



# WISCONSIN COURT OF APPEALS

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January 19, 2017

Clerk of the Wisconsin Supreme Court  
Attn: Deputy Clerk – Rules  
P.O. Box 1688  
Madison, Wisconsin 53701-1688

Re: Rule Petition 16-05, In re creation of a pilot project for dedicated trial court judicial dockets for large claim business and commercial cases

Dear Deputy Clerk:

This letter is written in response to the request for comment on the referenced rule petition. I write to suggest the Supreme Court consider three significant issues prior to implementing the pilot project: (1) the evidentiary basis for creation of Commercial Case Dockets (CCDs) in Wisconsin; (2) the ability to evaluate their effectiveness; and (3) the credibility of the remaining justice system and morale of the other judges serving in the remainder of the circuit court dockets in our state. Action taken in response to these issues will enhance the viability, effectiveness and perception of the proposed Commercial Case Dockets (CCDs) and the pilot project. My comments on this issue are informed by my experience as a civil litigator for eighteen years with approximately one-third of my practice devoted to business litigation; as a circuit court judge for thirteen-plus years in a general jurisdiction circuit court in Eau Claire County, which included nine years as the presiding judge over a drug treatment court; as a dean of the Wisconsin Judicial College; and as a judge for almost four years on the District 3 Court of Appeals.

## 1. Evidentiary Basis for the CCDs

The stated purposes for the pilot project and creation of CCDs in Wisconsin include a desire to make Wisconsin a more favorable forum for resolving business disputes by improving access to justice, expeditiously resolving business cases and reducing litigation costs, improving the quality and predictability of justice in connection with business disputes, and decreasing the likelihood of repeat litigation. These are laudable goals for any area of law. However, I suggest research is necessary to determine the need for creation of these specialized commercial litigation dockets in Wisconsin, and to provide a baseline to evaluate their effectiveness.

The proposed pilot project is a unique venture in Wisconsin and differs significantly from other specialized dockets and specialty treatment courts existing in this state. As the petition notes, dedicated dockets have been created in Wisconsin circuit courts for years to handle different types of cases such as family matters, small claims actions, sensitive crimes, probate, children's court, felonies and misdemeanors. However, unlike the proposed pilot project, those dedicated dockets are created based upon the number of case filings and the judges needed to handle the case volume in larger counties, and the judges serve a set term and rotate between dockets. While the judges in such dedicated dockets achieve a measure of expertise in an area of law over the period of their term, they are not usually assigned based upon interest or area of expertise.

The Committee submitting the petition points to specialty courts in Wisconsin as an example for creation of the CCD pilot project. These specialty courts (i.e., treatment courts, veteran's courts, mental health courts, etc.) differ from the proposed pilot project CCDs. Wisconsin specialty courts are created within an individual county, or by agreement between consenting counties, based upon a researched need and a consensus among the stakeholders in those jurisdictions as to the population to be served and who should bear the attendant costs. The specialty courts have their genesis in twenty-five plus years of national research on their effectiveness in reducing criminal recidivism. Judges are selected to serve based upon their expressed interest and willingness to serve, and research suggests their terms should be no more than five years. Many judges receive specialized training after their selection to enhance their effectiveness.

In contrast, the proposal to develop the pilot project CCDs in Wisconsin does not appear to be evidence based. According to the petition, it is based upon a long-standing anecdotal request from the State Bar Business Law Section and some research obtained from other states indicating such dockets speed the time to resolution of complex commercial cases. While providing some support for creation of the CCDs, most of the data from other states appears to be dated, and it does not appear there has been any effort to determine whether the differences in procedure in the different states employing the use of these commercial dockets translates to Wisconsin.

I am concerned we are embarking upon this pilot project without any Wisconsin-based research evidencing a delay in handling of complex commercial litigation cases, a lack of predictable results, or any unfair handling of such cases. In fact, the memorandum accompanying the petition acknowledges the Committee was unable to even determine the number of cases likely to be handled in the CCDs created by the pilot project. Given my anecdotal analysis based upon my experience on the circuit court and court of appeals, I expect the number to be small. (However, I do pause to note the list of case types that are required to be venued in a CCD is quite comprehensive. There is no research provided to support the inclusion of all of these case types, many of which do not appear to be complex or require specific judicial expertise.)

Analysis of the recently completed weighted caseload statistics may shed some light on the number and types of cases that should be subject to the CCDs as proposed. A sample review of the case types proposed to be included in the CCDs from court records for the last several

years in the jurisdictions where the pilot project will operate should provide some baseline information on the number of cases likely to be handled by a CCD and the current time to completion. That information can be used to determine the need for separate dockets, and can be compared to all case types to determine if there is any unusual delay in commercial case processing. A review of the number of cases to be included in the CCDs that have been appealed and decisions reversed in the last several years will provide some insight into whether these case types are being mishandled and fail to provide predictability in result. Without this information, we may be creating a solution without a problem.

Finally, the pilot project proposes those judges assigned to a CCD maintain their current caseload and docket. Without supporting data on the number of cases likely to be venued in a CCD, I question whether that is realistic, and whether cases will be processed more expeditiously.

## 2. Evaluation

Section 7B of the petition requires the Wisconsin Supreme Court Office of Court Operations to monitor the pilot program and submit an annual progress report to the Supreme Court addressing five topics. Without initial data to use as a benchmark, the Office of Court Operations will be unable to: compare the number of cases heard in the CCDs to the number brought prior to their creation, thus determining if the CCDs have helped to achieve the goal of decreasing repeat litigation; compare the time to completion of cases before and after the implementation of the pilot project, thereby determining whether the CCDs more expeditiously handle business cases and reduce litigation costs; and compare the number of cases appealed and reversed prior to and after the creation of the pilot project, thereby helping to determine if complex commercial cases are handled more predictably and fairly.

I am also concerned that no resources are proposed to be allocated to the pilot project. Clerks of court, district court administrators, chief judges and the Office of Court Operations will have extra burdens on their time under the proposal. Costs will be incurred to establish and maintain a database or repository for CCD opinions that is accessible and useable by all. The Office of Court Operations will incur costs in gathering the proposed data and submitting progress reports. For example, the petition suggests the Director of State Court may wish to enlist the assistance of an expert in the evaluation process. Doing so will necessarily cost money. In addition, the petition recommends the level of litigant, attorney and judicial satisfaction with the pilot project be determined. I am aware from my recent service on a committee involved in assessing satisfaction with a change to a comment in SCR 60.04 that the cost of validated surveys, not anecdotal evidence, ranges between \$3000 and \$15,000 per survey, depending upon who conducts the survey, the number of persons surveyed and the depth of the questioning. We may be able to superimpose this pilot project on the dockets of the judges selected to serve without significant cost other than the hard work and diligence of those judges and their staff, but we will not be able to accurately evaluate the effectiveness of the pilot project without expense. Without an accurate evaluation, we will have no definitive basis to determine the effectiveness of the pilot project and whether it should be continued or expanded.

### 3. Other Circuit Court Considerations

The pilot project CCDs run the risk of creating a system in which “judge shopping” is permitted and/or encouraged. Specific types of cases are to be mandatorily assigned to the CCDs, some based upon monetary values. This permits litigants to self-select a CCD based upon the type of claims raised and amounts sought. Litigants can petition to be accepted into the CCD, and if accepted effectively remove an assigned judge and self-select the presiding judge, especially in Waukesha County, where it is currently proposed that only two judges be assigned to the CCD. Finally, there is no provision in the petition for assignment of cases in the event of multiple substitutions, which may occur given the number of litigants in complex litigation cases. Will those judges in the other CCD be assigned, and if so, how will these out of district transfers be handled? What happens if all CCD judges are substituted or disqualified?

In the pilot project, the Chief Justice assigns judges to the CCDs. There are no specific criteria for selection or service other than familiarity with commercial disputes, possession of strong business law backgrounds and knowledge of commercial transactions. No set term for service is provided, although I understand that will be necessarily limited by the proposed three-year term of the pilot project. To avoid any impression the creation of CCDs is politically motivated and to avoid other unintended consequences, I suggest that specific objective criteria be established for the selection and assignment of the judges serving in the CCDs, and that set terms for service be established if the CCDs are continued when the pilot project is concluded.

Many judges, including those with state government backgrounds or a number of years on the circuit court bench, who would not normally be considered for these CCD positions, would have the appropriate background, experience and interest to serve. I suggest that an application process be established in the pilot project jurisdictions so that all judges with an interest and expertise may apply for these positions in the CCDs, and that specific selection criteria are established for appointment. If the pilot project proceeds, or is expanded, I also suggest that term limits would be helpful to avoid burnout (which is well supported in treatment court research) and permit others with the interest and experience to serve. Without these opportunities, I am concerned the creation of the CCDs may have the unintended consequence of discouraging otherwise qualified individuals from seeking the bench because they will not believe they will have the opportunity to preside over the types of cases they would find interesting, challenging and rewarding. The public will be disadvantaged through the loss of their service.

(As a side note, the petition suggests guidelines for case management in the CCDs. These suggested practices are taught routinely at the Judicial College and in continuing judicial education seminars, and most are not unique to complex business and commercial cases.)

Finally, I believe the manner in which our message about the creation of the CCDs is conveyed is extremely important. I am concerned the impression created by the petition is that circuit court judges are not capable of handling complex civil cases and their lack of business acumen causes decreased confidence in our courts. I do not want to create the impression that judges who are not selected to serve in the CCDs are somehow less capable, expeditious or fair. We should not create the impression that business, above all, deserves the fastest, most cost

effective, most predictable and fairest disposition of cases. To do so will create resentment among judges, attorneys and litigants, and cause the public to question the credibility of all serving in the courts.

Conclusion

This pilot project is proposed because there is a perception that complex business disputes are unique, and a separate docket is needed because those with specific expertise in business issues will preside over complex commercial matters more efficiently and effectively. However, before implementing the proposed pilot project, we should have evidence and resources to evaluate those claims. If the claims prove true, we should then provide all judges interested with the opportunity and any necessary training to preside in the proposed dockets. Doing so will enhance the integrity of the entire judiciary and provide for CCDs that are fair, efficient, and sustainable. Thank you for your consideration.

Sincerely,

Lisa K. Stark

cc: Chief Justice Patience Drake Roggensack  
Justice Shirley S. Abrahamson  
Justice Ann Walsh Bradley  
Justice Annette Kingsland Ziegler  
Justice Michael J. Gableman  
Justice Rebecca Grassl Bradley  
Justice Daniel Kelly  
Attorney John Rothstein