

## Trial Run

Ohio is nearly halfway into a pilot program aimed at boosting expertise and efficiency in commercial cases. So far, most judges and attorneys give it a thumbs-up.

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By Kevin Kemper |

For years, attorneys across Ohio lobbied the state to establish courts designed to meet the special needs of business. Lawyers complained that commercial cases took too long, that judges had varying degrees of expertise in business law, and that lack of uniformity in decision making made it hard for firms to decide whether it was even worthwhile to litigate.

In 2008, after years of requests, attorneys got their wish.

The Ohio Supreme Court established rules that year for the creation of commercial dockets—special courts where businesses could have their disputes adjudicated by judges with expertise in business law. In January 2009, four counties—Cuyahoga, Franklin, Hamilton and Lucas—agreed to establish pilot commercial dockets for four years. In each county, two common pleas court judges preside over all business litigation filed there.

Almost halfway into the pilot program, local attorneys say the commercial docket has been a refreshing improvement and should be made permanent. "It's definitely more efficient," says Kenneth Cookson, a commercial litigator and director at Columbus law firm Kegler, Brown, Hill & Ritter. "It has made my life easier."

"I like the concept," echoes Marion Little, a commercial litigator at Zeiger Tigges & Little in Columbus. "It has some pros and cons, but I like it."

Franklin County Common Pleas Court Judges John Bessey and Richard Frye direct the commercial docket. Between May 2009 and April 2010, the most recent period for which the Ohio Supreme Court has gathered statistics, Bessey and Frye heard more than 380 total cases.

Ohio's commercial dockets aren't separate courts. Instead, they're more akin to organizational tools. For each commercial case that is sent to either Bessey or Frye, one of his civil cases is transferred to another judge.

"Commercial dockets have gotten a lot of momentum because they've been successful where they've been tried, despite severe budget restrictions," says Mitchell Bach, a commercial litigator and commercial docket consultant for the American Bar Association. "Taking existing judges in existing courtrooms and feeding certain cases to them is really just a form of docket control."

### Modeling a System

The commercial docket has benefits for both businesses and taxpayers. Ohio's pilot program doesn't cost any more to operate than the standard court system, says John VanNorman, policy and research counsel at the Ohio Supreme Court. Judges aren't paid any more (or less) for joining the pilot program, and no additional judgeships or courts were established that require additional funds.

When the idea for a commercial docket was floated in the past, VanNorman says attorneys suggested either a separate court or that the assigned judges focus only on these cases. "We didn't develop that because it would have been such a sea change," he says. "It would have been a major change in the way we operate."

It also would have required approval from the Ohio Legislature—a potentially long and fruitless process. Instead, the idea evolved into its current form and caught the attention of the late Ohio Supreme Court Chief Justice Thomas Moyer. His championing of the issue led to the pilot program's formation, VanNorman says.

Ohio is one of 16 states that have already instituted a commercial docket system in one form or another, and more are on the way, says the ABA's Bach, a partner at Eckert Seamans Cherin & Mellot in Philadelphia (See "State By State"). The oldest such court in the country is the Delaware Court of Chancery, established in 1792. Similar courts have been organized primarily along the East Coast and in the Midwest.

Bach, who has helped several states set up their own systems, became an advocate for commercial dockets because of his experience in Pennsylvania state courts. "For the most part, our state courts were poorly equipped to handle commercial litigation," Bach says. "In Philadelphia, most litigators tried to shy away from the state courts and get their cases into federal court."

A common perception was that federal judges were more adept, and more knowledgeable, about business litigation, Bach says. But since the commercial docket was established in Philadelphia in January 2000 (Pittsburgh followed suit in 2006), things have changed.

"It's revolutionized the practice in Philadelphia," Bach says. "The results are more predictable, cases are concluded quicker and it's allowed specialized forms of alternative dispute resolution. I'm a big believer in this. I have no objectivity on the subject."

The types of cases heard by business courts or commercial dockets vary across the country. In Ohio, cases are limited to business creation or liquidation disputes, trade secrets, employment agreements, director and officer liability issues, obligations between business owners and shareholders, and other similar cases. The dockets do not accept cases filed by individuals against businesses, discrimination or labor disputes, or litigation between businesses and governments.

"My perspective is that we've had success in moving some cases along faster than if they had been on the civil docket," Frye says.

### **Fast-Tracking Cases**

From the beginning, the commercial docket was touted by the Ohio bar as a solution for expediting business cases. Such litigation has historically taken two years or longer to reach resolution, due to the complex issues involved and the court system itself.

"Commercial cases have a higher degree of complexity, and the discovery can be more substantial," says Little.

Discovery, the process of obtaining pre-trial information by gathering documents and taking depositions, can be especially time-consuming and document-intensive in commercial cases. Sometimes the process involves a number of hearings, often presided over by a magistrate judge, to determine what's admissible and what's not. In Ohio, a magistrate essentially operates as a common pleas judge, except that his or her decisions are subject to review and approval, disapproval or modification by a judge.

The commercial docket essentially cuts out the judiciary middleman, which speeds up the process. "On the regular docket we see a lot of issues referred to [the judge's] staff attorney or the magistrate," says Little. "In the case of the commercial docket, the judge has handled everything. I have yet to have an experience where anything was referred to anyone else, and I think that's a real advantage to the system."

Another reason Ohio commercial cases have often been slow to conclude is the demands of the criminal justice system. Because the Sixth Amendment guarantees defendants the right to a speedy trial, criminal cases take precedence over civil suits.

To fast-track business cases, Ohio's pilot program mandates an 18-month timetable for resolution. That has drawn criticism from some attorneys whose cases went through the commercial docket process, VanNorman says.

To address concerns, the Ohio Supreme Court has been gathering statistical data and soliciting anonymous feedback from attorneys. "Not every commercial case can be ready for trial in 18 months," one lawyer wrote. "Given the caseloads typically carried by counsel engaged in these commercial disputes, it is almost impossible to effectively prepare and try these cases under the commercial docket parameters. Please end this program."

Others argue the new timeline is too slow. "It seems as though the cases are more drawn out and are taking longer," another attorney commented. "For example, I can be on a 12 month case management plan without the commercial docket. When going to the commercial docket the case gets an automatic 18 month case management plan. It would be better to have two tracks at least because not every commercial case needs 18 months."

## Providing Predictability

In addition to speed, the commercial docket also aims to achieve an element of consistency in court decisions.

Judges across Ohio have varying degrees of expertise with business issues. Many of those elected to the bench are criminal prosecutors or defense lawyers with little to no business law experience. For the most part, that background is a good fit for common pleas court because the majority of cases a judge hears are criminal. But a lack of business law expertise can result in cases whose durations are lengthier or whose decisions may not match similar cases filed elsewhere, says attorney A.C. Strip.

"We have a pretty darn good bench in Franklin County that moves cases along," says Strip, who specializes in business insolvency and receivership at Strip Hoppers Leithart McGrath & Terlecky Company in Columbus. "Where I think in some aspects it's easier now is that because it's down to two judges, I know how they will react to something I file. For example, when I file something with Judge Frye, I know he will have a hearing in two weeks. It's very predictable."

Just as in many other professions, attorneys say that knowing your audience is a key to success. For commercial litigators who primarily practice in one of Ohio's four commercial docket counties, the chances for success improve greatly because attorneys are working with the same judges day-in and day-out. But Little says there is a flip side to that coin.

"The biggest disadvantage [of the commercial docket] is that if your practice is commercial litigation, the bulk of your cases will be assigned to one or two judges," Little says. "We have a lot of good judges [in Franklin County], judges that I enjoy appearing before and now I just don't have the chance."

For the judges, the commercial docket experiment has mostly been a success, says Bessey: "It's an ongoing learning experience, which is one of the reasons I think I enjoy it so much."

Although Bessey has a business background—he once co-owned a small restaurant—he says the job requires him to continually educate himself. Frye also has a foundation in business law: As a civil trial attorney, he handled cases involving antitrust issues, medical malpractice and professional liability.

Both Bessey and Frye say that despite the focus on commercial litigation, their jobs haven't changed much. Both still handle a docket of mostly criminal cases. Approximately 27 percent of the nearly 9,000 cases filed in Franklin County Common Pleas Court in 2008 were criminal cases, according to the latest available statistics compiled by the Ohio Supreme Court.

"Judge Bessey and I still spend 75 percent of our time on the criminal docket, so no matter how eager we get, we will always be handling criminal cases," Frye says.

## Moving Forward

While Bessey and Frye offset each new commercial case by transferring a previously drawn civil case to another judge, that system isn't universal. The rules for the pilot program don't stipulate how to handle caseload management, so other counties do things differently. In Cuyahoga County, for example, judges in the common pleas court agreed to reduce the criminal dockets of the two commercial judges by half, Frye says.

"We've heard some of the judges would like to see the commercial judges handle fewer criminal matters, but the problem with that is it's a fundamental change in the nature of the types of cases judges hear," VanNorman says.

While the majority of feedback on the pilot program has been positive, some attorneys have suggested the program has already engendered jealousy among judges. "Judges whose prior law practice consisted of primarily civil matters are envious of those chosen for the commercial docket," one lawyer wrote. "Other judges indicate that the commercial docket judges have an advantage in fundraising, and such judges have catered to the larger law firms in town who in turn are ready to contribute to their campaigns since they have a keen interest."

Privately, some judges have suggested that the commercial docket is an insult because it implies other judges are not qualified to hear all types of cases. Meanwhile, some attorneys contend that the program's success relies solely on the success of a few judges. Should a judge need to be replaced because of retirement or an election loss, the quality of his or her replacement isn't guaranteed.

A task force established by the Ohio Supreme Court will issue a final report on the docket's successes and failures next year, VanNorman says. The report, which must be completed by July, will include a recommendation on whether the program should be made permanent,

continued as a pilot project, or scrapped. If a permanent program is recommended, VanNorman says the report will include suggestions on how to improve the system. The final decision rests with Ohio's seven Supreme Court justices.

Franklin County's two judges hope the commercial docket sticks around. "I feel very positive about the contribution, and I feel it's achieving its objectives," says Bessey. "I think that for the most part we are doing what we hoped to do."

*Kevin Kemper is a freelance writer.*

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