

Final Report and Proposed Recommendations
Business & Technology Case Management Program
MSBA Business Law Section Ad Hoc Task Force
January 31, 2017

The Business & Technology Case Management Program (“BTCMP”) introduced a new approach to handling complex business and technology law cases in the Maryland circuit courts. Since its implementation in 2003, the BTCMP has addressed some important issues in managing complex business and technology law cases. Nevertheless, several key factors have limited the effectiveness of the program. These factors include:

- Non-uniformity in the program as administered in the various circuits;
- Inconsistency in forms and case management procedures;
- Lack of coordination of, and accessibility to, information;
- Lack of coordination of, and accessibility to, opinions; and
- Lack of coordination of, and accessibility to, resources.

As concern over the program’s effectiveness grew, the Business Law Section of the Maryland State Bar Association created an Ad Hoc Task Force on the BTCMP (“Task Force”). The Business Law Section Council and the Task Force engaged in an extensive two-year study of these issues, which culminated in a well-planned and well-presented Spring 2016 Symposium: *Taking Stock of Maryland’s Business and Technology Case Management Program and Business Courts Around the Country* (the “Symposium”). The Symposium participants included the following judges and practitioners from Maryland and a few neighboring jurisdictions:

Judge Stuart R. Berger, Maryland Court of Special Appeals

Judge Ronald Rubin, Montgomery County Circuit Court

Judge Audrey J.S. Carrión, Baltimore City Circuit Court

Judge Kathleen Gallogly Cox, Baltimore County Circuit Court

Judge Sean D. Wallace, Prince George’s County Circuit Court

Judge Albert Matricciani (Ret.), Whiteford, Taylor & Preston, LLP

Judge Steven L. Platt (Ret.), The Platt Group, Inc.

Judge Mary Miller Johnston, Superior Court of Delaware

Judge Christopher C. Wilkes, 23rd Judicial Circuit of West Virginia, Chair of Business Court Division

Judge Timothy S. Driscoll, Supreme Court of New York

Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases in North Carolina

Vice Chancellor Donald F. Parsons, Jr., Morris, Nichols, Arsht & Tunnell

Eric G. Orlinsky, Saul Ewing LLP

Geoffrey M. Gamble, Saul Ewing LLP

Mitchell L. Bach, Eckert Seamans Cherin & Mellott, LLC

Robert L. Haig, Kelley Drye & Warren, LLP

William M. Krulak, Jr., Miles & Stockbridge P.C.

Scott Wilson, Miles & Stockbridge P.C.

Rachel McGuckian, Miles & Stockbridge P.C.

Charles Piven, Brower Piven, A Professional Corporation

Kristen Herber, Under Armour, Inc.

Lee Applebaum, Fineman Krekstein & Harris, P.C.

Michelle M. Harner, Professor of Law at the University of Maryland Francis King Carey School of Law.

I. Potential Issues Facing the BTCMP

The primary purpose of the Symposium was to review certain aspects of the BTCMP, including: (a) centralization and administration; (b) selection and assignment of judges; (c) selection and assignment of cases; (d) resources for courts, including education and opportunities to issue written opinions; (e) appeals process; and (f) online presence and accessibility of program to businesses and practitioners; and to address any potential weaknesses in these areas. The Symposium participants were selected based on their respective experience and expertise as judges and practitioners in the BTCMP and related business courts in other jurisdictions. They offered insights and suggestions concerning these topics, which have been summarized below.

A. Centralization and Administration

Uniformity and predictability in the administrative process were identified as key goals for the fulfillment of the BTCMP's legislative purpose of promoting business in Maryland.¹ (Gale, 111:20-112:1; Herber, 147:7-10; Orlinsky, 112:20-113:3; Piven, 111:9-16.) Symposium participants indicated that the lack of centralization arising from circuit court inconsistencies, judicial interest, bias, and specialty concerns from the bar all stand as roadblocks to uniformity. (J. Platt, 29:20-30:5; 33:18-21; 34:8-14; Haig, 64:1-9.) Geography, varying levels of enthusiasm, and priority of the BTCMP program across circuit courts were cited as the primary causes of inconsistent operations. (J. Platt, 29:20-30:5; 33:18-21.) Participants believed that the lack of consistency in the case management program across circuit courts and the lack of unification of circuit courts affect the level of interest in the BTCMP. (J. Carrión, 119:8-120:1.) Participants also noted a concern by some that the BTCMP may be viewed as an elitist, pro-business program, which may hinder the program's effectiveness. (J. Platt, 66:11-20; Haig, 20:5-8.) It was observed that there "have been criticisms that providing resources to business courts provides resources to the most affluent constituencies in court systems and deprives the least affluent." (Haig, 64:1-9.) To be clear, most of the Symposium participants did not concur with these criticisms but merely reported their existence.

Looking to Delaware, North Carolina, and West Virginia, the Symposium participants explored other business court models and programs similar to the BTCMP. It was observed that "[i]n North Carolina there are three [judges] that are assigned exclusively complex business cases, and we get them from all 100 counties. So it's a statewide court, and I as the chief judge single-handedly overlook which cases are properly designated and which are not." (J. Gale, 93:4-10.) Similarly, in Delaware, there are only five trial judges in the Court of Chancery who hear virtually every case that relates to business matters. (VC Parson, 87:8-18.) The centralized

¹ The primary objective is to create a more certain and predictable process for business and technology litigation, which would allow businesses (and all litigants) to better assess the time and costs associated with resolving disputes in Maryland. Such a process can create cost-savings and efficiencies for the judiciary and all litigants. Notably, the objective is not to create a court that is, as a substantive law matter, pro-business or to facilitate pro-business outcomes, but predictability and efficiency could well be regarded as enhancing Maryland's reputation as a welcome forum to engage in business. See *infra* note 3.

nature of the Delaware Court of Chancery aides the predictability and uniformity goals by requiring all cases that fit within its jurisdiction to go to one courthouse. (Orlinsky, 113:10-14.) West Virginia employs a discretionary referral system, in which any party or judge may move to refer a particular case to the business court division, which has seven business court judges. (J. Wilkes, 190:4-11.) West Virginia's system was recognized for being able to achieve predictability by having one central administrative office, one dedicated law clerk, and an executive director who contacts counsel at regular intervals to expedite resolution of matters. (J. Wilkes 190:21-191:3.)

The low volume of business and technology ("B&T") cases, which varies significantly by county, has made it difficult to sustain efforts to implement and maintain the BTCMP. (See J. Berger, 57:11-22; J. Cox 200:20-201.) Indeed, as Judge Cox noted with respect to Baltimore County, "one of the biggest challenges is it is hard to have a really robust business and tech court when you're talking about a county our size with a bench our size and four judges in that rotation[.] . . . [W]hen there's not enough volume, it's hard to maintain the focus that I think a really robust business tech program requires." (J. Cox, 199:8-201:9.) Symposium participants suggested that enhanced education for the bar and the centralization of the administrative process may encourage participation and increase case volume. (J. Wilkes, 201:10-202:5.) Further, Symposium participants recommended that a high-level advisory council, which would meet regularly and recommend improvements, be created to assist the BTCMP. (J. Matricciani, 239:18-240:17.)

B. Selection and Assignment of B&T Judges

The Symposium participants generally agreed that B&T cases should be assigned to specific judges. As one Symposium participant explained:

[L]itigation involving sophisticated business, commercial or technology matters should be handled by judges with some expertise...² that [employ] advanced case management techniques including and in particular [that] one case/one judge should be available to judges handling B&T matters and that those judges would issue opinions helpful to the other [future] business litigants and judges.³

² The BTCMP, and litigants in the program, would benefit from judges with a general working knowledge of the law and the legal issues relevant to cases involving business, finance, and technology disputes. Such expertise would not affect a judge's role in resolving each case based on an application of the law to the facts of the particular matter.

³ A consistent development and application of the law would create judicial efficiencies by, among other things, allowing the court and the litigants to more readily identify disputed issues and streamline the resolution of those matters. See also *supra* note 2. As explained by the North Carolina Business Court's website:

Specialization. Because the Business Court judges will hear only complex business cases, they will develop proficiency in handling both the substantive law and the case management issues that arise in complex cases. Much like the Delaware Chancery Court, the judges will acquire

(J. Platt, 33:5-13.)

Although criticisms and concerns about a specialized court were raised, including the concern that certain jurisdictions could not support dedicating multiple judges exclusively to a B&T docket, (J. Cox, 208:12-16), most participants recognized the benefit of increased efficiency that would come from specially-assigned B&T judges not being “distracted by the criminal . . . or the juvenile docket[s].” (Piven, 114:5-10; 97:2-98:8.) Special B&T assignment would “reduce[] the cost associated with the learning curve in terms of educating the judge. It promotes efficiency both in the subject matter and in the individual case,” and “prevent[s] gamesmanship.” (J. Berger, 50:17-22, 51:4-10.)

In North Carolina, there are a select number of judges (currently five) who are exclusively assigned to adjudicate complex business matters from all across the state. (J. Gale, 93:4-10.) There, the chief judge oversees B&T case assignments to ensure they are properly assigned. (*Id.*) The approach in the Delaware Superior Court (not in Chancery), which was also discussed, identifies a select number of judges (currently four) to serve on the panel of judges assigned to B&T cases; these judges generally are selected based on expressed interest in B&T matters, prior experience in handling such matters, or being “stellar in some other respect that they really are . . . capable of handling these kind of cases[.]” (VC Parsons, 127:8-18.) In the Delaware Chancery Court, the chancellors hear a significant number of business cases due to the nature and reputation of that Court and because internal business disputes fall within the constitutional jurisdiction of that Court.

C. Conferring Jurisdiction on Qualifying B&T Cases

Even with specific judges dedicated to the B&T docket, the Symposium participants recognized the attendant jurisdictional concerns. First, courts must decide which business cases should be routed to the B&T docket. Participants noted several recurring types of matters that should belong on the B&T docket, such as REIT disputes, (J. Berger, 60:18-61:7), “corporate governance, trade secret, [and] antitrust,” (J. Gale, 85:1-86:12), and “class actions, stockholder disputes, and internal relations of an LLC or LLP,” (J. Rubin, 205:3-12).

Second, once a case is determined to be eligible for special assignment, courts must ensure that their exercise of jurisdiction is proper, and establishing B&T jurisdiction could be a mandatory

the level of expertise in dealing with complex cases that come with specialization, which in turn will lead to greater efficiency and predictability.

North Carolina Business Court, About the North Carolina Business Court, available at http://www.ncbusinesscourt.net/ncbc_website/new/aboutcourt/. See also Michigan Courts, Business Courts, (“Business courts are intended to provide a case management structure that facilitates more timely, effective, and predictable resolution of complex business cases. Specialized dockets improve the efficiency of the courts, which benefits all litigants.”), available at <http://courts.mi.gov/administration/admin/op/business-courts/pages/business-courts.aspx>.

or discretionary issue. Many states, including West Virginia, have employed a discretionary referral approach, under which either party may request B&T designation for a case without an obligation of a party to request or a court to assign B&T designation to any matter. (J. Wilkes, 190:4-5; J. Gale, 114:13-115:1.) Some Symposium participants saw discretionary B&T jurisdiction as a means of bringing flexibility to dockets, (J. Carrión, 94:2-5), including the ability to assign business cases based, in part, on the number of B&T matters already pending in that jurisdiction, (J. Platt, 214:10-215:20.) Others worried that such discretion would permit too much flexibility, thereby detracting from predictability. (Haig, 22:2-19.) Conversely, B&T jurisdiction could be mandatory or automatically conferred in qualifying cases. (J. Rubin, 205:3-12.) Under the mandatory jurisdiction approach, the scope of B&T jurisdiction could be defined by statute or rule, under which cases falling within that scope would have a right to enforce B&T jurisdiction. (VC Parsons, 88:11-16.) Some states employ a hybrid model, mandating jurisdiction in certain cases while including other cases on a discretionary basis. (Haig, 21:19-22:1.) With any approach, jurisdictional issues are likely to arise. Although a judge can always be called on to make the final decision as to whether a case is, in fact, a qualifying business case on the basis of complexity criteria as set forth in Maryland Rule 16-308 (Applebaum, 73:2-74:22), that may raise concerns that “[l]itigating over this issue” is “a waste of time and effort[.]” (J. Matricciani, 242:3-6.)

Regardless of the chosen jurisdictional approach, the Symposium participants agreed that B&T designation must be made in the early stages of the litigation; North Carolina representatives attributed this aspect to the success of their special assignment program. (J. Gale, 85:1-86:12.) In North Carolina, a case qualifying for B&T jurisdiction must be filed for B&T designation either by the plaintiff at the time of filing the complaint, or by the defendant within 30 days of the commencement of the action. (J. Gale, 85:1-86:12) (attributing this strict timeline to the state’s transition from discretionary to quasi-mandatory jurisdictional approach). In order to thwart venue disputes, parties could be required to waive venue as a prerequisite for B&T jurisdiction, (J. Platt, 121:17-122:3), or, alternatively, have all pretrial matters conducted from the presiding judge’s chambers, while still trying the case in the proper venue, (J. Gale, 116:12-16.)

D. BTCMP Judicial Resources

When it comes to focusing on business and technology cases, judges “should be given the time and the resources to do that job.” (J. Platt, 33:13-15.) The Symposium focused on three major categories of judicial resources: (1) staffing and case assignment issues; (2) sufficient time to issue written opinions; and (3) educating the judges within the BTCMP.

It was observed that the number of judges assigned to the BTCMP impacts the amount of resources that are available to the program. (J. Carrión, 83:16-21.) There is no problem with a judge from another county hearing a case, but issues arise with the resources and the availability of courtroom space. (J. Cox, 216:15-217:4; 217:14-218:1.) Although the judges are paid by the state, the county provides all of the other court resources and administration. (J. Wallace, 218:15-219:2.) The judges at the Symposium agreed that the use of special masters and

magistrates could help alleviate the lack of resources. Special masters could be used in discovery disputes and jury screenings. (J. Johnston, 153:18-156:22.) Special magistrates could be used to increase the efficiency in resolving the case. (Herber, 164:1-18.) Among other uses, special magistrates could be appointed and the judge could assess the costs to the parties. (J. Wallace, 158:9-13.)

Symposium participants agreed that B&T judges must be afforded time to issue written opinions to increase the body of Maryland jurisprudence in B&T cases. (J. Wallace, 177:17-178:3.) Generally, practitioners want published B&T decisions to help guide them in drafting pleadings and advising clients.⁴ (Wilson, 182:2-10.) Such development of a robust case law should also drive greater efficiencies by reducing the number of future disputes. Judges generally agree that the courts would greatly benefit from “statewide discovery orders, ESI orders, [and] scheduling conference orders.” (J. Rubin, 223:14-19.) Many of the judges, however, are not afforded the time necessary to write opinions for publication. “[T]he ability to do that with the time to really write published opinions. I don’t want to put something in writing that’s not to the quality that I think . . . I want to have my name on it.” (J. Wallace, 177:19-178:3.) Judges are often forced to use their nights and weekends to write these important opinions. (J. Ruben, 181:4-13.)

The Symposium participants emphasized the need for specialization and education of judges regarding the law and the legal issues to hear BTCMP cases, as mentioned in the Commentary to Maryland Rule 16-205. (J. Berger, 53:4-21.) The current Maryland education program does not offer diversity in the education programs. (J. Carrión 100:22-101:11.) Additionally, judges must “be able to extricate themselves from the day-to-day grind of deciding cases, go somewhere for a week or so and then immerse themselves in these issues. That is not happening now.” (J. Carrión,

⁴ Such opinions would be persuasive, but not precedential. This approach is consistent with the existing treatment of BTCMP opinions available online. The BTCMP website explains:

In order to provide lawyers and litigants with a growing body of predictive information at the trial court level to advise clients on likely rulings and to encourage collegiality and consistency among judges, the Maryland Business and Technology Case Management Program recommended that an opinion database of judicial opinions arising from cases in the program be created. Opinions published on this site will contain factual or legal analysis that is useful to judges, lawyers, and litigants interested in the Program. These trial court opinions are not considered to be precedent.

See Maryland Business and Technology Case Management Program, Published Opinions, available at <http://www.mdcourts.gov/businesstech/opinions.html>.

The MSBA Business Law Section Council believes that this and the other recommendations set forth in Parts II-VII of this Report would benefit the judiciary and all participants in the BTCMP. The objective of these recommendations is to create more certainty, predictability, and uniformity in the process and the applicable law for all parties. The focus is on creating efficiencies for both the judiciary and the litigants. The Council is not advocating for a court that is biased in favor of business entities against individuals or other litigants. See also *supra* note 1.

101:18-102:1.) There is a severe need for mandatory educational programs for judges in the BTCMP program. (J. Cox, 228:3-6; J. Platt, 226:7-14; J. Wilkes, 229:11-230:5.) A leading proponent of business courts pointed out, however, that the Maryland judicial education for business and technology law is ahead of the curve: “I think you’re actually way ahead of almost every other state in terms of your educational component which was implemented during the first year of the program’s existence, and I think you should be proud of it.” (Bach 224:18-21.) Moving forward with educational programs, it was agreed that the programs should strive for diverse education to provide judges with education from both plaintiff and defense points of view. (Applebaum, 107:13-19; Piven, 99:18-19.)

E. BTCMP Appeals

Similar to the lack of published trial court opinions, Symposium participants expressed significant concern over the lack of decisions coming from the Maryland appellate courts relating to B&T matters. (J. Matricciani, 48:14-16.) Judges find it difficult to reconcile the dedication of time and resources to BTCMP with the lack of volume of appellate cases on B&T issues. (J. Cox 207:22-208:2.)

Some states, including Pennsylvania and Texas, have discussed specialized appellate courts dedicated to B&T cases; however, no implementation has happened so far. Specialized appellate courts have faced contention in New York for the same reasons that B&T trial courts have struggled with successful implementation. (J. Driscoll, 186:12-187:2.) Although not a specialized appellate court structure, North Carolina has implemented a streamlined appellate structure, where appealed B&T cases skip the intermediate appellate court and go straight to the North Carolina Supreme Court. (Applebaum, 185:3-9.) One idea raised at the Symposium is to have three judges from the Maryland Court of Special Appeals specially assigned to handle all BTCMP appeals.⁵ (Orlinsky, 185:20-186-11.) However, participants were skeptical that any such appellate specialization could be achieved anytime soon. (J. Matricciani, 243:18-22.)

F. Online Presence and Accessibility

With respect to online presence and accessibility of the BTCMP, participants noted that there are two websites, a Baltimore City site and a statewide site, where B&T opinions are posted. (J. Matricciani, 44:7-12.) Although the opinions are insightful, they cannot be cited to the Court of Special Appeals because they lack precedential value. (J. Berger, 55:11-22.) Participants also observed that many other states, notably Delaware and West Virginia, have standard guidelines, scheduling orders, and other tools for case management that the BTCMP lacks. (J. Johnston, 182:11-18, 134:19-135:2; J. Wilkes, 220:3-10.)

⁵ The Task Force considered this structure, as well as other proposals and comments regarding the appellate process. Ultimately, the Task Force did not offer any recommendations on the appellate process, primarily because it was focused on the trial court process. Nevertheless, the proposals concerning education and training at Part VI.A could be extended or available to appellate judges on both the Court of Special Appeals and the Court of Appeals.

The Task Force's recommendations outlined below address these topics and notable weaknesses in the BTCMP and are supported by the Symposium transcript, the research (including statistical data) and qualitative interviews of BTCMP judges throughout the state of Maryland conducted by students at the University of Baltimore School of Law, the research on business courts in other states conducted by students at the University of Maryland Francis King Carey School of Law,⁶ the reports produced by the original task force and implementation committees in connection with the formation of the BTCMP in 2003, and other information reviewed during the Task Force's work.⁷

II. Structural Changes to the BTCMP

The Task Force strongly recommends a change to the structure of BTCMP. The primary deficiencies in the program relating to non-uniformity, inconsistency, and lack of coordination are best addressed (and some aspects of these problems can only be addressed) through a change in the basic structure of the program. The Task Force considered proposing a complete overhaul of the program to resemble the structure of the Delaware Court of Chancery, creating a separate, centralized court for business and technology law cases. The Task Force rejected this approach, despite some strong support for a separate centralized court like the Delaware Court of Chancery from Maryland's legal and business communities. The Task Force has intently focused on a tailored solution that would best meet the needs of Maryland businesses and litigants within the existing framework of Maryland's judiciary. The Task Force believes that Proposal A below satisfies all concerns and would greatly enhance the effectiveness and efficiency of business and technology litigation in Maryland to the benefit of all stakeholders, including the judiciary. The Task Force strongly recommends that Proposal A be adopted by the Maryland courts.

A. Proposal A: A Statewide Business Court

The BTCMP should be restructured to designate three or four judges as program judges statewide. Notably, this designation would not be determined by geography and would not require new judges, courthouses, or resources. BTCMP cases would be assigned to program judges on a rotating basis (akin to the federal system) regardless of where the case is filed or the circuit in which the program judge sits. Parties to BTCMP cases would be asked to waive venue to allow the program judge to hear the case in his or her home circuit. If the parties did not waive venue, the program judge would be specially assigned to the circuit in which the case was filed, and the program judge would hear matters requiring court proceedings in that circuit. *Note:* If the litigants seek a temporary restraining order or other expedited relief at the

⁶ The foregoing materials and the original task force report are included as Appendices to this Report.

⁷ The Task Force shared drafts of this Report with various constituencies, including participants in the Symposium (which includes practitioners who represent plaintiffs and defendants in business litigation, inhouse counsel, and judges), members of the Association of Corporate Counsel (ACC), and others. The Task Force carefully considered all comments that it received and incorporated many of those comments in this Report and the recommendations set forth in Parts II-VII.

commencement of the case, the BTCMP judge would be assigned on an expedited basis. In the extreme case where the assigned judge cannot make him- or herself available under any circumstances, the case would be assigned to the duty judge in the circuit solely for purposes of deciding the temporary restraining order or other request for expedited relief. The program judge could handle matters not requiring in-person court proceedings from his or her home circuit. BTCMP judges would hear all BTCMP cases statewide, but also could hear other cases if an insufficient number of BTCMP cases exist to achieve a full caseload.

Under Proposal A, each circuit administrative judge could recommend at least one circuit judge to be considered by the Chief Judge for appointment to the BTCMP, provided, however, that the administrative judge in each of Baltimore City, Baltimore County, and Montgomery County would be required to recommend at least two circuit judges for consideration, and the administrative judge in each of Anne Arundel County, Howard County, and Prince George's County would be required to recommend at least one circuit judge for consideration. The required number of nominees from certain circuits are based on the historical number of BTCMP cases filed in each county, but as further discussed below, may be adjusted based on periodic reviews of the program's operation by the Program Advisory Board (described in Alternative C). As further explained below, regardless of the overall number of nominees submitted by the administrative judges, the Chief Judge would only assign a total of three or four judges to the BTCMP.

Under Proposal A, the Chief Judge would select the three or four program judges from the judges nominated by the administrative judges to serve the BTCMP statewide. This process would apply whenever a judicial opening existed on the BTCMP. In addition, as further discussed below, the overall number of judges assigned to the BTCMP on a statewide basis could be adjusted based on periodic reviews of the program's operation by the Program Advisory Board. As discussed at Part III, the primary qualifications to serve as a BTCMP judge should be an interest and a willingness to serve and to comply with the requirements of the program, including the opinion writing and ongoing education requirements discussed at Parts V and VI.A, respectively. In addition, the business, finance, or technology background of a judge may be considered, but should not be required or determinative. Once appointed, the BTCMP judges should meet periodically (but no less than quarterly) to discuss the coordinated administration and operation of the program, including the adoption of uniform forms, case management procedures (including discovery, electronically stored information, and scheduling conference matters), opinion writing, new or novel issues of law, challenging legal issues, and other basic protocols.

Under Proposal A, a Program Advisory Board would be created to assist the functioning of the system. As more fully described below, the Program Advisory Board would be composed of sitting BTCMP judges, sitting appellate judges, former judges, practitioners, and business and community leaders. The Program Advisory Board would, among other things, conduct a review of the program every three years, assessing the kinds and number of cases and number of judges assigned to the program, the administration, duration, and resolution of such cases, and other issues relating to the implementation of the program. The Program Advisory Board would

submit this triennial report to the Chief Judge. A subcommittee of Program Advisory Board members who are sitting BTCMP judges also would serve as an opinion review committee, which is available to review opinions of the program judges prior to publication if requested, as discussed at Part V. Under Proposal A, the Program Advisory Board also would facilitate and monitor educational opportunities consistent with the guidelines at Parts VI.A and VI.C, and coordinate and maintain the BTCMP website as discussed at Part VII.

Proposal A addresses the primary deficiencies in the existing system and would greatly enhance its overall operation.

B. Alternative B: Program Coordinator

As a lesser alternative to streamlining the overall system, the BTCMP could be improved through the appointment of a statewide Program Coordinator. Presumably, the Program Coordinator would be a BTCMP judge. The Program Coordinator would report directly to the Chief Judge and would be responsible for, among other things:

- Reviewing applications for assignment and assigning cases to the BTCMP, though the administrative judge or individual circuit judge would continue to have the authority *sua sponte* to assign a case to the BTCMP (the assigning judge would then notify the Program Coordinator of the case for tracking purposes). *Note:* If the litigants seek a temporary restraining order or other expedited relief at the commencement of the case, the BTCMP judge would be assigned on an expedited basis. In the extreme case where the assigned judge cannot make him- or herself available under any circumstances, the case would be assigned to the duty judge in the circuit solely for purposes of deciding the temporary restraining order or other request for expedited relief.
- Developing and implementing uniform forms, case management procedures (including discovery, ESI, and scheduling conference matters), and protocols for the program.
- Monitoring and tracking the progress and resolution of cases assigned to the BTCMP.
- Monitoring the assignment of judges to BTCMP cases, though administrative judges would retain the authority to assign judges and manage each judge's docket assignments consistent with the guidelines at Part III.
- Monitoring and facilitating the publication or posting of opinions written by BTCMP judges consistent with the guidelines at Part V, including coordinating with LEXIS, Westlaw, and other online legal publishers to ensure appropriate treatment of BTCMP opinions and ensuring easy public access to all opinions online.
- Monitoring and facilitating appropriate educational programs for BTCMP judges consistent with the guidelines at Parts VI.A and VI.C.
- Coordinating and maintaining the BTCMP website as discussed at Part VII.

Under Alternative B, the Program Advisory Board would assist the functioning of the system in much the same way as described above at Proposal A.

C. Alternative C: Program Advisory Board

In both Proposal A and Alternative B, the recommendations include the appointment of a Program Advisory Board. Although the Program Advisory Board is intended as a complement to other, more important and much-needed changes to the system as described at Parts I.A and I.B, as the most minimal changes to the system, the Program Advisory Board should be implemented even if no other structural changes are adopted. The Program Advisory Board should be populated with individuals committed to, and experienced with, complex business and technology law matters, including sitting BTCMP judges, sitting appellate judges, former judges, practitioners, and business and community leaders. The board members should represent the diverse and broad interests of the stakeholders in business and technology law matters. The board should consist of seven members.⁸

Although not recommended as a stand-alone proposal, if the only structural change is the implementation of the Program Advisory Board, the board should be responsible for:

- Developing and implementing uniform forms, case management procedures (including discovery, electronically stored information, and scheduling conference matters), and protocols for the program.
- Monitoring and tracking the progress and resolution of cases assigned to the BTCMP.
- Monitoring the assignment of judges to BTCMP cases, though administrative judges would retain the authority to assign judges and manage each judge's docket assignments consistent with the guidelines at Part III.
- Monitoring and facilitating the publication or posting of opinions written by BTCMP judges consistent with the guidelines at Part V, including coordinating with LEXIS, Westlaw, and other online legal publishers to ensure appropriate treatment of BTCMP opinions and ensuring easy public access to all opinions online.
- Monitoring and facilitating appropriate educational programs for BTCMP judges consistent with the guidelines at Parts VI.A and VI.C.
- Coordinating and maintaining the BTCMP website as discussed at Part VII.

In addition, the Program Advisory Board would conduct a review of the program every three years, assessing, among other things, the kinds and number of cases and number of judges assigned to the program, the administration, duration, and resolution of such cases, and other issues relating to the implementation of the program. The Program Advisory Board would submit this triennial report to the Chief Judge. A subcommittee of Program Advisory Board members who are sitting BTCMP judges also would serve as an opinion review committee, which is available to review opinions of the program judges prior to publication if requested, as discussed at Part V.

⁸ The board needs to be representative, but it also must be of a size that is manageable and is able to meet on a regular basis to review materials, deliberate, and make recommendations. Although the number of members selected could be more or less than that proposed here, the board should have a firm number of members that does not affect its functionality and effectiveness.

Again, the Program Advisory Board will be most effective if implemented in connection with Proposal A or Alternative B, as described at Parts II.A and II.B.

The Task Force believes that Proposal A is preferable to the alternatives presented as Alternatives B and C, and feels that Proposal A reflects the collective findings of the two law school studies and the experience and insight of the leading judges and practitioners who participated in the Symposium. That said, the Task Force recognizes that the elements of the three proposal are not necessarily mutually exclusive, and a final approach may include elements of two or three of the proposals.⁹

III. Selection and Assignment of Judges

Proposal A addresses specific procedures for selecting and assigning judges to the BTCMP in a streamlined program consistent with the structure outlined at Part II.A. Under Alternatives B and C, judges would continue to be selected and assigned as under the existing system.

In all instances (including Proposal A), the primary qualifications to serve as a BTCMP judge should be an interest and a willingness to serve and to comply with the requirements of the program, including the opinion writing and ongoing education requirements discussed at Parts V and VI.A, respectively. In addition, the business, finance, or technology background of a judge may be considered, but should not be required or determinative. The assignment procedures also should identify one of the judges assigned to the BTCMP as the lead judge, who would be responsible for coordinating discussions, activities, and interactions among the BTCMP judges, as well as with the Program Coordinator (if applicable) and the Program Advisory Board.

Perhaps most importantly, in all instances (including Proposal A) the overall case mix assigned to BTCMP judges should account for the BTCMP cases assigned to that judge, and adequate time and resources should be allotted to the assigned judge so that he or she has the time and resourced needed to write and publish opinions in the BTCMP cases consistent with the guidelines at Part V. BTCMP judges should not be required to take on BTCMP cases on top of their existing case assignments.¹⁰ Notably, the assignment of a BTCMP case to a BTCMP judge removes those cases, which often are the most time- and resource-intensive cases, from the dockets of other, non-BTCMP judges. Accordingly, there should be no meaningful impact on docket assignments or resource allocations from the assignment of BTCMP cases to BTCMP judges. Moreover, as under the existing system, the same BTCMP judge should be specially assigned to a specific BTCMP case for the entirety of that case.

⁹ Implementing Proposal A or any of the structural changes discussed in this Report likely will require an amendment of Maryland Rule 16-308 (Business and Technology Case Management Program).

¹⁰ Although the Task Force strongly recommends that the BTCMP judges receive full credit for their BTCMP cases, an alternative proposal would be to restrict the rotation of BTCMP judges to civil dockets, which may assist them in managing the workload.

IV. Selection and Assignment of Cases

In all instances, parties should have the ability to opt into the BTCMP through an application, as under the existing system. In Proposal A and Alternative B discussed in Section II above, one of the three or four sitting BTCMP judges or the Program Coordinator, respectively, should make a decision on the application. The administrative judge or an individual circuit judge also should have the ability *sua sponte* to assign a case to the BTCMP, as under the existing system, but should be expected to notify the BTCMP judges or the Program Coordinator of such determination. Nevertheless, the rule should be changed to designate certain cases that are presumptively qualified for the BTCMP and certain cases that are presumptively excluded from the BTCMP. The original task force considered this aspect of the program extensively, and this Task Force endorses that original approach with one minor change to the dollar threshold and a few other minor tweaks to the description of cases below. Accordingly, the Task Force recommends a rule providing as follows:

General Requirement. Only complaints seeking compensatory damages totaling \$100,000.00 or more,¹¹ or complaints seeking primarily injunctive or other equitable relief, will be considered eligible for assignment to the BTCMP if the other criteria identified below are met.

Presumptively Included Cases. Actions in which the principal claims involve the following should presumptively be assigned to the BTCMP.

- (i) Disputes arising out of technology development, maintenance and consulting agreements including software, network and Internet website development and maintenance agreements.
- (ii) Disputes arising out of the hosting of Internet web sites for business entities.
- (iii) Disputes arising out of technology licensing agreements, including software and biotechnology licensing agreements or any agreement involving the licensing of any intellectual property rights, including patent rights.
- (iv) Actions relating to the internal affairs of businesses (i.e., corporations, general partnerships, limited liability partnerships, limited liability companies, sole proprietorships, professional associations, real estate investment trusts, and joint ventures), including the rights or obligations

¹¹ Setting a threshold of \$100,000 may require an amendment to Maryland Rule 2-305 (Claims for Relief), which currently provides that “a demand for a money judgment that exceeds \$75,000 shall not specify the amount sought, but shall include a general statement that the amount sought exceeds \$75,000.” Alternatively, this change could be facilitated through an amendment to Maryland Rule 16-308 (Business and Technology Case Management Program). *See also supra* note 9.

between or among stockholders, partners and members or the liability or indemnity of officers, directors, managers, trustees, or partners.

- (v) Actions claiming breach of contract, fraud, misrepresentation or statutory violations arising out of business dealings.
- (vi) Stockholder derivative actions.
- (vii) Stockholder, consumer, or commercial class actions.
- (viii) Actions arising out of commercial bank transactions.
- (ix) Declaratory judgment and indemnification claims brought by or against insurers where the subject insurance policy is a business or commercial policy and where the underlying dispute would otherwise be assigned to the Program.
- (x) Actions relating to trade secret, non-compete, nonsolicitation, and confidentiality agreements.
- (xi) Business tort actions, including claims for unfair competition or violations of Maryland's Trade Secret or Unfair and Deceptive Trade Practices Acts.
- (xii) Commercial real property disputes other than landlord/tenant disputes.
- (xiii) Disputes involving Maryland's Uniform Computer Information Transactions Act, including alleged breaches of the warranty provisions provided in such Act.
- (xiv) Professional malpractice claims in connection with the rendering of professional services to a business entity.
- (xv) Claims arising out of violations of Maryland's Anti-Trust Act.
- (xvi) Claims arising out of violations of Maryland's Securities Act.

Presumptively Excluded Cases. Actions in which the principal claims involve the following shall be presumptively not assigned to the BTCMP.

- (i) Personal injury, survival or wrongful death matters.
- (ii) Medical malpractice matters.
- (iii) Landlord-tenant matters.

- (iv) Professional fee disputes.
- (v) Professional malpractice claims, other than those brought in connection with the rendering of professional services to a business enterprise.
- (vi) Employee/employer disputes, other than those relating to matters otherwise assigned to the Program.
- (vii) Administrative agency, tax, zoning and other appeals.
- (viii) Criminal matters, including computer-related crimes.
- (ix) Proceedings to enforce judgments of any type.

As discussed at Part II.A, in the streamlined system of Proposal A, BTCMP judges could be assigned to cases on a rotating basis and not limited by the geography of their home circuit (although deference might be given to having the BTCMP judge hear cases initially filed in his or her home circuit). In Alternative B or C, judges should be assigned on a rotating basis to cases within the circuit, and each circuit should have at least two judges assigned to the BTCMP to foster assignment akin to the federal system and discourage forum shopping.

V. Written and Published Opinions

The evidence reviewed by the Task Force supports the conclusion that certainty and predictability are vital components of a robust and effective business and technology law program.¹² The BTCMP currently lacks these components. The BTCMP needs to incorporate a procedure that fosters and promotes written opinions on important aspects of BTCMP cases and facilitates the use of these opinions to strengthen the system as a whole. Accordingly, the Task Force supports the following three recommendations:

- A presumption should exist in favor of written opinions on all matters that: are non-routine; involve new, novel, or unresolved issues of law; or would otherwise enrich the existing body of law. As discussed at Part III, BTCMP judges need to be given the time and resources necessary to write such opinions.
- Litigants should be able to cite opinions written by BTCMP judges in cases before other BTCMP judges and/or appellate courts. These opinions would not be considered precedent in other courts, but such opinions still convey valuable research and information. Other courts simply could have the opinions as a resource even though they would not be bound to consider them.¹³

¹² See *supra* notes 2 and 3.

¹³ See *supra* note 4.

- Litigants should be able to request that a BTCMP judge write and/or publish an opinion in a particular matter, providing justification to support the request. The judge would retain discretion with respect to any such request.

In addition, the Program Coordinator or the Program Advisory Committee (as discussed at Parts II.B and II.C) should ensure that all written opinions are published and easily accessible through the BTCMP website and other online resources and easily accessible via links from all court websites throughout the state. Among other things, the Program Coordinator or the Program Advisory Committee should work with online sources such as Westlaw or LEXIS to ensure that BTCMP opinions are compiled in a single, easily identifiable database for BTCMP cases. The Program Advisory Committee also should establish a subcommittee of its members who are judges to serve as an opinions review committee. The opinions review committee would be available to review opinions of the program judges prior to publication if requested by the program judge. This will add consistency and structure to the opinion writing and publication process.

VI. Resource Issues

As a general matter, the Task Force recognizes that the judiciary as a whole is in need of additional resources in terms of, among other things, technology, staffing, number of judgeships, and judicial salaries. The Task Force supports efforts to increase resources for the judiciary generally. Indeed, the Task Force and the Business Law Section stand ready to advocate for increased funding for the judiciary and/or increased filing fees either generally or specifically for BTCMP cases in order to increase resources for the judiciary. In addition, it believes that the following resources are of particular importance to the BTCMP.

A. Education of BTCMP Judges

Educational opportunities for BTCMP judges serve two distinct, but equally important, objectives. First, at the beginning of a judge's service to the BTCMP, educational programs inform the judges about their responsibilities in, and the issues pertinent to the kinds of cases assigned to, the BTCMP. Second, ongoing educational programs inform judges about key changes and developments in applicable or relevant statutes, regulations, and case law governing businesses and the constituents with which they do business. They also provide an opportunity for judges to discuss the coordinated administration and operation of the program, including the adoption of uniform forms, case management procedures (including discovery, electronically stored information, and scheduling conference matters), opinion writing, new or novel issues of law, challenging legal issues, and other basic protocols.

BTCMP judges should be required to attend an initial educational program that introduces them to the program and general business and technology law issues. After that, each BTCMP judge should be required to attend at least one meaningful educational program every year.

The Program Coordinator or the Program Advisory Board (as discussed at Parts II.B and II.C) should identify or work to develop relevant educational opportunities for BTCMP judges. These educational opportunities should offer both a variety of subject matters and a range of relevant perspectives so that judges may choose programming that will enhance their individual skill sets and be representative of the diverse issues and stakeholder interests in BTCMP cases. The Program Coordinator or the Program Advisory Board should work to ensure that BTCMP judges have adequate time and, where necessary, flexibility in managing their dockets to be able to attend relevant educational opportunities. The Program Coordinator or Program Advisory Board also should try to secure funding to reimburse travel expenses and support the judges' attendance at various educational programs offered by outside organizations such as the American Bar Association.

B. Technology

BTCMP cases often move quickly and involve parties from geographically diverse locations. Consequently, electronic access to file and review pleadings in cases is essential to an efficient system. Although some circuit courts are equipped for electronic filing and docket access, many are not. The Task Force strongly recommends the continued move toward electronic filing and docket access in all circuit courts.

In addition, given the complex nature of BTCMP cases, additional technology in the courtroom is needed in many circuit courts. Litigants should have the ability to reference and use exhibits in electronic format, with the ability to show the exhibit electronically in the courtroom. Litigants and the court should have video-conferencing capabilities and other technological tools to enhance both the administration and presentation of BTCMP cases. Again, the Task Force supports these improvements throughout the judiciary, but believes they are particularly relevant to the kinds of complex litigation matters handled by the BTCMP.

C. Education of BTCMP Stakeholders

One of the problems identified during the Task Force's work was the lack of information and understanding regarding the BTCMP in Maryland's legal and business communities. Many stakeholders are not aware of the program or its potential utility for litigation in which they may be involved. Accordingly, the BTCMP judges, working with either the Program Coordinator or the Program Advisory Board, should consider ways to inform stakeholders and provide them with accurate information, about the program. These efforts could include educational programs, written materials such as a BTCMP practice manual, and posting additional resources and information on the BTCMP website, as discussed below.

VII. Online Presence (BTCMP Website)

The BTCMP website needs updating, both from a design and a content perspective.

From a functional design perspective, the website is difficult to use. For example, clicking on the link for the Maryland rule implementing the BTCMP (Rule 16-308) takes you to a LEXIS page containing all rules for all states, which requires the user to already know the relevant rule number and location. In addition, the main BTMCP website provides only very high-level information. The circuit courts' websites vary as to what information they provide regarding the BTCMP in the particular circuit. Further, there is little uniformity or coordination among the various websites. From a content perspective, the website contains outdated information and could include more substantive resources.

A redesign of the website would significantly enhance the presence and administration of the BTCMP. The Program Coordinator or the Program Advisory Board could maintain a single website for the BTCMP generally, as well as with respect to each active circuit court. The circuit courts could then, in turn, simply provide a link to the main BTCMP website in lieu of having to maintain a webpage that coordinated with the other circuits. The Program Coordinator or the Program Advisory Board also should be responsible for updating the website on a regular basis.