

SUPREME COURT OF APPEALS OF WEST VIRGINIA



BUSINESS COURT DIVISION ANNUAL REPORT

OVERVIEW

The West Virginia Business Court is a Division within West Virginia's Judiciary designed to handle complex commercial litigation between businesses. In 2010, the legislature passed House Bill 4352 authorizing the Supreme Court of Appeals to conduct a study and make a recommendation regarding the creation of a business court division. The Court appointed a committee to study the feasibility of a business court and ultimately a proposal was presented to the Supreme Court with a recommendation by the committee that a business court division be established within the circuit courts. The committee then drafted a rule to govern complex business litigation. After deliberation, public comment, and revision, the West Virginia Supreme Court of Appeals unanimously approved Trial Court Rule 29 on September 11, 2012, which was amended by order entered June 13, 2014. Justice Robin Jean Davis, Administrative Director Steven Canterbury, and Division Chair Christopher C. Wilkes held a formal opening of the Business Court Division on October 10, 2012 at the Central Office located in the Berkeley County Judicial Center in Martinsburg.



BUSINESS COURT JUDGES

The Division currently consists of six judges appointed by the Chief Justice to serve a term of seven years. These judges have agreed to undertake the additional caseload because they have a particular interest and expertise in business litigation. Rule 29 allows for one additional judge to be appointed to the Division as the need arises. The Chief Justice designates one of the Division Judges to serve as Chair every three years. Rule 29 indicates there is no prohibition against serving successive terms, either as judge or as Chair of the Division.

The Division Judges receive specialized training in business law subjects, are members of the American College of Business Court Judges, and are members of the Business Law Section of the American Bar Association. They meet semi-annually at the judicial conferences to discuss new developments, caseload distribution, case management techniques, and any other issues that may need addressed, and communicate via email and telephone to discuss case assignments and scheduling. As of the end of 2014, the Division now has web conferencing capabilities for meetings and hearings in business court cases, which should ultimately reduce travel expenses and expedite proceedings.

Below are the Business Court Division Judges and the expiration dates of their terms:



Honorable Christopher C. Wilkes*
Judge of the Twenty-Third Circuit
Business Court Region G

October 9, 2019

Shall serve as Chair through October 9, 2015



Honorable James J. Rowe*
Judge of the Eleventh Circuit
Business Court Region F

October 9, 2019



Honorable James H. Young Jr. *
Judge of the Twenty-Fourth Circuit
Business Court Region D

December 31, 2019



Honorable Thomas C. Evans III**
Judge of the Fifth Circuit
Business Court Region C

October 9, 2019



Honorable Russell M. Clawges Jr.***
Judge of the Seventeenth Circuit
Business Court Region A

September 30, 2020



Honorable Paul T. Farrell***
Judge of the Sixth Circuit
Business Court Region D

September 30, 2020

* Appointed by Chief Justice Menis Ketchum by Administrative Order dated September 11, 2012.

** Appointed by Chief Justice Brent D. Benjamin by Administrative Order dated March 4, 2013 to fill Former Judge Cookman's unexpired term

*** Appointed by Chief Justice Brent D. Benjamin by Administrative Order dated October 1, 2013.

STAFF

The central office is administered by Carol A. Miller who is employed by the Supreme Court of Appeals as an assistant to Judge Wilkes. She was given the additional title of Executive Director of the Business Court Division in 2013. The Executive Director works closely with the Division Judges to implement procedures and policies to improve efficiency. Her duties also include coordinating referrals and assignments and implementing appropriate technology to ensure the Business Court Division is running effectively. The Executive Director also performs any other administrative action necessary to assist the Division Judges with achieving effective management of business litigation. Lorri J. Stotler was hired in 2013 to assist the Director of the Juvenile Justice Commission, and also assist the Executive Director of the Business Court Division as needed in the Central Office.



HIGHLIGHTS OF 2014



The goal of the Division Judges is to continually make improvements so that complex commercial litigation that comes before them can be resolved in a timely manner as the Division strives to maintain one of the best judicial environments for business in the country. After receiving solicited feedback during the first year from Business Court participants, the Executive Director scheduled a retreat with the Division Judges and the Clerk of the

Supreme Court of Appeals in February to discuss potential changes to Rule 29 that could optimize the efficiency of Business Court. Subsequently, the Chair, on behalf of the Division Judges, proposed amendments to West Virginia Trial Court Rule 29. After review by the Supreme Court and a thirty-day public comment period, the Amendments were approved and became effective June 13, 2014.

DEVELOPMENTS IN 2014

Chairman Judge Wilkes authored an article titled *Emerging Fronts in Alternative Dispute Resolution: Judicial Mediation in West Virginia Business Court*, which was published in the *West Virginia Lawyer*, April-June 2014.

Judge Clawges presented to Leadership Monongalia regarding Business Court in West Virginia.

Legal Journalist, Amanda Robert, published a three-article series focused on the history and future of Business Court in West Virginia including practicing lawyers' perspectives of the Division.¹

The Division procured Cisco WebEx Conferencing to expedite certain proceedings. The technology allows for more efficient scheduling and reduces travel time for judges and lawyers, providing judges more time for their general dockets.

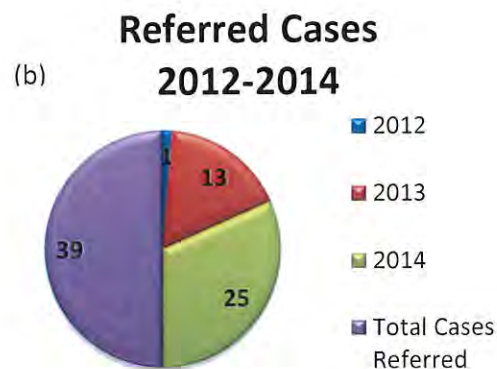
A law clerk position was approved for the Division and advertised in November of 2014. Claire Watson, Esquire was hired and will begin employment January 5, 2015. Her office will be located at the Central Office in Martinsburg.

¹ Amanda Robert, *Businesses making increased use of West Virginia's specialized court*, Legal Newsline Legal Journal (November 11, 2014). <http://legalnewsline.com/news/253635-w-v-a-business-court-making-improvements-to-lesser-costs-for-litigants>.
Amanda Robert, *Attorneys say W.Va. Business Court accelerates resolution of disputes*, Legal Newsline Legal Journal (November 18, 2014). <http://legalnewsline.com/news/253421-attorneys-say-w-v-a-business-court-accelerates-resolution-of-disputes>.
Amanda Robert, *W.Va. Business Court making improvements to lessen costs for litigants*, Legal Newsline Legal Journal (November 25, 2014). <http://legalnewsline.com/news/253635-w-v-a-business-court-making-improvements-to-lesser-costs-for-litigants>.

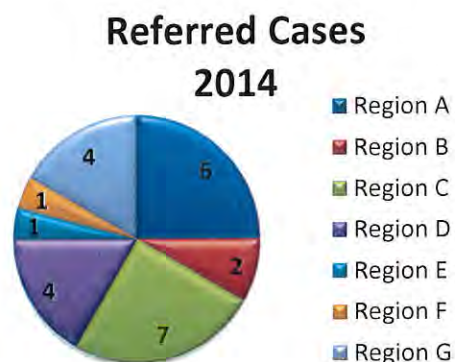
Other highpoints included the attendance of some Division Judges to the Tenth Annual American College of Business Court Judges Conference and the Judicial Symposium on the Economics and Law of Public Pension Reform in San Francisco, California. Most of the expenses were paid for by symposium sponsors with little or no expense to the State. As approved by the Supreme Court of Appeals of West Virginia, the Division will continue to attend courses relating to the management of complex business litigation. They will also remain active with the local and statewide bar and business associations as requested to update lawyers and public on any rule changes and business court statistics.

BUSINESS COURT CASE ACTIVITY

Since inception, there have been fifty-eight motions to refer to the Business Court Division filed; the yearly breakdown is shown in chart (a) below. Five of the motions did not require a ruling due to settlement or withdrawal. Thirty-eight of those motions were granted and therefore referred to the Business Court Division; the yearly breakdown is shown in chart (b) below.²



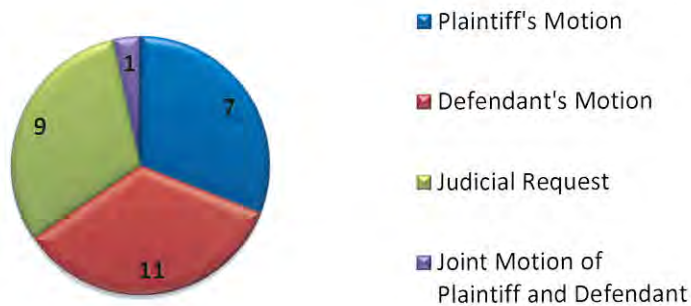
Below, the charts represent the number of motions to refer and referred cases per region in 2014.



² Statistics may be different from the 2013 Annual Report due to certain cases being consolidated. Consolidated cases will be counted as one case for the purposes of the Annual Report regardless of consolidation before or after referral.

Who Requested Referrals to Business Court in 2014

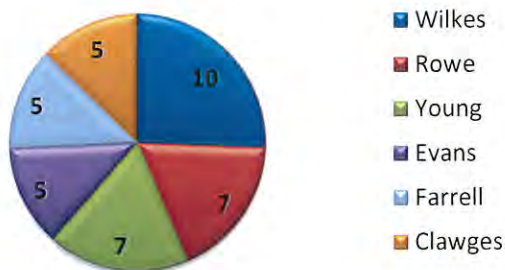
Pursuant to Rule 29, prior to the Amendment, only a circuit judge could request referral for a case that was over three months old. In two cases in 2014, the defendant filed a motion to refer with the circuit judge, and the judge subsequently filed the judicial request. Both cases were included as a judicial request in this report.



How Cases Are Assigned

The Chair considers the locality, number of assignments, and expertise of the judges when receiving a new referral. He then consults the Division Judges to ensure there are no conflicts before making assignments of presiding and resolution judge. The cases to date have been assigned as indicated in the charts below:

Assigned as Presiding Judge



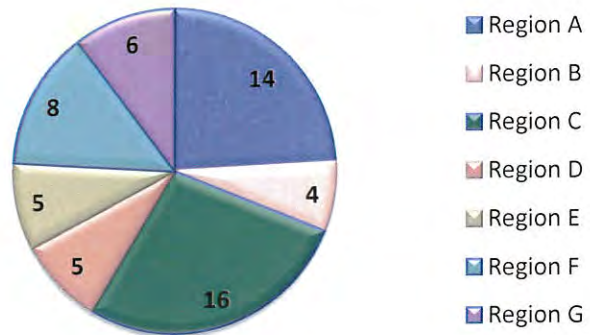
Assigned as Resolution Judge



Total Motions to Refer to Business Court Since Inception

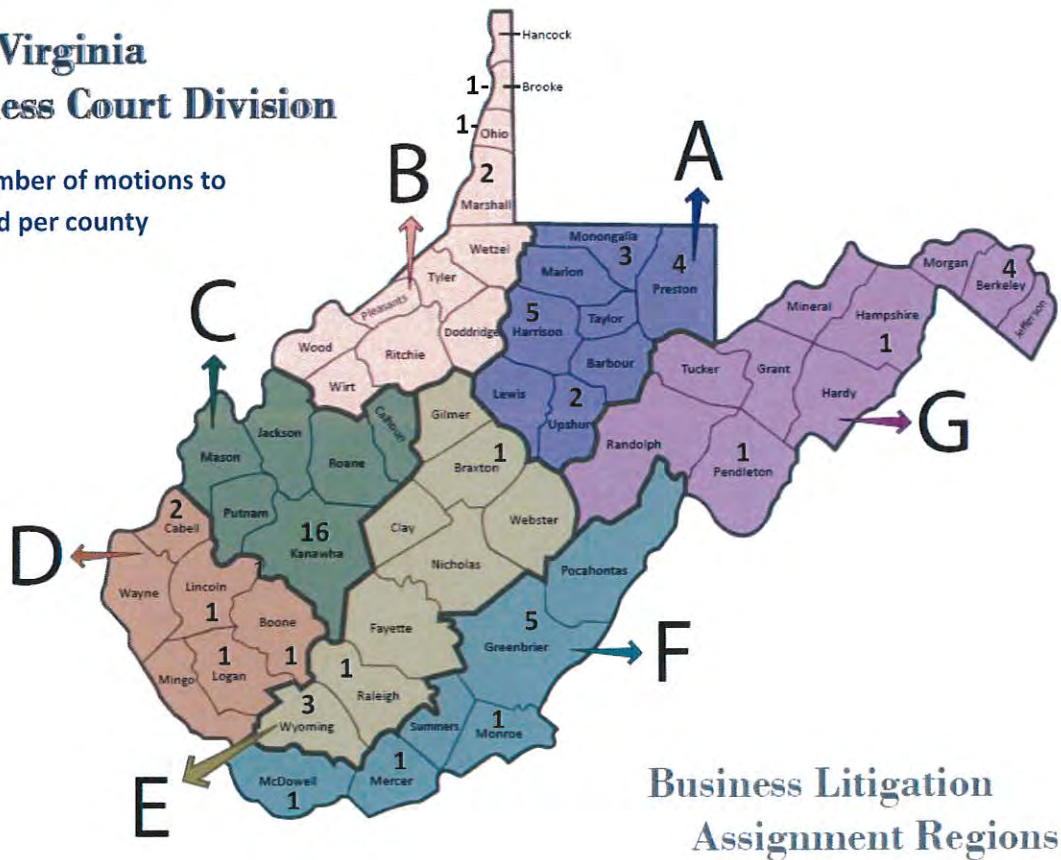
Since inception, there have been requests from all seven regions with the majority of motions from Region C. The chart to the right shows the number of requests per region and the map below represents the number of requests by county with a total of fifty-eight.

Motions to Refer to Business Court by Region



West Virginia Business Court Division

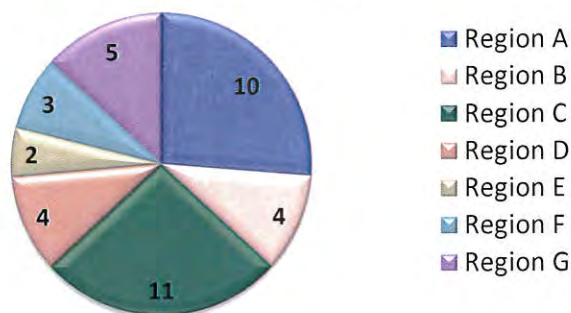
Total number of motions to refer filed per county



Total Number of Cases Referred to Business Court Since Inception

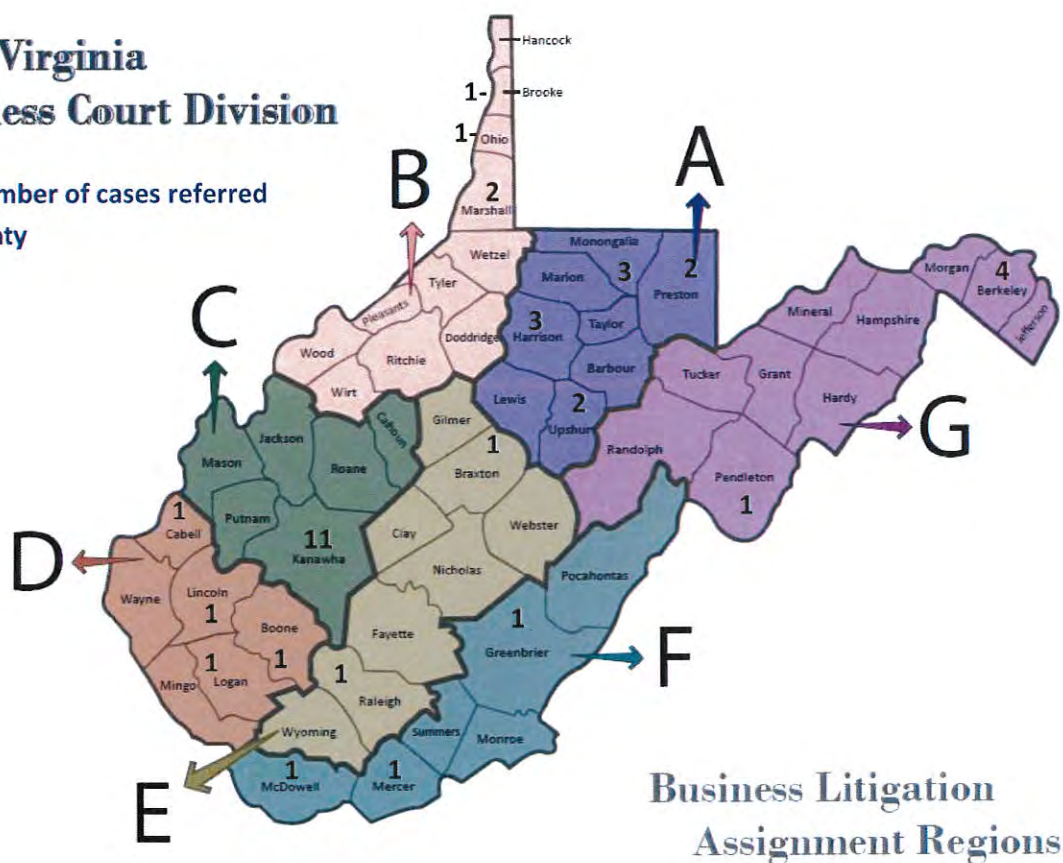
Since inception, there have been thirty-nine referrals. The chart to the right represents the number of cases that have been referred to the Division from each region. The map below shows how many cases have been referred to the Division from each county.

Referrals by Region



**West Virginia
Business Court Division**

Total number of cases referred per County



Nature of Cases Referred to Business Court in 2014

(As taken from the Motions to Refer and/or Complaint)

County	Nature of Case
Berkeley	A complex tax appeal, which is included in the definition of Business Litigation under the jurisdiction of the BCD pursuant to W.Va T. C. R. 29.04 (a)(1)(3), concerning the valuation and assessment of commercial real estate over multiple tax years.
Berkeley	Involves the taxation (or exemption from taxation) of a hospital foundations' real property where a non-profit, healthcare business rents to other healthcare providers who use it in a manner ancillary to the completion of the owner's charitable purposes.
Berkeley	Breach of contract; professional liability claims in connection with the rendering of professional services to a commercial entity; commercial bank transactions; disputes involving commercial entities.
Boone	Breach of contract; commercial torts; injunctive and declaratory relief between commercial entities; franchisees/franchisors; dispute involving commercial entities; and claims under Chapter 17A, Article 6A. Motor Vehicle Dealers, Distributors, Wholesalers and Manufacturers, 17A-6A-1 et. seq. ("West Virginia Dealer Act").
Braxton	Complex nature of litigation involving highly technical commercial issues. Longstanding and highly contentious issues, and presently pending in the Circuit Court of Braxton Co, WV, is an appeal presenting complex tax matters of significance to the operations of all Enrolled Agents practicing in WV and to the transactions between those Enrolled Agents and the many small businesses for whom they provide tax services.
Brooke	Complex dispute over the determination and calculation of pole attachment rates that Mon Power may charge citizens for the use of its utility poles and breach of contract.
Cabell	Dispute between corporate entities. Involves a request for declaratory relief by Plaintiff with respect to the location of Defendant's natural gas pipelines in that certain area of Cabell County, WV known as 'Kenetic Park'. Issues regarding the applicability and scope of easements in a dispute between commercial entities.

County	Nature of Case
Harrison	Breach of contract, in part, between commercial entities, and professional liability claims in connection with the rendering of professional services to commercial entities.
Kanawha	Complex matters regarding the enforceability of business restrictive covenants.
Kanawha	Matters dealing with the issuance of stock and the rights of the stockholder to redeem or exchange its shares.
Kanawha	Claims involve significant questions that arise out of a web of overlapping commercial agreements between business entities. Highly complex and unprecedented issues of a commercial nature in this state.
Kanawha	Significant transactions concerning bids for video lottery permits and commercial lending between two West Virginia corporations; breach of contract; "Special Relationship"; assumption of duty.
Kanawha	This action arises from a complicated and sophisticated series of transactions, the ultimate goal of which were to obtain a contract with the Fayette County West Virginia Board of Education to engage in a multiyear energy-saving program. Requiring the trial court to apply or interpret and apply sophisticated contracts dealing with the issuance of surety bonds.
Kanawha	Declaratory relief. This is a suit by WVIMB and WVCPRB to obtain a declaration that the Defendant VALIC must surrender upon demand and without penalty or other restriction, public money...
Lincoln	Sale or purchase of commercial entity, commercial torts, liability of shareholders, directors, officers, partners, etc.
Logan	Breach of contract and related tort theories.
Marshall	Involves the management and operation of two closely held business corporations.
McDowell	Tortious interference with business relationships, contracts and expectancies; civil conspiracy.
Monongalia	Injunction, breach of contract/non-piracy, tortious interference, misappropriation of trade secrets pursuant to WV Code, conversion, theft of business through

County	Nature of Case
	fraudulent scheme.
Monongalia	Commercial issues including, but not limited to, commercial torts and disputes among commercial entities. Plaintiff alleges tortious conduct on behalf of the Defendants.
Pendleton	Internal affairs of a commercial entity; A request for judicial dissociation; corporate malfeasance with regard to the operation of a third business entity which the parties jointly formed with each business seeking relief in the form of judicial expulsion of the other from the jointly formed limited liability company; corporate governance; potential judicial supervision of dissolution of a limited liability company; and potential valuation of distributional interest between two business entities.
Preston	Internal affairs of a commercial entity; liability of shareholders, directors, officers, partners, etc.; shareholders derivative claims.
Preston	This matter is in the nature of a derivative shareholder action. Involves accusations of breaches of fiduciary duties by the majority shareholder and the directors/officers of the company to the minority shareholders. Internal governance of the company and accusations of self-dealing by the majority shareholder. Complex issues surrounding work invoices, land appraisals, and oil and gas leases.
Upshur	Involves a contractual dispute between the parties related to the quality and timelines of work performance by the Defendant under several public work project subcontracts, and involves matters of significance to transactions between business entities.

Resolved Cases

As of December 31, 2014, thirteen cases have been resolved after being referred to the Division in an average of 307.6 days. Five settled at or after mediation with a resolution judge, one was tried by jury and one by bench trial, one was resolved by summary judgment, and the others settled prior to mediation.

Case Style	County	Presiding Judge	Resolution Judge	Date of Chief's Ruling	Date of Final Order	Age of Case in Business Court
Casto Technical Services, Inc. v. Omega Facility Solutions Surety, Inc.	Kanawha	Young	Rowe	12/27/2012	9/30/2013	277
DB Land, et al. v. Empire Consulting Services, et al.	Kanawha	Wilkes	Young	2/5/2013	2/24/2014	384
Atkinson v. General Glass Company, et al.	Kanawha	Rowe	Evans	4/3/2013	4/4/2014	366
Mountain State Carbon v. Bluestone Coal Corp., et al.	Ohio	Wilkes	Young	4/26/2013	4/3/2014	342
Erie Insurance v. Lambert Construction Co., et al.	Mercer	Rowe	Evans	5/10/2013	3/12/2014	306
Holley, et al. v. Beirne and Elk Meadow Energy, et al.	Kanawha	Young	Rowe	5/10/2013	11/11/2014	550
Harrison County Development Authority v. Tetrack & Bartlett	Harrison	Young	Wilkes	5/31/2013	8/5/2014	431
Holliday, et al. v. Toney, et al.	Greenbrier	Rowe	Evans	6/24/2013	7/14/2014	385
Dealership Management Company v. Air-Row Sheet Metal Co., Inc., et al.	Berkeley	Wilkes	Evans	8/1/2013	8/12/2014	376

Case Style	County	Presiding Judge	Resolution Judge	Date of Chief's Ruling	Date of Final Order	Age of Case in Business Court
Shell Equipment v. Rossco, et al.	Upshur	Wilkes	Rowe	9/24/2013	5/1/2014	219
Franklin Oil Co v. GEOJIM	Pendleton	Wilkes	Clawges	3/18/2014	7/18/2014	122
Huntington Municipal Development Authority v. Mountaineer Gas	Cabell	Farrell	Young	3/18/2014	8/14/2014	149
Lee Trace v. BC Council, et al. ³	Berkeley	Wilkes	None	5/29/2014	8/29/2014	92

Pending Cases

The Business Court Division has twenty-six pending cases. Due to complexity some cases go beyond the ten-month final disposition goal, but every case is being managed efficiently by the combined efforts of the Chair, the Executive Director, and the assigned presiding and resolution judges. In 2015, the newly-hired Division Law Clerk will assist the Division Judges with legal research to aid in timely resolutions.

FEEDBACK

During the first two years of Business Court, the Executive Director sent a survey to all counsel upon final disposition of each business court case and requested that it be completed anonymously and returned to the central office. The majority of the feedback was positive with 84% being satisfied or extremely satisfied; however, the Division did receive some constructive feedback which highlighted some areas needing improvement. That feedback influenced the Rule Amendment discussed in the "Highlights of 2014" section above. The Executive Director no longer sends out surveys, but continues to welcome any comments or suggestions relating to the operation of the state's Business Court Division.

³ This referral is a tax appeal that consists of five separate cases involving the same parties. A final order has been issued in two of the cases which are on appeal. The other three cases are stayed pending appeal.

The Division continues to hear positive feedback from participants in Business Court verbally and through published articles. John McCuskey, a managing partner and co-founder of Shuman, McCuskey & Slicer, PLLC in Charleston, states, “I think it works out to the advantage of both litigants to have a judge as well as a support system that is geared toward trying to understand and resolve business disputes.”⁴ Kenneth Webb Jr., a partner at Bowles Rice, LLP in Charleston, proclaims, “[e]ssentially, you get a free mediation in the case by an experienced business court judge,” and further states, “[m]y impression is that the resolution judge offers you resolution options beyond mediation, which include arbitration, and it is wide open.”⁵ John Meadows, who is of counsel at Steptoe & Johnson, PLLC, agrees with the benefits of judicial-led mediation and says, “[i]t helps with dealing with clients, and it helps with dealing with opposing counsel. That judge has immediate credibility, and that judge has a great wealth of legal knowledge and expertise.”⁶ A law review article focusing on the benefits of an Intermediate Appellate Court, indicates that the state’s judicial environment for businesses has improved with the introduction of the Business Court Division and that companies litigating in West Virginia will benefit by (1) enjoying a “more effective and efficient resolution in the business court,” (2) having experienced and trained judges in business law issues and developments, (3) having the availability and encouragement of judicial-led mediation, and (4) thorough case management.⁷ The article further asserts that, “[t]he new Business Court Division is a significant improvement to how cases between companies are handled and decided in West Virginia.”⁸

⁴ Robert, *supra* note 1, *Attorneys*.

⁵ *Id.*

⁶ *Id.*

⁷ Stephanie Zwerner, *Better for business, better for justice: Why West Virginia Needs an Intermediate Appellate Court*, 117 W.Va. L. Rev. 429 (2014).

⁸ *Id.*