion for improvement would be to give the judges in these courts exclusively commercial case loads. I believe the courts could operate even more efficiently if the judges were freed of docket responsibilities that do not involve commercial matters.

Thank you for canvassing responses and let me know if you need additional input.

Sincerely,

FROST BROWN TODD LLC



Alan S. Brown

ASB/aw

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September 4, 2018

Indiana Supreme Court  
315 Indiana State House  
200 W. Washington Street  
Indianapolis, IN 46204

Re: *Commercial Court Pilot Program*

Dear Members of the Court:

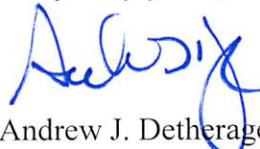
I am pleased to write this letter concerning my experience with the Commercial Court Pilot Program. I strongly endorse continuing, and potentially expanding, the Program. I have had cases in the Commercial Court, and I have tried a bench trial in the Commercial Court. I found the Commercial Court to be extraordinarily well organized, accommodating to lawyers, practical, effective, and efficient.

Judge Welch understands business disputes and runs a very effective court. Parties are able to have their disputes heard, to have decisions made on motions, and to have cases tried with timely and well-reasoned decisions.

It is important to Indiana businesses that the commercial courts are available for significant business disputes. Motions are promptly addressed, hearing dates and trial dates are available, and the court's procedures accommodate businesses and help the parties efficiently resolve business disputes. Moreover, the Court efficiently addresses issues that are prevalent in commercial disputes, like protective orders, case management issues, and discovery disputes.

I would be happy to provide additional information if it would be helpful. I recommend that the Commercial Court program be continued and expanded.

Very truly yours,



Andrew J. Detherage

AJD:alw

DMS 13228102v1

Atlanta California Chicago Delaware Indiana Michigan Minneapolis Ohio Texas Washington, D.C.

September 6, 2018

Indiana Supreme Court  
c/o Amanda Wishin  
Staff Attorney for the Commercial Court Pilot Program  
Indiana Office of Court Services  
251 N. Illinois Street, Suite 800  
Indianapolis, IN 46204  
Via [Amanda.Wishin@courts.in.gov](mailto:Amanda.Wishin@courts.in.gov)

Re: Recommendation regarding the continuance of the Commercial  
Courts Pilot Program

Dear Justices:

I hope this letter finds you well. It is with pleasure that I am writing to recommend the continuance of the Indiana Commercial Courts Pilot Program. Over the last three years, I have had the occasion to utilize the Allen County Commercial Court on numerous occasions. As a civil practitioner, I find the structure of the Commercial Court to be beneficial in many cases as the procedure is aimed at an efficient and early exchange of information amongst all parties which, in turn, is generally utilized to allow the parties to approach an early attempt at finding an amicable and reasonable resolution to the case.

While the structure of the Commercial Court is very beneficial, it also comes with a certain characteristic of fluidity. In my experience, so long as the parties are moving forward reasonably, and within the construct of the Commercial Court, the Court itself is very agreeable to allow counsel for all parties to proceed in a manner that best works for all parties involved on a case-by-case basis. This, again, is also very helpful in leading cases to an early and efficient resolution.

It is for these reasons that I find the Commercial Court program to be important, and its continuance will greatly assist practitioners throughout the state.

**Jeremy J. Grogg**  
PARTNER  
  
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Email: [jgrogg@burtblee.com](mailto:jgrogg@burtblee.com)

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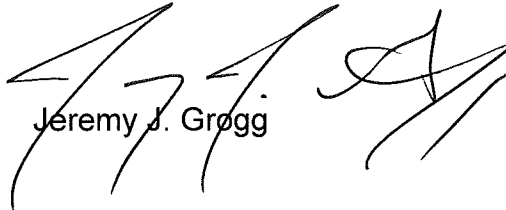
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Indiana Supreme Court  
September 6, 2018  
Page 2

In the event you would like to discuss any aspect of the Commercial Court further, please do not hesitate to contact me. Thank you for your time on this matter and your overall service to this State and its bar are greatly appreciated.

Very truly yours,

**BURT, BLEE, DIXON, SUTTON & BLOOM, LLP**

  
Jeremy J. Grogg

JJG/clc



**SHINE & HARDIN, LLP**

*Attorneys At Law*

2810 BEAVER AVENUE AT BROADWAY  
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dkensinger@shineandhardin.com  
jvenderley@shineandhardin.com

August 30, 2018

The Indiana Supreme Court  
Indiana Office of Court Services  
251 N. Illinois St., Suite 800  
Indianapolis, IN 46204

In re: Commercial Court Pilot Program

Dear Chief Justice Rush and Justices of the Court:

I believe in the rationale behind the creation of Indiana's Commercial Court. The Commercial Court provides a dedicated venue for the business community to resolve disputes in an efficient and orderly manner. I have appeared in the Commercial Court overseen by Judge Craig Bobay of the Allen Superior Court. I can confirm that Judge Bobay has implemented procedures to achieve the efficiency that was touted at the outset of the Commercial Court Pilot Program. I continue to hold the view that the Commercial Court is important to the administration and resolution of disputes for Indiana's business community because this dedicated forum promotes efficiency, confidence and expertise that, in my opinion, improves the legal system for these types of disputes. I endorse and recommend the permanent establishment of Indiana's Commercial Court.

Sincerely,



Thomas A. Hardin  
Attorney at Law

TAH/tk

**ALAN K. HOFER**  
*Attorney At Law*  
**203 W. WAYNE - SUITE 315**  
**FORT WAYNE, INDIANA 46802-3610**

---

**260.422.9906**  
**AKHofer@aol.com**

August 24, 2018

INDIANA SUPREME COURT

Re: Commercial Courts Pilot Program

To the Court:

My only experience with the pilot program was brief since my client retained other counsel soon after I filed the complaint on behalf of my client.

I do believe that the commercial court was appropriate for my case and that a more expeditious conclusion would have occurred than otherwise.

Thank you.

Sincerely,

/s/ ALAN K. HOFER

Alan K. Hofer

# JACKSONKELLY PLLC

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August 13, 2018

Indiana Commercial Courts Working Group  
Indiana Office of Court Services  
251 N. Illinois Street, Suite 800  
Indianapolis, IN 46204

**Re: Recommendation for Commercial Court Continuance**

To whom this may concern:

Thank you for the opportunity to submit a recommendation letter for the Indiana Commercial Court Program.

I have been practicing law in the State of Indiana since 1987. For nearly three decades, I have represented clients falling mainly within the category of complex commercial law and civil litigation. I also hold a leadership position within my firm's commercial litigation practice group.

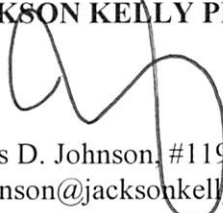
During the Program's 3-year pilot period, I had the pleasure of working primarily with Vanderburgh Superior Judge Richard G. D'Amour. From my experience of the Program, identification to the Commercial Court provided effective and competent handling of the case, allowed close management to the complexity of all the issues, and encouraged consistent communication between the parties and the court. Appearing before the Commercial Court has been an extreme honor and I commend Judge D'Amour for his obvious commercial law expertise and enthusiasm in being a part of the Program.

I recommend without hesitation that the Commercial Courts Program continue within the State of Indiana. Thank you for your time and consideration. Please do not hesitate to contact me to discuss further.

Sincerely,

**JACKSON KELLY PLLC**

By:

  
James D. Johnson, #11984-49  
[jdjohnson@jacksonkelly.com](mailto:jdjohnson@jacksonkelly.com)

**BOSE  
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**V. Samuel Laurin III**

*Registered Mediator in the State of Indiana*

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September 7, 2018

Indiana Supreme Court  
c/o Amanda Wishin  
Staff Attorney for the Commercial Courts Pilot Program  
Indiana Office of Court Services  
251 N. Illinois Street, Suite 800  
Indianapolis, IN 46204

Re: Commercial Courts Pilot Program

Dear Ms. Wishin:

I have had several cases in in commercial court and have been pleased with the experience in large part because of the timeliness of the orders and the orders always explain the rationale for the court's decision.<sup>1</sup> The court and staff are always very courteous and accommodating as well. I believe it is important that litigants who have cases which fit the definition of commercial cases have the option to be in a court that is focused in this area. It provides a level of certainty both for lawyers and their clients. I strongly support continuing the program.

Very truly yours,



V. Samuel Laurin, III

VSL:csl

3497015\_1

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<sup>1</sup> I have received favorable and unfavorable rulings and understanding the court's rationale is particularly important for unfavorable rulings.

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September 7, 2018

Indiana Supreme Court  
c/o Amanda Wishin  
Staff Attorney for the Commercial Courts Pilot Program  
Indiana Office of Court Services  
Indianapolis, IN 46204

Re: Commercial Courts Pilot Program

To the Honorable Chief Justice and Justices of the Indiana Supreme Court,

I write to comment positively on my experiences with the Commercial Court Pilot Program, and to recommend that the Commercial Courts should continue.

First, I have had several cases with the Commercial Court before Judge Welch, and otherwise had early interaction with the other Commercial Court judges in collaborating with them regarding federal procedures of potential interest. All of these experiences have been very positive, leaving me extremely impressed with the dedication of these judges to this pilot program.

Second, I believe the Commercial Courts are important to the bench, bar, citizens, and businesses of Indiana, and for several reasons. Although Indiana is blessed with many outstanding jurists, few have the luxury of concentrating on complex business litigation among the daily crush of family law, criminal, probate, and diverse civil matters. Commercial litigation is a unique niche worthy of its own rules, procedures, focus, and jurists. Having dedicated Commercial Courts - much like many courts have judges dedicated to juvenile, family law, criminal, probate, and other matters - leads to efficiency and expertise.

Moreover, beyond matters that are litigated in Commercial Court, the existence of this program and its rules and procedures has been beneficial in other cases in Indiana courts. Practitioners and judges are looking to the Commercial Courts Rules and Handbook for guidance in handling business cases, and CLE programs in which the Commercial Court judges speak have been well received by the bar.

Accordingly, I am a strong advocate for continuing the Indiana Commercial Courts, and hope that they become a permanent fixture. I commend the Supreme Court for undertaking this innovative pilot program, and optimistically look to the future of the Commercial Courts.

Thank you for the opportunity to comment. Best regards.

Yours very truly,

*/s/ John R. Maley*

September 7, 2018

WRITER'S DIRECT NUMBER: (317) 236-2267  
DIRECT FAX: (317) 592-4859  
INTERNET: DREW.MIROFF@ICEMILLER.COM

**VIA ELECTRONIC MAIL**  
**(Amanda.Wishin@courts.in.gov)**

Indiana Supreme Court  
c/o Amanda Wishin, Staff Attorney for  
the Commercial Courts Pilot Program  
251 N. Illinois Street, Suite 800  
Indianapolis, IN 46204

***Re: Indiana Commercial Courts - Letter of Recommendation***

Dear Amanda:

In response to your request, I wanted to share my unequivocal support for the continuation of the Commercial Courts in the State of Indiana.

The stated purpose of the Commercial Courts is to (1) establish judicial practices that will help all court users by improving court efficiency; (2) allow commercial disputes to be resolved efficiently with expertise and technology; (3) enhance the accuracy, consistency, and predictability of judicial decisions in commercial cases; (4) enhance economic development in Indiana by furthering the efficient resolution of commercial law disputes; and (5) employ and encourage electronic information technologies, and early alternative ADR interventions. My experience is that the Commercial Courts have proven to satisfy each of these purposes.

By my count, I have been involved in at least five actions filed on the commercial court docket. The cases have involved trade secrets, franchise disputes, breach of contracts, non-compete agreements and several others, including at least two involving injunctive relief. Prior to the creation of the Commercial Courts, it was not infrequent to hear clients voice their frustrations with the civil litigation system, notably delays (which led to uncertainty), costs, and their perception of a lack of consistency and predictability all of which impacted their ability to carry out their business. I have not heard a single complaint from any client involved in a Commercial Court case; rather, I have heard the opposite—unsolicited appreciation for the Commercial Court's speed, efficiency and reasoned resolution of their dispute.

In my experience, the dedicated group of Commercial Court judges have developed a unique understanding of the complex legal issues facing businesses. This, in turn, has led to prompt, more consistent and more predictable results, which aid practitioners and businesses alike. Perhaps less perceptible, have been the benefits experienced as a result of having a dedicated group of court staff, personnel and law clerks who are also developing an expertise and

September 7, 2018

Page 2

understanding of the nature of the litigation and working to fulfill the purpose of the commercial court by taking a proactive approach to facilitating and expediting the litigation process.

By way of example, LaToya Boothe of the Marion County Commercial Court, was instrumental in facilitating and expediting the initiation of a commercial court matter involving highly confidential, emergent trade secret matter. Ms. Boothe worked with counsel to not only coordinate an emergency hearing with the Court, but to ensure that the Complaint and supporting materials were maintained under seal while the case was being transitioned to the Commercial Court and pending the Court's hearing of the same. In addition, Shirley Willoughby and others on the Commercial Court staff will frequently reach out to counsel to facilitate scheduling issues or to expedite the ruling on motions by determining whether they will be opposed.

Should you have any follow up or additional questions, it would be my privilege to address them. I simply cannot convey how important I believe the Commercial Courts are to Indiana and my sincere hope that the Pilot Program will become a permanent part of the Indiana judicial system.

Very truly yours,

ICE MILLER LLP



Drew Miroff

DJM:rjk

August 6, 2018

Indiana Supreme Court  
200 W. Washington Street  
Indianapolis, IN 46204

Re: Commercial Courts Pilot Program

Dear Members of the Indiana Supreme Court:

I write to emphatically recommend the continuation of the Commercial Courts in Indiana. The Commercial Court Pilot Program has been a huge success, and the litigants and lawyers in Indiana will be well served to have the program continue.

I am a commercial litigator at Hoover Hull Turner LLP, and I frequently appear in Commercial Court in Marion County. All of my state court cases are in Commercial Court except one case where opposing counsel refused to consent to participate in the Commercial Court program. I also recommend Commercial Court to other attorneys who haven't yet had a chance to litigate a case in the Commercial Courts.

The Commercial Courts are an asset to all businesses that need to resolve disputes in Indiana. We can assure our business clients that the Commercial Courts understand their business disputes since the Commercial Courts primarily handle contract claims and business torts. And we can assure them that the Commercial Courts are a good forum for resolution of those issues. The Commercial Courts are sensitive to the issues important to businesses such as confidentiality, interlocutory appeals of novel issues, and extensions of deadlines to allow the parties an opportunity to try to resolve their disputes informally without incurring additional legal fees that could be avoided.

The Commercial Courts' resources are very valuable as well. I refer to the Commercial Court Handbook whenever questions come up on an issue of court preference or procedure. And as a former law clerk myself, I know law clerks can be a good resource for the Judges.

As an attorney, I enjoy litigating in Commercial Court. The judges know the lawyers who appear in Commercial Court. The judges are always well prepared, ask thoughtful questions, and issue detailed decisions explaining their reasoning. It is



also helpful that the case management plan, discovery procedures and ESI expectations are based on federal procedures where our other business disputes are pending.

I recommend the Indiana Supreme Court continue the Commercial Court program. The Commercial Court program makes us one of the top states for business litigation and helps Indiana attorneys give clients greater predictability regarding likely outcomes and risks.

Sincerely,

A handwritten signature in cursive script that reads "Alice M. Morical". The signature is written in dark ink and is positioned centrally below the word "Sincerely,".

Alice M. Morical

AMM/mma

# ROTHBERG

ROTHBERG LOGAN WARSCO LLP



Theodore T. Storer  
*tstorer@rhwlawfirm.com*

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September 7, 2018

Amanda Wishin, Staff Attorney  
Commercial Courts Pilot Program  
Indiana Office of Court Services  
251 N. Illinois Street, Suite 800  
Indianapolis, IN 46204  
*amanda.wishin@courts.in.gov*

Re: Commercial Court Pilot Program

Dear Ms. Wishin:

I am writing this letter to recommend that the Commercial Courts Pilot Program continue, or that a full Commercial Court program be implemented, in the State of Indiana.

During the Pilot Program, my partners and I have had the opportunity to appear before the Commercial Courts, primarily in Allen County. Those cases have involved claims of different subject matter that fall within the types of cases eligible for the Commercial Court docket; and, we have appeared as counsel for the Plaintiff and the Defendant.

The Commercial Court program is important for Indiana businesses and the attorneys who represent and advise those businesses. The business world works much more quickly than the legal field, primarily because of important Constitutional principles like due process and the exchange of information in litigation through the discovery process. The Commercial Courts attempt to balance making timely decisions for the benefit of commerce and protecting the due process rights of those who appear before courts. All trial courts share this goal, but it appears that the case procedures found in the Interim Commercial Court Rules require the parties and their counsel to focus on these ideals.

The requirement that counsel for the parties meet to discuss an initial case management plan and to disclose and exchange materials early on in the case is very important to accomplish this balancing of priorities. The initial outlay of fees and expenses may be more than what a client usually sees at the outset of litigation. However, the parties see a corresponding benefit by having counsel align their procedural goals for the case while still allowing the attorneys to advocate for their respective clients' positions.

September 7, 2018

Page 2

The ability to have a trial court with both the ability, time and experience to make quick and decisive opinions will benefit business and their counsel in Indiana. The continued exposure of our trial courts to commercial matters in this forum will also aid the parties in potentially reaching business decisions without the involvement of the courts.

Based on my experience, it is clear that the procedural aspects of the Commercial Court have been beneficial to parties. To date we have not experienced a great deal of substantive decisions from the pilot courts. This is not a result of any lack of interest nor ability of the trial judges, but primarily because the parties have been motivated to resolve their disputes because of the Commercial Court procedures. I believe that as counsel grow more accustomed to the Commercial Court process that more cases will be filed or transferred to the Commercial Court docket and that this will benefit both the parties and their counsel who do so.

Very truly yours,

**ROTHBERG LOGAN & WARSCO LLP**

A handwritten signature in black ink, appearing to read 'TTS', is written over the firm name.

Theodore T. Storer

TTS/jms

**Kevin M. Toner**  
*Partner*  
kevin.toner@FaegreBD.com  
Direct +1 317 237 1200

**Faegre Baker Daniels LLP**  
300 North Meridian Street ▼ Suite 2700  
Indianapolis ▼ Indiana 46204-1750  
Main +1 317 237 0300  
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September 4, 2018

**VIA FIRST CLASS MAIL**

Indiana Supreme Court  
c/o Amanda Wishin  
Staff Attorney for the Commercial Courts Pilot Program  
Indiana Office of Court Services  
251 N. Illinois Street, Suite 800  
Indianapolis, IN 46204

Re: Commercial Courts Pilot Program

Honorable Justices:

It is my pleasure to offer comments about my favorable experiences with the Commercial Courts Pilot Program. Since the program's inception, I have represented plaintiffs in two significant business disputes in the Indiana Commercial Courts. I describe each case below and provide some of the reasons why I feel the Commercial Courts Pilot Program is a success.

**Marion County Commercial Court (Judge Welch) – Indiana LLC Dispute.** In August 2016, we filed a breach of fiduciary duty case on behalf of the minority member of an Indiana LLC. The case began in Hamilton County, which was the only preferred venue under Trial Rule 75(A). Following a TRO hearing, defendants filed their notice of change of judge. The parties and all counsel agreed to transfer the case to Judge Welch for pretrial matters, and she agreed that if any part of the case involved a jury trial, the trial would take place before a Hamilton County jury.

The case was hard fought, and it involved claims in excess of \$80 million. Defendants were represented by Barnes & Thornburg and Riley Bennett Egloff. Lawyers at Taft Stettinius & Hollister also appeared as to nonparty discovery. John Van Winkle conducted an early mediation, but the mediation was unsuccessful. Deposition and written discovery disputes arose during late 2016 and throughout 2017. Defendants unsuccessfully attempted an interlocutory appeal after Judge Welch certified a significant ruling involving privileged documents. Multiple dispositive and partially dispositive motions were filed. Ultimately, counsel negotiated a complicated confidential settlement. Judge Welch approved the parties' settlement of certain derivative claims as part of the ultimate resolution. The case was dismissed with prejudice in early June 2018.

This complicated case involved high stakes, and I feel strongly that the matter was well-suited for the Commercial Court. The parties benefitted greatly from Judge Welch's accessibility, her law clerk support, and her willingness to tackle promptly several novel issues of Indiana business law and civil procedure. We and our client were pleased with the high quality of her timely rulings. Had the parties been unable to reach a settlement, I am confident that the court was well-equipped to handle what was likely to be a multi-week trial involving many witnesses, documents, experts, and complicated accounting and financial fraud issues.

**Allen County Commercial Court (Judge Bobay) – Software Contract Dispute.** This case involved an expensive three-year software contract. On one side was a 10,000-employee hospital group based in Fort Wayne. On the other side was an international software company with U.S. offices in Oregon, California, and Texas.

In May 2017, our client terminated the contract due to the vendor's failure to deliver a reliable communications platform for doctors and staff. Unfortunately, a few weeks later, our client's accounts payable department also erroneously paid the final invoice of \$698,000. The software company not only refused to return the money, but it also filed a declaratory judgment action in Oregon during October 2017. The vendor chose not to serve its Oregon lawsuit in the hope that the parties could negotiate a solution. When that failed, we filed our own breach of contract case in the Allen County Commercial Court and immediately served the other side. We meanwhile removed the Oregon case to federal court and filed a motion to dismiss. The software vendor, represented by Bose McKinney & Evans, filed a motion to dismiss in the Indiana case. While the parties were briefing the Indiana motion, the Oregon district court dismissed the declaratory judgment action, and the software vendor appealed to the Ninth Circuit. Judge Bobay held a hearing and encouraged the parties to mediate while he took the Indiana motion under advisement. In chambers after the hearing, we agreed to a tentative pretrial schedule should the mediation prove unsuccessful. During the mediation with Bill Baten in Indianapolis, the parties reached a settlement. The Indiana case and the Ninth Circuit appeal were dismissed during August 2018.

I think it is significant that I chose to file the Indiana case in the Commercial Court and that opposing counsel chose not to remove it to federal court even though they could have done so. All counsel must have concluded that their clients would be well served in the Commercial Court and that they might reach a resolution more swiftly than they would in federal court. That certainly turned out to be true. Judge Bobay's comments during the motion to dismiss hearing and in chambers afterwards gave counsel useful talking points to convince their clients that mediation might provide better options than continued civil litigation in two forums thousands of miles apart. Judge Bobay provided us with a very useful means to convince these sophisticated parties that a compromise was in their interest. I know from several delightful comments I received from our client that they have no regrets about how things went for them in the relatively brief time the matter was pending in Allen County.

**Commercial Courts Pilot Program Generally.** My only direct experience with the program involved the two cases described above. In a couple of other cases where I represented defendants, I was unable

Indiana Supreme Court  
c/o Amanda Wishin  
Re: Commercial Courts Pilot Program

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September 4, 2018

to convince plaintiffs' counsel to agree to a transfer. Nevertheless, experience has persuaded me that the Commercial Courts would provide a valuable service for resolving business disputes. The Commercial Court judges appreciate the strong desires of business parties to have prompt, fair, and thoughtful consideration of the issues in these types of cases. Their access to high quality law clerks also is extremely helpful in this regard.

Additionally, these courts have an appreciation of how much business people value the ability to keep their company records confidential if it is appropriate. Traditionally, businesses have gravitated to commercial arbitrations because of confidentiality concerns. Of course, with arbitrations, they must give up the meaningful right of appeal. The Commercial Courts perhaps give businesses the better solution. If this pilot program results in a permanent set of commercial courts in Indiana, I am hopeful this will be helpful in attracting businesses to our state and in showing the business community at large that our courts have great capabilities and excellent jurists.

Sincerely,



Kevin M. Toner

Wayne C. Turner  
[wturner@hooverhullturner.com](mailto:wturner@hooverhullturner.com)  
Direct: 317-381-5606

September 6, 2018

**VIA EMAIL TRANSMISSION**  
(Amanda.Wishin@courts.in.gov)

Chief Justice Loretta H. Rush  
Indiana Supreme Court  
315 Indiana State House  
200 W. Washington Street  
Indianapolis, IN 46204

Dear Chief Justice Rush and Associate Justices:

I write in support of the proposal by the Commercial Courts Working Group to continue the Commercial Courts in Indiana, preferably on a permanent basis and with funding sufficient to meet its important objectives.

My law firm and I engage primarily in a business litigation practice. Our clients are mainly businesses, sometimes large and public, sometimes closely held. A number of these clients are headquartered elsewhere and have had little experience with litigation in Indiana; they often enter the scene wary of “home town” justice they believe has been meted out in other states and fora. The initial discussion in such engagements usually involves the question of whether removal to federal court is available and desirable. This inevitably includes a comparison of expected treatment of the parties and issues in the two systems.

We have had a number of cases in Commercial Court during the Pilot Program, mainly in Marion County, with several pending at this time. Primarily these cases have involved closely held entity disputes, as well as some supply chain and other commercial contract cases. Two of my cases in Marion County involved refusal notices (one untimely, such that the case remained on the docket), and my one effort to file in Vanderburgh County was the subject of both a refusal notice and a preferred venue motion.

I believe the Commercial Courts are an extremely important addition to the judicial assets of our State, for several reasons. The judges were good choices for this project: they have proven to be highly competent, interested in business issues, and hard working. They maintain good relations with lawyers, are building a wealth of business-issue expertise, and have produced sound rulings on an efficient and timely basis.

The work of the Commercial Court judges has been enhanced by the asset of full-time law clerks. From my observation, the law clerks do very sound work, have the advantage of seeing the evidence come in firsthand, and are high quality lawyers with good research and writing skills.

Our business clients like the mission of the court and the ability to get well-reasoned, timely rulings. They have been pleased that the Commercial Court has been highly accessible, including on injunction and other expedited matters. They have appreciated the hands-on management style of Judge Welch in particular, including case management oversight and a practical approach to attorney conferences and hearings.

As I have written in the past, I believe that voluntary participation has been a limitation on the court's usefulness. The statistics I have seen indicate that Marion County has received and handled a disproportionate number of case filings in Commercial Court. I expect a number of factors contribute to that – population, concentration of significant businesses, nature of the lawyers making the choices, all sorts of things. I wonder if one key factor isn't the combination of preferred venue rules with the notion that one lawyer or firm may have deeper experience with a particular judge than the other, and this leads to refusals under the voluntary system. In addition to considering a change in voluntariness / trumping preferred venue, one could consider creating just a few locations – one in southern Indiana and one or two in northern Indiana, in addition to Indianapolis. Assignments could be made among the pool of judges, and handled at those locations. That may run into all sorts of logistics and staffing issues, but if there were a practical solution for the logistics, my bet is that the lawyers and their clients who make these decisions would file a significant number of additional cases in Commercial Court.

I also believe, as I have written in earlier comments, that employing the federal summary judgment standard in these courts, for at least a subset of business versus business (or business owner) cases, would add to its appeal to commercial parties and their counsel.

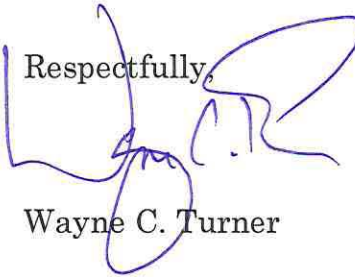
Regardless of how these points are handled, though, I strongly support the continuation of the Commercial Courts in Indiana. Our clients share that view. Indiana has been a leader in providing a favorable environment for business success. The Commercial Courts Project has enhanced that effort substantially and should be continued.



Chief Justice Loretta H. Rush  
September 6, 2018  
Page 3 of 3

HOOVER ■ HULL ■ TURNER

Thank you for considering these comments, and for recognizing the good work of the Commercial Courts.

Respectfully,  
  
Wayne C. Turner

WCT/dll

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# JONES • WALLACE

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## ELEVATING LAW

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CERTIFIED BY THE TRUST AND ESTATE SPECIALTY BOARD

August 10, 2018

Ms. Amanda Wishin  
Indiana Office of Court Services  
251 N. Illinois Street, Suite 800  
Indianapolis, IN 46204

RE: Commercial Court Pilot Program

Dear Ms. Wishin:

Per your request by email on Thursday, August 9, 2018, we are happy to inform you that our experience with the Vanderburgh County Commercial Court Pilot Program has been outstanding. We have recommended to our clients and to opposing counsel at every opportunity that cases be filed with or transferred to the local Commercial Court due to the advanced time table and the accumulating expertise of this Court in commercial matters.

Going forward, and hopefully when the Commercial Court program is made permanent, we would recommend that rather than have an opt in approach to the Commercial Court, that qualifying cases be required to be filed in Commercial Court and then have an opt out program where appropriate.

We strongly recommend the Commercial Court program continue and hope the Indiana Supreme Court agrees to a permanent Commercial Court program.

Very truly yours,

JONES • WALLACE, LLC



Paul J. Wallace

PJW/cdh

September 7, 2018

WRITER'S DIRECT NUMBER: (317) 236-2439  
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Chief Justice Loretta H. Rush  
Justice Steven H. David  
Justice Mark S. Massa  
Justice Geoffrey G. Slaughter  
Justice Christopher M. Goff  
Indiana Supreme Court  
315 Indiana State House  
200 West Washington Street  
Indianapolis, IN 46204

**RE: Indiana Commercial Court Pilot Program**

Dear Chief Justice and Associate Justices of the Indiana Supreme Court:

I have been privileged to serve on the committee to establish the Indiana Commercial Court Pilot Program. I write this letter in support of this Program.

First, I need to praise the diligent work of the six Indiana Judges who have led this effort and who have accepted the responsibility to make this Program successful. Their collective experiences as Judges, including the administration of heavy dockets, have provided the committee with invaluable insight into what the judicial system can realistically provide at this time. Their open-minded and practical approach has provided the bar and the business community with a real opportunity to express what is needed and preferred to develop a system that serves the fair and expeditious administration of justice in the business world. Make no mistake that the Program is far from complete and will need to evolve over time, but the foundation is in place and there is a solid group of jurists, along with attorneys and community leaders, who are committed to the making the Commercial Courts into a permanent benefit for the State of Indiana.

The need for the Commercial Courts cannot be questioned at this juncture. Businesses, which are the drivers of economic development and progress and the principal employers in our State, have a great need to resolve disputes in a fair and expeditious manner. Over the decades, businesses have experienced too many delays, too much cost, and too much unpredictability in our current civil justice system. I have often heard the business community state that judges do not understand or appreciate how businesses operate. The opposite is also true. Most business operators do not understand or appreciate how the courts function. This situation leads to bad business policies, a bad business environment for our State, and criticism of the bar and the

judicial system. Arbitration, mediation and other forms of alternative dispute resolution have attempted to provide other forums for dispute resolution but also not served the business community well for many of the same reasons. Of course, this is not a unique problem in Indiana. It exists everywhere. Some states have taken steps to address this disconnect between business and the courts. The Commercial Courts serve as a realistic solution to help businesses and the courts to work together to improve the image of our State and the functionality of our judicial system.

There are three main reasons that I am committed to this project. First, over time, business disputes will be directed to and be decided by a dedicated group of Judges who will have experience and will be trained in the types of business disputes that often will come before the Commercial Courts. It is axiomatic that a Judge who knows the applicable law and has decided many similar cases will not only make better decisions, but will make them quicker. Second, the development of unique procedures tailored to businesses will expedite the process and will make it more understandable to the business world. Third, the combination of highly experienced and educated judges along with the special procedures will allow for more predictable results.

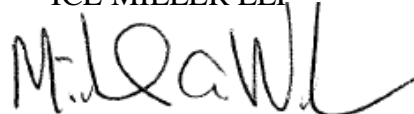
The Commercial Courts as a Pilot Program is a first and big step toward making Indiana a state where businesses can operate fairly and obtain swift justice, if needed. The Commercial Courts is still in its infancy and needs to be given a full chance to develop. The Program needs more time to gain credibility in the business community as practitioners educate their clients on the benefits. It needs more time to explore new procedures at both the trial court and the appellate court to make the processes more efficient. Most importantly, the Program needs more time to develop a critical mass of cases with measureable results, enough to garner the credibility and widespread support to get funded by the Legislature.

On a personal level, as a practitioner who has been practicing in the State of Indiana for 34 years, the Commercial Courts is an exciting development that is long overdue and has great potential. This is Program that can and will work if given the time to make it happen.

I thank this Court for the opportunity to serve and for your continued support for the Indiana Commercial Courts.

Very truly yours,

ICE MILLER LLP

A handwritten signature in black ink, appearing to read "M. A. Wukmer", written over the typed name below.

Michael A. Wukmer

## Appendix B: Proposed Rule 5 with Track Changes

**(A) Appointment and Compensation.** ~~A Commercial Court Judge may appoint a Commercial Court Master in a pending Commercial Court Docket case, if all parties to the case consent to the appointment of the Commercial Court Master.~~

1. As used in these rules, ~~the term~~ “Commercial Court Master” includes without limitation an attorney, a senior judge, or a non-attorney ~~agreed upon by the Commercial Court Judge and the parties~~ who has special skills or training appropriate to ~~undertake to~~ perform the tasks that may be required. ~~The compensation to be allowed to a~~ A Commercial Court Judge may appoint a Commercial Court Master in any case pending on the commercial court docket if:

a. All parties consent to appointment of a Commercial Court Master; or

b. If all parties do not consent, the Court, after giving notice to the parties and an opportunity to be heard finds it probable that:

i. Appointment of a Commercial Court Master will materially assist the Court in resolving the case in a just and timely manner;

ii. The anticipated costs associated with the appointment of a Commercial Court Master ~~shall be~~ are proportionate to the value of the case; and

iii. The anticipated costs associated with the appointment of a Commercial Court Master will not be unduly burdensome to any party.

4.2. The compensation allowed to the Commercial Court Master must be reasonable. The rate of compensation and the allocation of the cost between the parties shall be established by the Court, with consideration of input provided by the parties and the Commercial Court Master. However, if the parties seek appointment of a senior judge as a Commercial Court Master, the appointment must be approved by the Supreme Court, and compensation determined under Trial Rule 53(A).

3. Powers. The order of reference to the Commercial Court Master ~~shall~~must specify the ~~Commercial Court Master’s~~ powers ~~and~~. The order of reference may also direct the ~~Commercial Court Master~~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 ~~Commercial Court Master’s~~Master’s report. Subject to the specifications and limitations stated in the order of reference, the ~~Commercial Court~~ Master has ~~and shall exercise~~ the power to regulate all proceedings ~~in every hearing~~ before the ~~Commercial Court~~ Master, and to ~~do all acts and~~ take all measures necessary or proper for the efficient performance of the duties assigned under the order.

2.4. The Commercial Court Master may require the production of evidence upon all matters embraced in the order of reference, including the production of all books, papers, vouchers, records and documents, ~~and writings applicable thereto~~ of all kinds, including electronic media.

The ~~Commercial Court~~ Master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to ~~put~~place witnesses under oath ~~and~~. The Master may examine ~~them~~ ~~and may call~~witnesses, including the parties to the action ~~and examine them,~~ under oath. ~~When a party so requests,~~ The Master may permit the ~~Commercial Court Master shall make a record~~parties to examine witnesses under oath, and may place reasonable limits on the examination of the evidence offered and excluded in ~~witnesses by the same manner and subject to the same limitations as provided for a court sitting without a jury.~~parties.

5. If a party so requests, the Master must make a record of the evidence offered and excluded in the same manner, and subject to the same limitations, as provided for a court sitting without a jury.

*Commentary: The Commercial Court Judge must issue an Order specifying the powers delegated to the Commercial Court Master. The Court may direct counsel for the parties to submit a proposed order setting forth those proposed powers, and/or the Court may wish to craft the Order in conference with counsel. However, the ultimate scope of the Order is dictated by that which is necessary and appropriate under the circumstances, and is left to the sound discretion of the Court.*

#### ~~(A)~~(B) Proceedings.

- (1) **Meetings.** When a reference is made, the clerk ~~shall~~must forthwith furnish the Commercial Court Master ~~and the parties~~ with a copy of the order of reference. Upon receipt ~~thereof, unless of~~ the order of reference ~~provides otherwise,~~ the Commercial Court Master ~~shall~~must forthwith set a time and place for the first meeting of the parties or their attorneys, to be held within twenty (20) days ~~after the date of~~thereafter, unless the order of reference ~~and shall~~provides otherwise. The Master must forthwith notify the parties or their attorneys ~~of the date of such meeting.~~ It is the duty of the ~~Commercial Court~~ Master to proceed with all reasonable diligence. Either party, on notice to the parties and ~~master~~Master, may apply to the Commercial Court Judge for an order requiring the ~~Commercial Court~~ Master to expedite the proceedings and to make a report. If a party fails to appear at the time and place appointed, the ~~Commercial Court~~ Master may proceed *ex parte* or, in the discretion of the ~~Commercial Court~~ Master, may postpone the proceedings to a future day, giving notice to the absent party of the postponement.

- (2) **Witnesses.** The parties may procure the attendance of witnesses before the Commercial Court Master by the issuance and service of subpoenas as provided in Trial Rule 45. If, without adequate excuse, a witness fails to appear or give evidence, the witness may be punished for the contempt by the Commercial Court Judge and may be subjected to the consequences, penalties, and remedies provided in Trial Rules 37 and 45

**(3) Statement of Accounts.** When matters of accounting are in issue, the Commercial Court Master may prescribe the form in which the accounts ~~shall~~must be submitted, and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the ~~Commercial Court~~ Master may require a different form of statement to be furnished, or the accounts or specific items thereof to be provided by oral examination of the accounting parties, or upon written interrogatories, or in such other manner as directed.

**~~(B)~~(C) Report.**

- (6) Contents and Filing.** The Commercial Court Master ~~shall~~must prepare a report upon the matters submitted by the order of reference and, upon request of any party or the Commercial Court Judge, ~~shall~~must submit the report ~~prior to~~before hearing or the taking of evidence. The ~~Commercial Court~~ Master ~~shall~~must file the report with the clerk of the court; and in an action to be tried without a jury, ~~shall~~must file with it a transcript of the proceedings and of the evidence and the original exhibits, unless otherwise directed by the order of reference. ~~The clerk shall forthwith mail to all parties notice of the filing.~~
- (7) In Nonjury Actions.** In an action to be tried without a jury, the Commercial Court Judge ~~shall~~must accept the Commercial Court ~~Master's~~Master's decision or findings of fact unless clearly erroneous. Within ten ~~{(10)}~~ days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application ~~to~~of the Commercial Court Judge for action upon the report and upon objections thereto ~~shall~~must be by motion and upon notice as prescribed in Trial Rules 5 and 6. After hearing, the Commercial Court Judge may adopt the report, reject it in whole or in part, receive further evidence, or recommit it to the ~~master~~Master with instructions.
- (8) In Jury Actions.** In an action to be tried by a jury, the Commercial Court Master ~~shall~~must not be directed to report the evidence. The ~~Commercial Court~~ Master's findings upon the issues submitted are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the Commercial Court Judge upon any legal objections ~~in point of law which may be~~ made to the report.
- (9) Stipulation as to Findings.** ~~When~~ If the parties stipulate that a Commercial Court ~~Master's~~Master's findings of fact ~~shall~~are to be final, only questions of law arising upon the report ~~shall~~may thereafter be considered.
- (10) Draft Report.** Before filing the report, a Commercial Court Master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.