Embargoed Until After Keynote Lecture
Not for Prior Circulation or Publication

Business Court Best Practices: Constructive Thoughts On the Challenging Work of Effective Commercial and Corporate Law Adjudication

Leo E. Strine, Jr.*

Second Annual Corporate Law Symposium
at Texas A&M School of Law
Fort Worth, Texas
February 17, 2026

* Michael L. Wachter Distinguished Fellow at the University of Pennsylvania Law School; Of Counsel, Wachtell, Lipton, Rosen & Katz; former Chief Justice and Chancellor, the State of Delaware. The views expressed are those of the author and no other person nor any organization with which the author is affiliated. Thanks for generous input to Bill Chandler, John DiTomo, Tricia Enerio, Sandra Goldstein, Larry Hamermesh, Kurt Heyman, Bill Lafferty, Scott Luftglass, Ryan McLeod, Ted Mirvis, Elena Norman, Garrett Rice, Lisa Schmidt, Kevin Shannon, and Joseph Slights. Thanks for excellent research, proofreading, and other critical support to Margaret Pfeiffer, Elana Rakoff, and Robinson Strauss.

Introduction

Good afternoon, everyone. Thank you for that generous introduction. In my time with you, I am going to discuss a topic that has engaged policymakers in many states. That topic is the role of so-called "business courts" in helping states create an attractive place for businesses to locate in two distinct senses. The first and most important for most states is being able to say that businesses that actually do business within the borders of the state can form contracts and undertake other commercial relationships there with more confidence, because if disputes about those contracts arise, they can be adjudicated fairly, predictably, and efficiently in the same state where they were negotiated and implemented.[1] The second, which

[1] For a durably useful overview of the first major wave of business court development and the policy considerations that drove that wave, see Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147 (2004). This comprehensive review underscores that the goal of better resolving commercial disputes for litigants doing business within state borders was the primary motivation for the formation of most so-called business courts. New York's important initiative has a name — the "Commercial Division"—that exemplifies that reality. *Id.* at 152-60 (discussing the creation and functioning of the Commercial Division of the New York Supreme Court in Manhattan). For most states, what is most important is retaining and attracting business operations within their states. Most states are far larger than Delaware, and although Delaware benefits enormously from its role in entity formation, the revenues that flow to the state from that role would not be systemically important to larger states, the jobs, tax revenues, and positive externalities that come from having vibrant business activity are important to all American states. Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30

gets more attention but is less material to most states, is the role of effective business courts in attracting business entities to domicile in a state, in the more particular sense of choosing to secure a charter under that state's corporate or alternative entities laws to govern the business's internal affairs.[2] Many, of course, look to my state, Delaware, as an example of how an effective system of business law dispute resolution can help aid a state encourage entities to charter under its laws.

There are important and legitimate questions that exist about the extent to which government should consciously enlist courts of law as part of an economic development effort. And for the sake of clarity, it must be remembered that the Delaware Court of Chancery was not formed as a "business court" and it continues to have most of its traditional equity jurisdiction over cases like guardianships over

---

DEL. J. CORP. L. 673, 679-81 (2005) (citing to examples where larger states changed their corporate law specifically to protect a state-headquartered company because the threatened jobs losses to the state were more important than substantive corporate law policy or competing in the corporate chartering market).

[2] Texas and Nevada policymakers have each cited to this purpose as a reason for creating a business court system. *E.g.*, Benjamin P. Edwards, *Nevada Proposes Appointed Business Court*, BUSINESS LAW PROF BLOG (Feb. 20, 2025), https://www.businesslawprofessors.com/2025/02/nevada-proposes-appointed-business-court/; Eleanor Klibanoff, *Gov. Greg Abbott Touts His Influence on Texas Court to Conservative Law Group*, TEXAS TRIBUNE (Apr. 3, 2025), https://texastribune.org/2025/04/03/greg-abbott-texas-courts-ut-jim-davis/; Greg Abbott, *Forget Delaware—'Y'all Street' Is Open for Business*, WALL ST. J. (Mar. 5, 2025), https://www.wsj.com/opinion/forget-delaware-yall-street-is-open-for-business-texas-corporate-law-cb9088d1.

adults that are important on a very human level.[3] But, there is no doubt that the Delaware Court of Chancery has the key attributes of a business court. And along with the Delaware Supreme Court, the Delaware Court of Chancery comprises a system that by now can be fairly seen as consciously employed to act as business courts attractive to business enterprises that care about the predictable, efficient, and fair resolution of corporate and commercial law disputes. We also meet at a moment when states are actively touting their systems of corporate law and dispute resolution as superior and seeking to convince business leaders "to make [**insert state name**] their home."

The word "superior" is relational and implies that something or someone is inferior. For those of you hoping for an addition to disputation of that kind today, expect profound disappointment. My goal today is constructive and positive.

A market-based economy governed by the rule of law constitutes part of our traditional freedom as Americans. And that economy's fair and efficient functioning is important to the economic opportunities and security of all

[3] A few generations ago, Delaware created a Family Court, which assumed jurisdiction over marital relations, child custody, and guardianships over the person of minors — jurisdiction that had originally been in Chancery before modern family law statutes were written. But that change left Chancery with the rest of its wide-ranging equitable jurisdiction. Balancing the Delaware Court of Chancery's duty to its entire caseload has long been challenging and in recent years a far greater share of cases involving will contests, guardianships, neighborhood disputes seeking injunctive relief over real property rights, and other traditional equity cases not involving business entities have been assigned to and adjudicated by court-appointed magistrates rather than members of the Court of Chancery.

Americans. Therefore, it seems to me legitimate for state governments to offer a sound system of dispute resolution for corporate and commercial disputes, so long as that system does not harm or in any way subordinate litigants in other types of cases, such as family and criminal law.[4] Operating from these assumptions, my focus today will be on advancing constructive thoughts for judicial systems charged with the challenging work of adjudicating complex business cases in a timely, expert, and predictable manner.

For want of a better term and for economy of expression, I will use the common and singular "business court" moniker, but with the important caveat that I do not just mean the trial court charged with handling those cases in the first instance, but also any appellate courts that hear appeals in those cases. Thus, although I will use the words business court *singular*, I am going to speak about the key attributes of an effective system of business courts *plural*. Unless all courts that handle the relevant cases work together, the business court system will not function well.

[4] Respected commentators have focused on this critical caveat and have argued that with appropriate design and resource allocation, "creating a business court" should "increase[] access to judicial resources" for "[a]ll litigants." Anne Tucker Nees, *Making a Case For Business Court: A Survey of And Proposed Framework To Evaluate Business Courts*, 24 GA. ST. U. L. REV. 477, 486 (2007); Am. Bar Ass'n Ad Hoc Comm. on Bus. Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947, 953 (1997) (making same argument) (hereinafter, "ABA, *Business Courts: Towards a More Efficient Judiciary*").

I do not expect everyone to agree with everything I say, or even with anything. Nor do I claim that I always lived up to my own view of best practices during my many years on the bench.[5] I was raised in a faith where only one thing is perfect, and that is not any ordinary human being, much less me.[6] My own views are informed as much by the many instances where I fell short of the mark, as by those in which I did a bit better.

And my only goal is the constructive one of advancing my sense of the attributes and practices that will best position a business court to operate effectively, expeditiously, expertly, and justly. Every court operates within its own unique resource, cultural, and political constraints, and those constraints necessarily influence in a practical way how the court functions. I recognize that the policies and practices I find productive may not work feasibly everywhere or may be the subject of legitimate disagreement on the merits. I intend no criticism of any court that diverges in small or large ways from my own views of the ideal; no doubt they have good reasons for taking a different approach. I simply use this opportunity to set forth my own sense of what, in the main, works best. If all I do

[5] Like my family, I am sure commercial and corporate law practitioners can find, perhaps many, examples of where there was a gap between the ideals I articulate and my own situational conduct.

[6] Well, I was raised Catholic, so I was taught that there is one important exception. One of the three things that comprise a singular divinity was a human being, Jesus Christ, but distinctly not like the rest of us, and certainly not in terms of fallibility.

is get you thinking about what practical policies and support might help the hard-working American judges in your own community do their challenging work even better and with less stress, then I will have accomplished my purpose.

The business world is dynamic, and business courts must be correspondingly supple and adroit. Evolving practices to responsibly address new phenomena like electronic discovery and artificial intelligence while preserving fundamental principles of due process and proportionality can be challenging. This lecture does not intend to address all the challenging issues facing those who serve on business courts or help support them in their function. Rather, I will focus on some attributes and practices that are likely to remain durably important.

Constructive Thoughts On The Attributes And Best Practices Helpful To Creating An Effective Business Court System

With that context in mind, let's begin, starting with something fundamental.

The appointment process for judges on a business court should inspire confidence, reduce the threat of partisan bias, and attract qualified applicants on the basis of merit: Businesses, especially those with a high profile, are caught up enough in our society's political controversies. They don't want a judicial process that is itself politicized. A business court perceived as partisan or having an

ideological bias is unlikely to be attractive to all corporate stakeholders and to be repellant to most.

Businesses and investors want (I would dare say need) predictable results that turn on the neutral application of principles of law to cases not the political predilections of a particular judge.[7] Businesses do not want cases tried by judges who fear that their rulings will cost them re-election or who are seeking public approbation at the expense of litigants before them. Predictability in the application of sensible, baseline principles beats constant judge-specific attempts to "improve" the law through the articulation of novel concepts. Businesses have to plan for and price what can be known — constant changes make reliable planning impossible.

For a business court, therefore, it is ideal for the Governor of the state to nominate judges for confirmation by the relevant body of the state legislature, typically the state senate, using a bipartisan, merits screening process, and give those judges a term of sufficient years to assure independence. Going further and

[7] In the literature on business courts, the desire of businesses for predictability, and the use of business courts to address that legitimate desire, is an almost ubiquitous theme. For articles citing to this desire and its connection to the rationale for creating business courts, *see, e.g.*, Tyler Moorhead, *Business Courts: Their Advantages, Implementation Strategies, and Indiana's Pursuit of Its Own*, 50 IND. L. REV. 397, 402-03 (2016); Nees, *supra* note 4, at 487-88;ABA, *Business Courts: Towards a More Efficient Judiciary*, *supra* note 4, at 952; Benjamin F. Tennille, Lee Applebaum & Anne Tucker Nees, *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases*, 11 PEPP. DISP. RESOL. L.J. 35, 42 (2010).

taking steps to assure that the bench is comprised of judges drawn equally from both major political parties has healthy consequences. My state has long used this approach. Because governors and legislatures in such a system must regularly seat judges of both parties, this tends to encourage the appointment of judges on the basis of legal abilities, not ideology, and their commitment to working together collegially and with the goal of resolving cases fairly and without partisan bias.

Litigants in business courts don't want to have to know the political party of the judge to which their case is assigned. They want to know that the judge is a judge, charged with the constitutionally unique and critical job of applying rules of law fairly to all litigants in a careful, case-specific way. They never want to feel that they lost a case because the judge assigned to their case had a partisan or ideological objective for ruling against them. Cursing the court's competence or wisdom will always happen when a court is forced to rule for one party or the other in a high-stakes dispute, but a party should never have reasonable grounds to curse the court as motivated by political or personal bias.[8]

[8] When I was Chief Justice, the Delaware Supreme Court, applying Delaware constitutional law, found that our system of capital punishment was unconstitutional because it did not require a unanimous jury favoring that severest of punishments. *Rauf* v. *State*, 145 A.3d 430 (Del. 2016). The only dissenter on the Court was a Democrat and the two Republican Justices supported the outcome. *Id*. at 501 (Vaughn, J., dissenting). Whether the Delaware public supported the decision, they had no fear it represented a partisan outcome. In corporate and commercial law controversies over the years, such as that occasioned by *Smith* v. *Van Gorkom*, 488 A.2d 858 (Del. 1985), critics of the decisions can attribute the outcome to many factors, but partisan bias is not rationally among them.

Judges, Not Juries, Should Decide Cases In a Business Court System: The value of sensible principles of commercial and corporate law rests primarily in their utility in avoiding the need to go to court at all. That is, when commercial and corporate law provides sound, sensible guidance, the real actors — two corporations entering a licensing agreement or a corporate board considering how to sell a public company — look to these principles to determine a course of action — how to address a certain contractual issue in a clear, binding way or what duties the directors have to ensure they have secured the right price.

Careful, measured decisions by judges who apply precedent work together with statutory law to provide business planners with a sound basis for addressing decisions about contracts and corporate transactions that have important legal implications. A jury verdict sheet, by contrast, might yield a fair, case-specific outcome, but does little to provide that kind of guidance. As important, complicated contract and corporate law disputes do not involve fundamental civil rights or quotidian human events, think traffic accidents, where, as a general matter, having a cross-section of the community deliberate on what happened and make a collective decision has utility in terms of not just perceived fairness, but in actual accuracy. More typically, commercial and corporate cases that go to trial involve an admixture of legal and factual disputes where having a judge not just frame and decide the ultimate questions of law, but also make the necessary

findings of fact, is the most efficient and fair method of adjudication. To the point of fairness, the requirement that the judge explain her findings of fact has an important accountability- and integrity-enforcing function for the parties in the case. And the obligation of the trial judge to make fact findings and explain why those findings support her legal conclusions results in a body of useful precedent that businesses can consult to better understand what course of conduct might best reduce legal risk in a cost-effective manner.

Use of judges, not juries, can be unfair, at least in my view, if the jurisdiction of a business court is not well-designed, however.

Business courts should address only cases between litigants that voluntarily chose to engage in commerce together. The benefits of specialization that come with a business court can be lost if the jurisdiction of the court is not focused on commercial and corporate cases where the parties have chosen to engage in commerce together. Business courts should have procedures adapted for cases of this kind and that might be unfair to impose on litigants who did not choose to contract with a business entity.[9]

[9] As with any specialty court, the ability of the judges to become more expert in the subject matters assigned to them — an arguably important strength of specialty courts — can be compromised if the breadth of that subject matter is too diffuse.

By way of example, the mere fact that people took prescription medicine, bought a certain model of car, or were injured in an accident by a commercial vehicle, does not mean that their tort claims should be brought before a business court. The same is true for litigants who have claims against corporations or other businesses under consumer, environmental, or other statutes enacted to protect the public.

Limiting the business court's jurisdiction to claims among those who made a voluntary decision to have an ongoing commercial relationship also makes it fair and justifiable to limit the right to a jury trial.[10] If it is understood that corporate and commercial claims are to be heard in a business court and decided by judges, not juries, then parties can factor that into their decision to contract with or buy a share in a particular company. The same is true for expectations that litigants in cases before the business court will be expected to act with dispatch in producing discovery and getting cases promptly to final adjudication.

Because litigants in corporate and commercial cases are jousting about commerce, they not only tend to employ sophisticated counsel as their champions,

[10] Tennille, et al., *supra* note 7, at 68 ("[W]hile decision-maker expertise and specialization exists in business courts for all non-jury trials, that expertise only exists up to the time of trial (final decision making) in a jury case.").

but are also fighting, in the end, about money.[11] Americans, admittedly, really love money, but I am among the many of us who view issues of criminal, environmental, and constitutional law as even more important.[12] There is, and should be, less comfort in imposing rigorous case processing procedures and restrictions on the right to a jury on litigants in cases like this.

Random, neutral case assignment processes are valuable to the perception and reality of fairness: Presumably, all members of a court are qualified to handle the court's jurisdiction. Presumably, all members of the court are duty-bound to apply binding precedent and to only handle cases where they have no bias or conflict of interest.

Therefore, the lawyers who advise clients with matters before a business court should not have to tell their clients that the outcome of a prospective case will differ materially depending on the trial judge assigned. If a truly predictable

[11] This is true not only in commercial cases. Most corporate and securities cases not brought by stockholders with a large, valuable equity stake are filed by repeat player, sophisticated plaintiffs' lawyers for their regular stable of willing plaintiffs with small stockholdings. And the corporate defendants bear the substantial costs of discovery almost exclusively because the representative plaintiffs typically have no evidence of their own, other than that relating to their adequacy as a class representative.

[12] In Delaware, I would note, some of the most sensitive human areas — marital relations, child custody, guardianships, and will contests, for example — have always been decided by judges because they were seen as cases in equity. The requirement for the judge to explain his ruling has, in my view, a due process and fairness value that more than compensates for the inability to ask twelve fellow citizens to decide the ultimate facts. But I would never deny that there are rational arguments to the contrary.

system of corporate and commercial law is in place, variation in terms of expected outcomes based on judicial assignment should be immaterial and involve matters more of style and pacing of process, rather than substantive differences of opinion about the governing law.

If "courts within a court" emerge, and the outcome of matters varies materially depending on which judges are assigned, the value of a business court is destroyed. Rather than being able to plan based on a predictable body of law applied before a predictable court, litigants face the unpredictability of idiosyncrasy the business court was supposed to eliminate.

Even worse, if the assignment process is not random and if for some reason, particular categories of cases are assigned frequently to certain members of the court for reasons that seem to be related to their ideological predilections about substantive law, then businesses and their advisors will have to factor that into their planning. And if businesses are frequently told that although there is substantial precedent on their side, the case is likely to be assigned to a judge who disfavors that precedent and that although they could win at the trial, or even dismissal stage, before other members of the court, they may have to fight all the way to appeal, to prevail, well . . . that just does not go over well and for good reason.

No doubt workload issues can determine whether certain judges get assigned expedited cases, because an underwater judge cannot handle as many of those. But when cases of all kinds on a business court are neutrally assigned to judges picked for their merit, it is more likely that everyone will have similar caseloads and similar capacity to handle assigned cases. And assigning cases in that fair way also enables the common law of corporations and commercial law to evolve more incrementally and with the valuable input of more, not fewer, judges.

Further to this point, business court assignment processes should not force corporate defendants into what in effect are involuntary class actions. The fact that a new wave of a certain type of claim by the plaintiffs' bar has been filed against a bunch of different corporations does not mean that all those cases should be assigned to the same judge. Those cases are not related in the sense that they arise out of a common factual dynamic where it is fair that all parties involved in that dynamic should have their claims addressed at one time before one judge. And if an entire wave of this kind is assigned to just one judge, no other judge gets to express a view on the newfangled legal theory the plaintiffs are pressing. If all these cases are treated as related and assigned to one judge, inevitably many defendants find themselves in the limbo of the resulting queue, while a "test case" proceeds that will results in a decision affecting their interests as a practical matter, but one resulting from a process in which their lawyers did not have input.

Such "waves" often involve new theories about longstanding corporate practices and no claim of actual current harm. That is, they often involve broad requests for advisory opinions. In this fraught context, fair assignment processes are indispensable. Assigning these cases individually and randomly allows for appropriate due process, reduces the potential that a judge will bite at the opportunity to make a systematically important ruling on a very narrow record, avoids giving unfair leverage to one side of the "v," and assures both the reality and perception of fairness because various members of court will have the chance to address the novel issue (and as importantly, a fair chance to determine it is not justiciable) in the context of a specific filed case where each defendant has its fair say.

The judges of the court must understand corporate and commercial law and commit to continuous learning. There are legitimate debates about the benefits and costs of specialized judicial expertise.[13] But it is difficult to be a genuine expert in any complex area of law and public policy. Mastering criminal procedure and law is daunting and applying relevant principles in the simultaneously high-stakes and

[13] For an international perspective on this subject in the specific context of commercial law adjudication, see Marina Matic Boskovic, *Judges and Court Specialization in Commercial Matters – How It Contributes to Efficiency of Courts and Quality of Decisions*, 2016 Strani Pravni Zivot [Foreign Legal Life] 99 (2016). For a consideration within the specific context of addressing U.S. business courts, see ABA, *Business Courts: Towards a More Efficient Judiciary*, *supra* note 4, at 953-55.

time- and resource-pressured context of state court proceedings — which govern the overwhelming bulk of the most serious criminal cases brought in our nation — with the required combination of skill and speed is amazingly difficult. The same is true of family law, where state judges must deal with the most emotionally intense and sensitive of human issues against a legal backdrop of great complexity.

Corporate and commercial law, although having fewer life and death consequences, are complex in their own right. [14] If business cases are to be resolved in the manner that is necessary to preserve economic value — thus both expertly and expeditiously — the judges who hear the cases must be simultaneously versed in the fundamentals of the law and its linguistics (*e.g.*, knowing what the concept of demand excusal involves or the relative function of representations and warranties, covenants, and conditions in a complex agreement), but also modest and willing to ask questions of the parties so as to understand the evolving commercial context in which their dispute arose.[15]

---

[14] Business court judges also must be versed in fundamental principles of corporate finance. Appraisal cases involve the most obvious disputes where corporate finance is central to the adjudication process, but there are many other contexts, such as the determination of the appropriate remedy for a breach of a licensing agreement or a non-compete, where complicated economic questions arise.

[15] By way of further example, this can also include seeking to understand the typical processes used by lawyers and clients in working with each other to take all steps required to close a major transaction. Most judges have valuable prior experience, but no judge has experience that cannot be usefully supplemented by further learning. Any individual's experience is necessarily incomplete and commercial practices evolve after judges commence judicial service; testing

Expertise and modesty are related values. Experienced judges understand their limits, that their prior reading and personal involvement in prior business matters is necessarily blinkered and can benefit from the input of those with different and more current knowledge of the commercial context, and that it is a sign of intellectual strength, not weakness, to seek to learn from the parties. By way of example, most judges, even ones on business courts, tend to come from litigation, not transactional, practice backgrounds. When judges with corporate or commercial law litigation experience, for example, have the modesty and self-awareness to admit that there is important value to understanding the nuances of transactional practice and drafting, they are more likely to respect both the fair expectations of the parties before them in the specific case, but also facilitate the reliable development of the canon of law more generally, by being better able to issue rulings that make commercial sense and that avoid unintended consequences that disrupt legitimate settled expectations.

However vast your prior work in these areas, a commitment to continuous learning is required of business court judges. Different stakeholders — for example, plaintiffs' lawyers, institutional investors, in-house counsel, academics,

---

intuitions about commercial practices based on personal experience by asking the parties for input in a genuinely open-minded manner thus not only increases procedural fairness, but it also best ensures a reliable ultimate judgment.

financial advisors, directors, officers, and transactional lawyers — look at the same things a bit differently, and understanding their perspectives by engaging with them outside the context of any particular matter is valuable. The world of commerce moves quickly and keeping abreast of developments is important. Litigators may genuinely think all your opinions are wise and all your jokes are funny, or you may just not be seen as open to candid feedback. Judges wield discretionary authority over matters important to lawyers and their clients. Making clear that you have a thick skin and genuinely want to hear what people have to say is valuable. Ask non-leading questions about why parties engage in commercial practices so that you can better appreciate the business dynamics at work. Make sure a party raising a claim has fairly presented it. Be careful if you are tempted to turn your ruling on a secondary, back-of-the-brief claim and to spend 25 pages of your opinion on an issue you gave the responding party effectively three pages of briefing to address — perhaps ask for more briefing, even evidence, and argument if that is the case.

Although it could be that a provision in a complex agreement at issue in a case before you makes absolutely no rational sense, it is more likely that there is a commercial reason why it exists in the form it does, especially if it appears in that form in many contracts in a similar context. Without understanding and modesty, judicial decisions can destabilize commercial practices that are not broken and force parties to figure out new ways to restore reliability to aspects of contracting

that were not uncertain or broken, but became so solely because a contract term was read by a judge in a way novel to practitioners.

Novelty is interesting for law professors[16] but creates unpredictability for business. When a judicial ruling contradicts prior precedent on a key issue of corporate law or reads a contractual provision in a way that was not envisioned by practitioners, the decision may be correct in some formal way and even required as matter of case-specific justice. But if such rulings are common and written in an overly broad, rather than careful, narrow manner, then the very promise of a business court will be dishonored. Businesses are not looking for courts to be the innovators of new legal principles; that is what legislatures are for. Businesses want business courts primarily to apply settled principles of commercial and corporate law to specific disputes. Businesses want business courts to resist invitations to unsettle precedent without a compelling reason for doing so, and to avoid broad rulings that look more like legislation than a case-specific explanation of why one party should win the case. Businesses understand why hypotheticals are used as a teaching tool in law school; they expect business courts to be

[16] Not so much for their students. It is confusing to law students when longstanding principles of law have been undermined because they risk either being forced to learn a potentially abandoned tradition, a new tradition, or some uncertain admixture of both. Constitutional and administrative law in this century are the foremost examples of rapid change, of course; subjects like corporate and commercial law still hold out the hope for more durable approaches less fraught with partisan controversy.

comprised of judges who understand that they should not answer hypothetical legal questions of systemic importance and risk imposing real world systemic costs by doing so.

These same concerns extend perhaps even more to appellate courts. Precisely because any generalist appellate court has a less specialized diet, even appellate judges steeped in a particular area of law gain distance from both commercial practice and from the daily diet of commercial and corporate law that trial judges on courts focusing on cases of that kind must digest.

Anyone who has served on an appellate court that has a wide-ranging diet cutting across all areas of law understands that the appellate court as a whole cannot replicate the subject-specific expertise developed by the judges asked to repeatedly decide cases of a certain kind. Although appellate courts must play their role in ensuring a uniform body of sensible law, they must also do so with appropriate deference to the trial courts that are on the legal factory floor and with an eye toward creating more, not less, predictability. Not only that, if litigants realize that the appellate court will back the trial court when it makes discretionary rulings about evidence, assesses the facts in a reasonable way, and applies settled precedent, then they are more likely to resolve cases without the need for appeal. Ideally, what businesses want is a predictable body of precedent and stability in its

application. That only can be achieved if trial and appellate courts play their respective roles with fidelity and show each other respect.

Do the Work and Do It On Time: This sounds obvious, but too many business litigators have appeared before judges in federal and state courts, both at the trial and appellate level, who have not done the reading.[17]

Commercial and corporate law cases often involve a lot of documents. And the parties have a duty to write briefs and motions that fairly summarize the key parts of the record, attach selected documents using good judgment, and don't rotely dump the entire record on the court.

But the judge, with the help of her law clerk and staff, has a duty to read the submissions, prepare for argument, and be ready to either rule in an informed way from the bench or move contiguously to the preparation of a prompt written decision. Preparing for oral arguments in complicated business disputes is time-consuming and head-hurting for all concerned, including the judge and her law clerk, who often are far outnumbered by the lawyers involved in the submissions. Counsel should expect tough questions at arguments because any judge who has

[17] To this point, the Delaware Court of Chancery and Supreme Court, like any courts, will issue decisions that do not always elicit consensus support. That is the reality that comes with doing the difficult work of adjudicating complex cases involving issues of importance to many. What no one can ever rationally question is the hard work the judges of those courts put in to prepare for arguments, keep cases moving, and deliver prompt decisions.

read your submissions carefully is going to have preliminary thoughts about the case. Litigators earn their money answering tough questions well and instilling confidence in the court that there is a sound basis for ruling in their favor.

Much worse than a hot bench is the blank stare of an unprepared judge, who has obviously not read the briefs with care, and leaves the clients with the perception that the court does not think their dispute merits his time.

Deciding motions and ruling after trial also requires hard and smart work. When judges prepare, work efficiently, and stay ahead of deadlines, they move cases along, limit their own need to relearn, and reduce costs to litigants. If a judge is going to do justice to all his cases, he cannot allow any one matter to take up an inordinate amount of time. You cannot spend disproportionate amounts of time on a decision in any matter without reducing the amount of time you have to keep other matters moving. When a decision comes out six months after submission, the judge has typically not been working on it contiguously for six months. Instead, it is more likely that most motions are put aside after argument for some time, and then returned to much later, as part of a docket-wide cycle of hurried preparation to get through argument, shelving, relearning, and deadline-driven scrambles. And alas, it is not unknown for judges to ask for additional submissions and then claim that the clock has started anew. In the courts on which

I served, a 90-day rule was in effect calling on judges to decide all matters within that period.[18] In my view, it had a salutary effect, and I treated it as an actual, rigid calendar day rule. A burden? Sure. But it also gave me the corresponding freedom that came with knowing that it was my duty to get the decision out, and that the obligation to do so came before personal vanity or a chance to edit the decision a ninth time.

And here's a startling revelation: lawyers know that law clerks are important, especially when each side may have eight lawyers working on the trial briefs. Taking into account the law clerk cycle is just and wise in scheduling; ignoring it is the opposite. Optimally, when motions and trials are heard, the law clerk who will help the judge craft the necessary ruling will be present. Many, if not most, judges use law clerks to write a first draft with guidance. The first draft of a post-trial decision by a law clerk who was not present at the trial may be many things, but it is not a first draft by someone present when the evidence came in live at trial, after having prepared by reading the pre-trial briefs. The words ersatz justice come to mind.

[18] Del. Sup. Ct., Internal Operating Procedures § 3(2) (2024), https://courts.delaware.gov/forms/download.aspx?id=117538.

Deciding motions and cases promptly is challenging for every judge. Judges want to get things right and issue well-written, persuasive decisions. But for a judge on a business court there is no escaping this reality: failing to issue timely decisions results in serious costs to the businesses involved. Businesses can act rationally in the face of adversity, but it is difficult to determine how to proceed in the face of uncertainty.

Be Approachable and Think About Your Impact On The Lawyers and Their Staff: Litigators understandably want to please the trial judge. Getting them to even voice their views about when in the day an oral argument would be most convenient can be difficult, especially when certain litigators will say that if the court wants argument during their child's birthday party, that would be their pleasure.[19]

[19] I would frequently ask parties with lawyers from outside Delaware if they preferred a morning or afternoon oral argument. The reason for the choice was not about my schedule; I would be in the courthouse either way. The morning option was offered because that gave the lawyers an option where they could fly or train in and spend the night before, then get back home the next night after argument, one based on knowing most litigators like to be settled in the location where they must argue and avoid any travel catastrophe. But I would also offer up a mid-afternoon argument, if they preferred to get into Delaware in the morning, but knowing the risk of not getting home that evening. Like all my colleagues on Chancery, I genuinely wanted to know which was best for the lawyers. But it was sometimes hard to get the lawyers to get past "whatever is best for Your Honor," to the real answer. The more the bar knows you actually mean it, the more likely they are to be candid with you, and the less likely they are to express their true feelings in the hallway when you issue a schedule that is inconvenient to them, because they failed to express them when they were in the scheduling conference with you.

Like the lawyers who practice in busy criminal and general jurisdiction courts, lawyers appreciate thoughtfulness in scheduling by business courts. Business lawyers are very busy and have many cases in several courts. When the court can be sensitive to that reality, that is helpful. Entering a briefing schedule that does not consider important religious holidays, or the reality that if a brief is due Monday, you have condemned the associates to a weekend of work, can impose stress and burden without any corresponding benefit to case-specific justice. Being approachable and being thoughtful about these issues helps the court build credibility with the bar and facilitates the parties being reasonable with each other and shaping approaches that reduce some of the stress for all concerned.

Realizing the impact that the issuance of a judicial ruling has on the real lives of lawyers is also welcome by business lawyers. If a motion has not been expedited, emptying your own in-box on a Friday afternoon by getting out a decision on it has the effect of requiring the lawyers to engage with their clients on a night when even most lawyers who need to be in the office again the next day need a time out. If you can take months to get out the decision, it can hold until Monday. Likewise, unless the parties are eagerly waiting on a decision, why put it out after business hours?

If you do, there are two possibilities. Neither are good for the lawyers. The first is that the lawyer has to turn from dinner with her family or other professional obligations to calling her client and discussing the ruling. The other is that the lawyer does not see the ruling promptly and that the client somehow finds out about it by other means. Neither is ideal.

As a best practice, it is useful for the business court to consider issues of this kind with its bar, and to endeavor to develop approaches that reduce some of the stress that both the bench and bar feel. There is enough necessary stress so that if the unnecessary can be reduced, that is a welcome outcome, and good practices that do also tend to encourage the court's bar to be more cooperative with each other, and to avoid disputes over non-merits issues.[20]

[20] In 2018, a group of distinguished practitioners issued a report on work-life balance at the instance of the Delaware Judiciary. That report contained sensible, stress-reducing recommendations of the kind that emerge when a court's bar and bench work together in good faith toward the common objective of helping hard-working legal professionals have a better chance of having a fulfilling personal life while practicing business law at the highest level. PATRICIA L. ENERIO, WILLIAM M. LAFFERTY & GREGORY P. WILLIAMS, SHAPING DELAWARE'S COMPETITIVE EDGE: A REPORT TO THE DELAWARE JUDICIARY ON IMPROVING THE QUALITY OF LAWYERING IN DELAWARE (2018) https://courts.delaware.gov/forms/download.aspx?id=105958; *see also* Leo E. Strine, Jr., Having It . . . Saner, Keynote Lecture, Delaware State Bar Association, Women and the Law Section Retreat (Mar. 6, 2015) (on file with the author). The Delaware court system at the appellate and trial court level followed up on many of those sensible recommendations. Order, *In Re Work Life Balance Recommendations and the Adoption of New Filing Deadlines For All Delaware Courts,* Del. S. Ct. (July 18, 2018), https://delawarelitigation.com/files/2018/07/work-life-balance.pdf; Press Release, Del Sup. Ct., *The Delaware Supreme Court Adopts Policies to Improve Work Life Balance* (July 18, 2018) https://courts.delaware.gov/forms/download.aspx?id=105928.

A court must be a court, not a collection of judges who do their own thang: The advantages of neutral case assignment processes are profound in terms of fairness and the perception of litigants that the justice system is just and not biased toward particular interests. But equal treatment is important in other respect, which is that cases should not be adjudicated in materially different ways by judges on the same court.

If one of the key selling points to businesses of a business court is predictability, then the court must act like a court and harmonize its approaches to key recurring issues. If not, then whatever else the court might be, predictable it isn't. Litigants cannot and should not know which judge will handle a case before filing.[21] It speaks poorly, not well, of a court the more that counsel must tell clients that on important issues how the case may proceed procedurally or substantively will vary substantially depending on which judge you are assigned. The more bespoke each judge's desires and predilections are, the less efficient is the litigation process as there is more time spent attending to catering to these idiosyncrasies and less time on the key case-specific issues.

[21] There is, of course, one common exception in business courts. When, for example, multiple plaintiffs challenge the same merger transaction, and the initial case was assigned by neutral means to a particular judge, the later plaintiffs will know the identity of the judge. But that is because genuinely related — in fact, often identical — cases have been grouped together under a neutral and fair assignment process.

For most business courts, there are common procedural and case-processing issues salient in many cases. These include:

- What are the procedures for obtaining expedition?
- When is it appropriate and when is it forbidden to proceed with an ex parte application for an injunction?
- Will preliminary injunctions be heard on a live or paper record?
- In non-expedited cases, will discovery typically be stayed pending the resolutions of motions to dismiss, if filed?
- In derivative cases, do all the judges recognize that the Rule 23.1 motion should be decided first unless the complaint is so obviously deficient that it should be dismissed under Rule 12(b)(6) as to the named plaintiff only?
- When should parties be expected to agree to a formal scheduling order culminating in trial and what should the core components of that order typically address?
- Do the judges of the court typically manage their own discovery, and do they do so under common protocols? If they farm out discovery, to whom, and do those who do this critical work use common protocols? Who has to pay for private discovery masters? What is the appellate process from their decisions and how does it affect costs and time to trial?
- Are the judges of the court willing to tailor discovery to allow the presentation of a targeted motion for summary judgment that may be dispositive of the entire case?
- Is there a right to have the court decide a motion for summary judgment in all circumstances or may the court, in its discretion, decide that a case is more fairly and efficiently resolved by going straight to trial after discovery is completed?

- What is the typical form of a pre-trial order, the sequence of pre-trial briefing, and the manner in which the parties identify trial evidence and can have it admitted efficiently?

- How may deposition designations be used as trial evidence and how will the court address objections to them?

This is a non-exhaustive list, and, of course, civil litigation is exhausting. But civil litigation gets more exhausting, less efficient, less predictable, and less just if the judges on a single court do not work together in good faith and with their local bar to shape generally common and consistent approaches to issues of this kind. No doubt some judges think their bespoke approach is optimal. But a court whose judges all do their own thang imposes substantial, suboptimal costs on litigants and lawyers; including the inability to predict outcomes before cases are filed, and more expensive, unpredictable litigation after.

No one expects or even wants robotic judging where the individual humanity and talents of particular jurists do not matter. But what litigants and lawyers expect is that the hard-working members of a court use their expertise to develop common practices for the handling of cases that parties can rely upon to assess risk and that reduce the costs and unpredictability of chamber-specific preferences. Even better is when the court engages with its bar, shapes court-wide practices and expectations in a genuinely collegial, not hierarchical, ongoing process of mutual collaboration, and makes the resulting guidance available to the bar and general

public. And if a court outsources the management of discovery from the assigned trial judge to others, this expectation of consistent court-wide practices becomes even more rightly indispensable, because this outsourcing effectively doubles the number of judicial officers that litigants and lawyers must take into account and necessarily increases the potential for inconsistency and excess costs, and thus unpredictability.

Ideally, One Trial Judge Manages The Entire Case, Full Stop: Further in this vein, my sense is that almost all business litigators prefer, all things being equal, that whoever is assigned to try a case, handle all issues at the trial court level. And that especially includes managing discovery.

When a trial judge is engaged from the beginning of a case, is accessible to the parties, and sets sensible incentives, cases move more efficiently. When the trial judge makes clear that she will oversee the discovery process herself, and approaches discovery on a goose and gander basis, discovery disputes become less frequent. When a trial judge understands that corporate cases often involve plaintiffs with very few shares and no evidence to produce who may seek overly broad discovery because they have no corresponding burden to produce evidence and appropriately circumscribes the scope, and thus burdens and costs of, discovery, then corporate defendants have less justification for engaging in

unreasonable self-help in the form of equally overly aggressive objections. Not only that, because the trial judge is handling the matters herself, no party can delay by taking an appeal, and because the trial judge is directly involved, parties are more likely to be on better behavior, understanding that they are educating the judge about the case in ways that can help or harm their chances for victory.

By contrast, if discovery is farmed out from the assigned trial judge to a special discovery master or facilitator, even one who is a full-time judicial employee such as a magistrate judge, cases will move slower and more unpredictably. When that is common practice, piecemeal appeals are not the rare exception, they can risk becoming the common rule. In most court systems, litigants have the right to a ruling on discovery issues by the assigned trial judge and therefore are permitted to take appeals from discovery masters. This second chance necessarily drives up costs, can add material amounts of time, and creates more unpredictability.

No doubt that there can be reasons for outsourcing this critical function, but some of the reason it happens is that managing discovery is not fun, not sexy, and thus has tended to be one of the first things that some trial courts farm out.[22] But

[22] Judges are human beings. In many federal and state courts, though, the cases most important to actual human beings are often not sexy and the subject of press attention — think immigration cases, social security cases, commitment proceedings, guardianships and so forth — and these

the fact that something is not enjoyable does not mean it is not important. In business cases, managing discovery well is one of the most essential ingredients to resolving cases cost-effectively and expeditiously. It's also an area where effort pays off. Judges who manage their own discovery will find themselves with fewer discovery disputes, because litigators appearing before them understand what is expected of their clients and understand that the judge will rule promptly on well-reasoned motions to compel or for protective orders. Judges who handle a case soup to nuts are better positioned to make timely and reliable judgements about the scope and proportionality of discovery. And when all judges of a trial court handle this fundamental part of the trial process themselves and with common approaches, then a healthy culture emerges among the litigation bar of the court, because they understand what the court as a whole expects of them.

There is another key advantage to having a single judge handle all stages of a matter which I discuss next.

---

cases somehow end up being primarily the responsibility of hard-working lawyers or other professionals who are not full members of the court in which these cases are filed. Discovery has long been seen as the kind of issue that can be left to someone other than the trial judge in the first instance. I am sure many view this outsourcing as justifiable. Without arguing that there is no good-faith basis for that position, I simply make these points: (1) outsourcing discovery has substantial costs to parties and the system as a whole; (2) discovery management is incredibly important in business cases given the costs and delays that can result, ones that can drive case outcomes on a non-merits basis; and (3) outsourcing results in an additional layer of judicial action and regular piecemeal appeals at the trial court level, but not to an appellate court, but to the assigned trial judges.

ADR Should Be Available, Voluntary and Business Court Judges Should Pitch In For Each Other: A good business court provides parties with off-ramps for a Rolling Stones settlement at every stage of the litigation process. Having the same judge handle all aspects of a dispute, including discovery, and be approachable, best positions the parties to determine when the time might be right to try to resolve the matter through mediation or even with appropriate involvement of the trial judge.[23] If a trial judge is available, sets an early schedule, and makes prompt rulings on motions, then it is my experience that the parties will often mutually seek out the judge's help when they think the time is right to consider a process for considering settlement or resolving a discrete dispute short of costly motion practice. If, as was the case on the trial court I served on for many years, judges of the court are willing to mediate cases for each other, parties will often ask for mediation, but at a stage they, not the court, selects. By way of example, corporate clients are more reluctant to consider settlement if the potential for dismissal exists. But, after a dismissal motion fails and the client faces the inevitable costs of discovery, that often changes.

[23] *E.g.*, Tennille, Applebaum & Nees, *supra* note 7, at 56 ("As a result of early case management conferences and assignment of a case to a single judge, business court judges are in a better position to pinpoint the stages at which ADR will be most fruitful . . . .").

A good business court should encourage voluntary efforts at settlement and accommodate reasonable requests for scheduling delays to facilitate those efforts.[24] And ideally, the judges of the court will agree to devote a manageable part of their time to mediating cases for each other, assuming the judges volunteering to do so are confident that they can be effective in that role. The systemic benefits of doing so can be large. For starters, on a personal level, it is satisfying for a trial judge to interact with lawyers and parties in a less adversarial process designed to allow each side to walk away with its head held high. Hearing from a sitting judge that it does not mean you are a bad person because you agreed to pay or do something to resolve a matter and that having the grace to compromise takes its own kind of courage and wisdom has human and thus real world business value in the settlement dynamic. The human dimension remains important in many business disputes, especially those involving company founders, closely held companies, and joint ventures. When judges of the court mediate cases, the bar of the court also gets to know them better and see sides of them that don't emerge in the more

[24] I acknowledge that many courts have automatic systems requiring mandatory mediations as to certain categories of cases. Such systems have their merit and can create a useful incentive system especially when they address repeat classes of cases involving segments of the bar that regularly handle those cases. Nonetheless, those systems do involve costs, particularly for less well-heeled parties for whom paying a lawyer for more stages of a case may not be feasible. Most such systems tend to involve cases involving smaller sums of money than is typically at stake in the kind of commercial and corporate litigation that business courts are commonly created to handle. Even in that different context, though, if every case is assigned to mediation by a court rule, that is meaningfully distinct from an assigned trial judge ordering parties in a particular case to mediation.

formal context of adjudicating a class. For the court as an institution, healthy use of judge-conducted mediation helps manage its busy docket better. Sweat put in a smart way to mediating cases pays off in fewer summary judgment and post-trial decisions to write.

But voluntary means voluntary. A frustrated trial judge throwing up his hands and ordering two clashing parties into "voluntary mediation" is a worst practice. The commercial and legal world has unreasonable people in it, and they don't see things the way the court does; that, for sure, happens more than any of us want. But ordering them into mediation is no cure for that.

And in many, if not most cases, the parties have reasonable disagreements about fundamental legal or factual issues, and until a ruling of some kind addressing those issues is made, settlement talks will not be productive. Mediating cases with parties who desired it was one of the most fulfilling tasks I did while a judge and I did it often. Mediating cases where it turned out that the parties had been ordered (being candid, coerced) into mediating was dispiriting. It never worked and it was not fair to me or to the parties.[25] And what I found out in most

[25] I do know of situations where it worked in a sense that is not, in my view, consistent with what I think of as justice. Regrettably, judges sometimes "order" mediation and before a person with whom the judge has a close personal relationship, thus putting the parties in the bind of accepting mediation before a person who they might not have chosen and, alas, creating a rational concern that the trial judge and mediator might actually communicate about the matter despite their obligation not to do so, and that the trial judge will be displeased if they don't agree to the mediator's proposal for resolving the dispute.

of those situations was that the parties believed there might be a right time for settlement discussions but felt that right time was after the trial judge decided a crucial issue.[26]

When the instinct to order ADR crosses your frustrated mind, try to exhale and resist the urge. Then realize that deciding that irksome discovery dispute, resolving that complicated motion to dismiss, hearing that motion for partial summary judgment on an issue the parties view as critical, or setting a firm trial date is likely the best way to get the case resolved by settlement. In the large main, the parties to cases, and their lawyers, look for chances to resolve cases short of the full time and cost burdens of trial and appeal. When that is not the case, what is usually needed is a trial judge resolute in her determination to decide motions promptly and keep the case moving to a prompt trial. When the parties both understand that the judge has a grip of the case and when the probabilities are more certain because preliminary motions have been decided and a discovery record

[26] In one matter where this happened, the parties had told the trial judge that they had a fundamental disagreement about a specific claim's viability and both desired to present cross-dispositive motions addressing that issue. Instead of setting a schedule and resolving those motions, the trial judge ordered them to mediate before me. The judge called me specifically and asked me to do it. I, of course, said yes. He told me none of that background, which I learned from the parties only during our brief mediation, who were caught between their desire to not displease the trial judge and their duty to me to come prepared with good-faith settlement authority. After an hour or so together, we parted on excellent terms as it was clear that the parties were not to blame and I apologized to them for having burdened them with an expensive, time-consuming process they never sought and that ate up a lot of their and my time preparing for a mediation that never had a chance to succeed.

created, the parties will likely either reach a settlement of their own accord or seek out help from a mediator. But "ordering" parties into "voluntary ADR" is not just oxymoronic, it is typically ineffective, results in more, not less expense for the parties and the court itself and is not best practice.

In general, write when a decision disposes of a case, otherwise issue narrow bench rulings when possible, and keep cases moving. Written decisions are important to the predictability and stability of corporate and commercial law. But written decisions have costs that are often not recognized. At minimum, they cause delay. And written decisions are taken seriously as at least persuasive precedent influencing the outcome of cases and the common law more generally. Thus, when a judge "reserves" on a motion, the reputational consequences of the ruling go way up. The judge will be concerned that whatever he does counts more beyond the matter at hand and against his judicial reputation and thus will devote his and his law clerk's time to buffing, polishing, and pondering. That may be worth it, but it often is not, and while the judge is on "Vanity Island" doing that, the parties are often in limbo — and limbo causes business uncertainty and raises eventual litigation costs.

Another cost is important. Motions to dismiss are based on a plaintiffs' untested allegations and all inferences are weighed in their favor. If the court is denying a motion to dismiss, the court can typically state why in a short bench

opinion that involves no risk of reputational harm to the defendants or no destabilization of settled law.

But if instead, a written decision denying a motion to dismiss advances novel propositions of law and reads like a post-trial decision because it repeats in fulsome terms the plaintiffs' untested allegations and draws every conceivable inference in their favor, awkward results can ensue. In the age of the internet and social media, the republication of the allegations in a judicial opinion risks creating reputational injury and personal embarrassment for the defendants. Search engines will forever pull up an opinion that might be read as validating and for sure republishes untested allegations and adjectival invective that are unflattering to the defendants. Business contacts, prospective employers, folks in the neighborhood, and the friends of their children will see that forever.

And if untested allegations are used as a basis for crafting broad written rulings, the careful, incremental evolution of common law is undermined. Precisely because the allegations are untested and all inferences must be granted in favor of those who make them, issuing broad legal pronouncements on them involves the risk of framing policy on the basis of a set of "assumed facts" that may not have any basis in real world fact — or, in other words, on a hypothetical built on fiction.

In most jurisdictions, interlocutory decisions denying a motion to dismiss for failure to state a claim are not appealable as a matter of right. When a motion to dismiss is denied, the prospect of substantial discovery costs greatly increases the likelihood of settlement. If opinions denying dispositive motions are used as basis to articulate new principles of law, they become a source of precedent that is mostly immune from appellate review. And business planners then find themselves having to evaluate whether these interlocutory rulings render prior trial court decisions on fuller, more concrete records or even binding appellate decisions, unreliable.

I was raised by two trial judges (one who was an appellate judge when I worked with him) who had a perspective that they shared with many other respected busy trial judges. When possible, rule narrowly, promptly, and orally on dispositive motions unless you are ruling in a dispositive way— that is, granting judgment for a party. If you are denying a dispositive motion, you will get a chance to rule again if the parties wish, but on a more reliable basis. So, in general, don't delay cases (and your overall docket) by reserving. And, if you feel you must write, don't unsettle the law by issuing broad non-appealable rulings on a one-sided record, and be sensitive to the effect that written decisions have on real people and their families.

Decide Only the Concrete Claims Fairly Presented by the Parties Themselves and Avoid Answering Hypotheticals. This point bears additional emphasis for business court judges. Judges are not legislators. Particular cases framed by particular parties do not present the ideal information base, nor due process, for the issuance of broad pronouncements of policy. Although the common law of corporate and commercial law is important, it best evolves through careful rulings that address no more than is necessary to decide the case.

Cases in business courts are presented by parties with the resources to hire skilled litigators who make deliberate decisions about what arguments to make and what arguments not to make. Judges in business courts are the ones who should thus most hesitate to introduce their own theories into a matter brought before them. Helping the plaintiffs by conjuring up reconstructions of their claims or proffering hypotheticals that the plaintiffs did not and asking the defendants to defend a claim that was never fairly framed by an actual litigant is not a practice endearing to businesses. Nor is throwing a life rope to a well-heeled corporate defendant that failed to present a particular defense. It is also not consistent with how our system of adjudication in the United States is intended to function. We do not have an inquisitorial system where the tribunal directs the proceeding.

Businesses want judges to address the claims fairly brought in the form they are brought, when there is an actual, concrete real-world dispute. There is a rather active litigation environment in the United States and no need for judges to pile on by introducing their own views of what claims or arguments should be made in commercial and corporate litigation.

The costs to society of so much business litigation are substantial. There is offsetting value in the peaceable and efficient resolution of genuine disputes. That value extends to representative litigation brought in the context of an actual corporate transaction or decision that poses the potential for injury to stockholders. But the value of litigation is at its lowest point and its costs at its highest when representative actions seek declaratory relief about an issue of corporate law that has no connection to any concrete claim of injury. The long practice of the best jurists, consider my late friend and mentor Chancellor William T. Allen, has therefore been to avoid taking the bait of these requests.[27]

---

[27] Chancellor Allen summarized the good reasons for courts to be chary about issuing advisory opinions:

> A number of important concerns have led courts in this country, both federal and state, to decline to exercise arguable jurisdiction in instances in which a controversy is deemed to have not yet matured to a point at which judicial action is appropriate. The central concern is to avoid hypothetical questions. Two general reasons underlie this concern. First, judicial resources are limited and must not be squandered on disagreements that have no significant current impact and may never ripen into legal actions seeking coercive relief. Second, to the

Evolving the common law by decisions based on arguments by particular parties in particular cases has risks of error enough. Broad abstract rulings on questions posed largely, if candor be permitted, to generate a potential attorneys' fee award, risk judges making rulings that look more like statute writing than careful statutory interpretation and that destabilize market practices improvidently and unnecessarily. Businesses want business court judges to resist deciding questions when there is no immediate need to do so, and who leave broad issues of policy to the legislature.

And when judges must write, businesses want their writing to acknowledge that the world of commerce involves shades of grey; to address the difficult

---

> extent that the judicial branch contributes to law creation in our legal system, it legitimately does so interstitially and because it is required to do so by reason of specific facts that necessitate a judicial judgment. To address a matter before the facts surrounding the dispute are fully developed necessarily not only increases the risk of an incorrect judgment in the particular case, but risks, as well, an inappropriate or unnecessary step in the incremental law building process itself.

Schick Inc. v. *Amalgamated Clothing and Textile Workers Union*, 533 A.2d 1235, 1238-39 (Del. Ch. 1987). Following his lead and that of our good friend and colleague, Vice Chancellor (and later Justice), Jack B. Jacobs, I declined for similar reasons to rule on the validity of a proposed bylaw before stockholders had voted. *General DataComm Indus., Inc.* v. *State of Wis. Inv. Bd.*, 731 A.2d 818 (Del. Ch. 1999). For an excellent article summarizing the traditional reluctance of Delaware courts to issue advisory opinions on important issues of corporate law, see John Mark Zeberkiewicz & Robert B. Greco, *Not All Facial Challenges Are Ripe*, 80 BUS. LAW. 747 (2025).

choices that confronted the parties; and to write respectful, measured, and candid decisions that explain the reasons why one side prevailed and the other did not.[28]

Threshold Issues Regarding The Tribunal's Right To Decide The Case Or, as Important, the Plaintiff's Standing To Prosecute a Derivative Case Should Typically Be Addressed First In Pleading-Stage Motion Practice. Commercial and

[28] This is another subject on which Chancellor Allen had much wise to say. *See, e.g.,* William T. Allen, *Ambiguity in Corporation Law*, 22 DEL. J. CORP. L. 894, 901 (1997) ("Candor is the first among a list of essential virtues of judicial opinions in a democracy."); *id*. at 902 ("If a case decision necessitates a difficult choice, that fact should be exposed and all choices made should be justified with good reasons. It is neither honest, nor I suppose intelligent, to attempt to hide choice when choice is compelled by circumstance. A judicial system that exposes its grounds — its real grounds, which may extend beyond a set of doctrinal expressions — is in the end, the better system of government."); *id.* (discussing his preference for a case-specific approach to corporate law judging that avoids "grand generalizations and the propounding of rules" and noting that especially where the legislature has not made a clear rule and the subject at issue divides the populace, the best approach "decides only the specific case and awaits the future formation of clearer signals."); William T. Allen, The Evolving Role of Corporate Boards 11, Address to Leadership Workshop, "Making Corporate Boards More Effective" Harvard Univ. Grad. Sch. Bus. Admin. (June 24, 1994) (on file with the author) ("The Delaware courts are not agents of change. They do not have a vision of ideal corporate governance structures that they seek to impress upon the world. On the contrary one of the strengths of Delaware corporation law is its great flexibility, allowing for the design of an endless number of permissible variations in a corporation's governance structures."); William T. Allen, *The Pride and the Hope of Delaware Corporate Law*, 25 DEL. J. CORP. L. 70 (2000) at 76 ("To my mind, *Smith* v. *Van Gorkom* fails the first and most important professional test of the judicial role in our democracy. It lacks a candid account of the justifications of its novel judgment."); *id.* at 77 ("In our democracy, it's vital that citizens be exposed to the real reasons underlying judicial policy choices. This is vital because it aids understanding and because it adds legitimacy and dignity to self-government. It's a mistake for courts to write as if they don't exercise judgment in hard cases, or that judgment is controlled by some cited case when discretionary judgment remains open, in fact. Ultimately, the courts and the judges that engage in such presentation of their results will be seen as weak. In a democracy, it is ultimately not precedent, but the quality of judicial reasoning, the integrity of the judicial process, and the candor and modesty of the judicial voices that justifies the public respect for judicial decisions."); *id*. at 78 ("The judicial opinion is an opportunity to disclose to the parties and to the public honest work of the court in struggling to find justice.").

corporate cases often generate motion practice about issues that, if answered a certain way, make it improper for the business court to speak to the merits. By way of common example, commercial disputes may often involve contests about arbitrability. Before the court speaks to the contract's merits legitimately, it must be willing to determine the issue of arbitrability, and even to defer that question to arbitration if that is appropriate. Likewise, unless the court has subject matter over the case or personal jurisdiction over the parties, it should not be speaking to the legal merits. Thus, it is traditional for effective business courts to decide these gating issues up front and with alacrity. Doing so is typically not sexy, but it is essential to moving cases with the speed that businesses demand and to the exercise of judicial restraint in the development of commercial and corporate common law.

For business courts, another similar gating issue — that of demand excusal in a derivative case — must be regularly addressed that is of equal, if not greater, importance in these respects. Derivative cases involve a party asking to assert a claim belonging to a business entity, not themselves. The burden is on that party to show the court why it, rather than the business entity's governing body, should control the claim.

Unless a derivative plaintiff proves that it should control the claim, the court should not give legitimacy to its allegations. In many states, a derivative plaintiff must meet a pleading standard higher than is required under Rule 12(b)(6) to proceed. When faced with a derivative complaint, corporate defendants must bring all their reasons for dismissal, though, and that typically includes moving to dismiss under both Rule 23.1 and Rule 12(b)(6).

By tradition in most respected business courts, the trial court addresses the Rule 23.1 motion first. If a plaintiff cannot plead demand excusal and thus a right to proceed, the case will be dismissed for that reason, full stop, and the court would not address it further because any claim belonged to the company, not the plaintiff, to prosecute. And if a plaintiff could plead demand excusal, of course, it would typically satisfy Rule 12(b)(6).

Only in one rare situation, therefore, would courts address a Rule 12(b)(6) motion first and not the Rule 23.1 motion. That is where a plaintiff's complaint was so clearly unmeritorious that it was advisable to dismiss for failure to state a claim as to the named plaintiff only and expressly without prejudice to other plaintiffs or the company prosecuting potential claims arising from the factual context addressed. By that means, the court would avoid prejudice to the company and its stockholders from issuing a broader ruling than necessary.

If, by contrast, a court puts to the side a Rule 23.1 motion, and addresses a Rule 12(b)(6) motion with the intent to deny that motion and to use the complaint as a basis to articulate novel legal principles, then new law is being made on the basis of untested allegations by a party without any proven right to even prosecute the claim. And if the defendants thereafter obtain dismissal under Rule 23.1 because the plaintiff has not pled demand excusal, the 12(b)(6) decision is not appealable, but is "out there" as problematic precedent for other businesses and as reputational harm for the defendants that won, but who have had a court republish harsh allegations against them in an official judicial decision.

If efficiency and if developing the law in an incremental, careful way are core missions of an effective business court, both are advanced by a rigorous practice of addressing the essential gating issue of demand excusal in derivative cases first and if that issue is dispositive, avoiding other comment on the case.

A Business Court System Does Not Operate In A Vacuum

Before concluding, I am going to touch on an issue that often gets slighted in the discussion about where a business should secure its charter, an issue over which the business court itself frequently has little control.

The Collateral Consequences of Corporate Domicile Must Not Be Negative. States trying to use a business court as a method for increasing the number of

business entities incorporated cannot ignore the collateral consequences that come with choosing a corporate domicile. Under traditional principles of American law, a business entity is subject to the general jurisdiction of the courts in which it is organized.[29]

This means that tort plaintiffs or other plaintiffs can sue the entity in those courts regardless of whether the claims involve a question of corporation or alternative entity law. Thus, if a corporation is choosing a state of incorporation that is not the same as its headquarters, the corporation is expanding the options plaintiffs have to sue it without facing a motion to dismiss for lack of personal jurisdiction.

For many business entities, litigation over issues other than entity law may be more common and material. If a consequence of domiciling in a state is to subject the corporation to potential uncertainty in the form of a prevalence of high jury awards, attorneys' fees, punitive damages, costly procedural pathways, and the like, the very promise on which a corporation has been encouraged to come to the state — because of its "business court" — is undermined.[30]

---

[29] *E.g.*, *Daimler AG* v. *Bauman*, 571 U.S. 117, 137 (2014).

[30] My own state has grappled with these problems when Delaware corporations have been sued on tort claims that do not involve actions in Delaware, that are not governed by Delaware law, and where Delaware is not an efficient or fair venue for the corporation to face suit and where the plaintiffs had a sound forum in the courts where they lived, where the alleged tort occurred,

Likewise, if a state purports to regulate its domestic business entities as to issues that do not involve their internal affairs — that is, the relationship between their investors and managers — then a corporation may come to regret its decision to incorporate there. A Governor of New Jersey, who desired to be President, once caused his state to enact legislation that subjected domestic corporations to regulation on issues like anti-trust. This did not appeal to them and many of them

---

and where the judges were familiar with the governing law, because it was the law of the forum. *See, e.g.*, *Martinez* v. *E.I. DuPont de Nemours and Co., Inc*., 86 A.3d 1102 (Del. 2014) affirming trial court determination that a case against a Delaware corporation involving an alleged tort occurring in Argentina, brought by Argentine plaintiffs and governed by Argentine tort law should be dismissed as filed in an inconvenient forum because of the burden imposed on the corporate defendant); *see also Genuine Parts Co.* v. *Cepec*, 137 A.3d 123, 127-28 (Del. 2016) (addressing analogous issue and limiting the ability of a plaintiff to see a non-Delaware corporation in Delaware based solely on its registration to do business in Delaware and requiring a nexus between the cause of action and the state such that exercising personal jurisdiction over the non-Delaware corporation would satisfy due process considerations and noting that an "incentive scheme where every state can claim general jurisdiction over every business that does any business within its borders for any claim would reduce the certainty of the law and subject businesses to capricious litigation treatment as a cost of operating on a national scale or entering any state's market"). Even the fact that a corporation is chartered in a particular state does not mean that it should have to defend all lawsuits there. By way of example, many Delaware corporations were sued in Delaware over asbestos claims by plaintiffs where the alleged tort had occurred in their own state, where the corporation was thus indisputably subject to personal jurisdiction, where their own state's laws governed, and where all the evidence was in that state. When groups of these claims were filed in Delaware as a form of de facto class action, many corporations did not find that fair or attractive. And although a corporation may have huge resources, the inefficient use of them harms the corporation's workforce and many diversified investors and can also cut the corporation's capacity to generate wealth for our society. Corporations should be accountable for their actions, but when the courts of the place where a tort alleged occurred are open to the resident plaintiff, the laws of that place govern, and almost all the evidence is in that state, there is typically no just reason why the case should not be tried there.

eventually migrated to the other side of the Delaware River.[31] Whatever the political leanings of a single American state, if it uses its issuance of a corporate charter to attempt to regulate the conduct of a corporation everywhere it operates in a 50-state federation and internationally, it is unlikely to be attractive to businesses. Corporations generally want to do business in all states, regardless of political persuasion, and not be subject to any particular state's desire to impose its particular political beliefs on them, especially when those beliefs may conflict with the prevailing beliefs in other states where the corporation makes substantial sales. Traditionally, states regulate businesses in terms of their effect on the state's consumers, workers employed within the state, and the state's environment on a neutral basis that is not tied to a business's state of incorporation. Using a business's choice of entity law as a basis to subject it to externality regulation beyond state borders involves a state attempting to act as a national regulator, risking certain conflicts with other states, and undermining the ability of businesses to freely operate on national and international basis efficiently.

[31] For a discussion of the role then-Governor Wilson's legislative agenda played in Delaware's eventual market pre-eminence and New Jersey's decline, *see, e.g.*, William E. Kirk, III, *A Case Study in Legislative Opportunism: How Delaware Used the Federal-State System to Attain Corporate Pre-Eminence*, 10 J. CORP. L. 233, 255-258 (1984). For an argument that New Jersey began to lose its edge to Delaware even before Wilson's aggressive legislation, *see* Sarath Sanga, *The Origins of the Market for Corporate Law*, 24 AM. L. & ECON. REV. 369 (2022).

Put simply, if the rationale for creating a business court is to assure your state's business entities that they have an optimally predictable, fair, and efficient domicile, then public policy must align across all the dimensions affected by the incorporation decision. If, instead of providing greater certainty, the choice of incorporation opens the corporation to more unpredictable litigation results in key areas like tort, or subjects the corporation to regulation unrelated to internal affairs, and that impinges on its freedom wherever it operates, any business entity that is acting rationally, rather than reflexively, will weigh those negative consequences in its decision where to incorporate.

Conclusion

As I close, I acknowledge again two realities. The first is that business courts have a challenging, often exhausting responsibility to address complex, fact-intensive commercial and corporate matters with alacrity and wisdom. The second is that reasonable people of good faith will disagree with or find impractical — perhaps strongly — some or all of the attributes and practices I commend as helpful to business courts in meeting the mark.

As citizens of a society whose best principles include both a commitment to the rule of law and freedom of expression, we each have the right to have our own perspectives. And by engaging constructively and civilly with each other's ideas

over the common goal of improving the nation in which we live, we not only build common ground, but give life to the important role we all have as citizens. If my thoughts simply inspire some of your own ideas about how we can make our business courts better instruments of justice, that is more than enough for me.