

3-2003

Business Litigation and Cyberspace: Will Cyber Courts Prove an Effective Tool for Luring High-Tech Business into Forum States?

Jacob A. Sommer

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Business Organizations Law Commons](#)

Recommended Citation

Jacob A. Sommer, Business Litigation and Cyberspace: Will Cyber Courts Prove an Effective Tool for Luring High-Tech Business into Forum States?, 56 *Vanderbilt Law Review* 561 (2019)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol56/iss2/3>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

NOTES

Business Litigation and Cyberspace: Will Cyber Courts Prove an Effective Tool for Luring High-Tech Business into Forum States?

I.	INTRODUCTION	562
II.	THE DELAWARE COURT OF CHANCERY: AMERICA'S FIRST "SPECIALIZED BUSINESS COURT"	564
III.	ACTIVELY PURSUING BUSINESS: THE ARGUMENT FOR BUSINESS COURTS AND THEIR PROLIFERATION	567
	A. <i>The Increase in the Specialization of Law</i>	567
	B. <i>Dealing with the Need for Speed and Specialization: Specialized Business Courts and the Rocket Docket</i>	569
	1. Specialization: The North Carolina Business Court	570
	2. Speed: The Eastern District of Virginia's Rocket Docket	571
IV.	TECHNOLOGY IN THE COURTROOM: A BRIEF OVERVIEW OF RECENT DEVELOPMENTS	572
V.	COMBINING HIGH TECHNOLOGY AND BUSINESS COURTS: HOW MICHIGAN AND MARYLAND LEGISLATURES PROPOSE TO ATTRACT HIGH-TECH BUSINESS TO THEIR STATES	575
	A. <i>The Michigan Approach</i>	576
	B. <i>The Maryland Approach</i>	580
VI.	A FRAMEWORK FOR ANALYSIS: WHY DELAWARE?	582
VII.	MEETING DELAWARE'S CHALLENGE: HOW DO MICHIGAN AND MARYLAND COMPARE TO THE PERCEIVED BENEFITS OF INCORPORATING IN DELAWARE?	584
	A. <i>Quality of Decisionmaking</i>	585
	1. The Danger of "Overspecialization"	585
	2. The Value of Precedent	591

B.	<i>The Appearance of Due Process: Reconciling the Cyber Court's and Litigants' Expectations</i>	593
C.	<i>The Rocket Docket Takes off into Cyberspace: Will Michigan's Cyber Court Improve Efficiency?</i>	597
D.	<i>Conclusion: Will Michigan's and Maryland's Focus on High-Tech Businesses Provide an Avenue for Success?</i>	602
VIII.	LOCATION, LOCATION, LOCATION: COMPETING FOR LOCATION, NOT INCORPORATION	603
IX.	CONCLUSION: SOME RECOMMENDATIONS FOR STATES CREATING SPECIALIZED BUSINESS COURTS	609

I. INTRODUCTION

From beginning to end businesses are wed to the law. The life of a corporation typically begins with the filing of articles of incorporation with the secretary of state¹ and ends with either a merger into another corporation² or dissolution.³ At every point in a corporation's life cycle, the American legal system places its imprimatur on the corporation's activities and governance. Inevitably, because of the sophisticated nature of business and frequent encounters with the law, businesses become engaged in their fair share of litigation and must resort to the judicial system for resolution.

Business, especially high-tech business, moves very quickly, and time is almost always of the essence. Investors consume data rapidly and evaluate and sell shares at the touch of a button. Thus, the market price of listed stock almost immediately reflects every corporate action.⁴ Corporations and employees must therefore act quickly to assure investors and avoid a decline in stock prices and profits. The unresolved issues created by existing lawsuits can jeopardize corporate profits and share prices; thus quick resolution of disputes becomes all the more important as business speed increases.

A business's reliance on the law provides states with an avenue to make their forum more attractive as a state of location or incorporation. Corporate law is primarily state law, with a few notable

1. See DEL CODE ANN. tit. 8, § 101 (2001).

2. See § 251.

3. See § 273.

4. CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 167-74 (3d ed. 1999).

exceptions.⁵ Further, state law controls many other legal aspects of the corporate existence, including contract law, certain aspects of employment law, trade secret law, covenants not to compete, and tort law. States therefore have a great deal of control over the legal system's approach to business and business-related litigation. Delaware's experience as a pioneer in using this control to shape corporate law and policy so as to encourage businesses to incorporate there has been quite successful.⁶ These efforts have been so successful, in fact, that more than sixty percent of Fortune 500 companies have incorporated in Delaware.⁷

The new wave of high-tech businesses has led states to reconsider their own corporate law and tailor it to attract high-tech business to incorporate or locate in their states.⁸ Many commentators have referred to this movement as the "race for corporate charters."⁹ However, new scholarship questions whether states actually compete for corporate charters.¹⁰ This Note takes the position that regardless of actual or perceived competition for corporate charters, states should focus on attracting businesses to locate, not incorporate, in their states. Such a move would likely be more successful than competing with Delaware for corporate charters and would provide more benefits for the forum states. This Note draws on the court reform proposals of two states, Michigan and Maryland, as potential methods of luring high-tech businesses into forum states.¹¹ This Note then evaluates the probability that each method will entice businesses to incorporate in

5. Examples include federal securities law, antitrust law, and bankruptcy law.

6. Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 720 (1987) (noting that Delaware enjoys advantages because it was the first mover in the race for corporate charters).

7. Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1061 (2000); see also Demetrios G. Kaouris, Note, *Is Delaware Still a Haven For Incorporation?*, 20 DEL. J. CORP. L. 965, app. (1995) presenting statistics and tables showing the large number of incorporations and reincorporations in Delaware).

8. See Victoria Rivkin, ABA NETWORK, *Courting Tech Business*, available at <http://www.abanet.org/journal/jul01/fcyber.html> (last visited Feb. 23, 2002).

9. This term finds its roots in the Cary-Winter debate over whether the competition to obtain corporate charters is a race to the bottom or a race to the top. For Cary and Winter's arguments, see William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974), and Ralph K. Winter, Jr., *State Law, Shareholder Protection and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254-62 (1977).

10. See generally Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002) (arguing that, Delaware aside, competition is a myth because no state has taken significant steps to attract corporations, and no state stands to gain meaningful tax revenues or legal business from chartering firms).

11. See Governor John Engler, State of the State Address (Jan. 31, 2001), available at http://www.michigan.gov/gov/1,1431,7-103-705-1931—M_2001_1,00.html (last visited Nov. 12, 2002).

the respective forum state, and in addition, whether high-tech businesses will be more likely to locate in each state.

In Part II, this Note describes Delaware's success in the race for corporate charters. Part III of this Note will explore the development of specialized business courts and speed-enhancing rocket dockets and, in Part IV, the increased use of technology in the court system. After a firm grounding in the means by which courts have previously addressed business needs, in Part V this Note describes how Michigan and Maryland combine specialized business courts, procedural devices that promote efficiency, and technology to create courts designed to appeal to high-tech businesses. In Part VI, this Note explores Delaware's achievements in order to develop a framework for analyzing the Michigan and Maryland approaches. After analyzing how Michigan and Maryland compare to Delaware in terms of general corporate law, in Part VII the Note concludes that Michigan and Maryland have a better chance for success than other business courts but may need to restate and refocus their goals toward inducing businesses to locate in their states. Finally, this Note makes recommendations for states considering specialized business tribunals and remarks on how the experience in these specialized courts may be able to improve the court system as a whole, even if they are ultimately unsuccessful in drawing corporations to their states.

II. THE DELAWARE COURT OF CHANCERY: AMERICA'S FIRST "SPECIALIZED BUSINESS COURT"

It is no secret that other states envy Delaware's grip on corporate law.¹² This grip is largely the result of the Delaware Court of Chancery and its emergence as the preeminent forum for corporate disputes in the United States.¹³ The Delaware Court of Chancery is by far the oldest specialized court in the nation, even though it was not specifically designed to be specialized.¹⁴

Unlike other states,¹⁵ Delaware did not create the Court of Chancery expressly to resolve business litigation. Instead, the court evolved into a specialized business court as a natural result of

12. *Id.*

13. See William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992).

14. Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 902-03 (1990); Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 5 (1995).

15. See *infra* Part III.

Delaware's early decision not to merge its courts of law and equity¹⁶ and the influx of corporations into Delaware early in its history.¹⁷ Delaware's practices, from a structural standpoint, have remained relatively unchanged. In fact the only modification to Delaware's court system, in the procedural as opposed to substantive law sense, has gone virtually unused since its inception.¹⁸ The Court of Chancery has jurisdiction over all actions in equity; its jurisdiction therefore is not limited to business cases, but also includes, inter alia, civil rights actions seeking injunctive relief and guardianships.¹⁹ The court's business expertise is a by-product of the equitable nature of many business disputes including the duty of disclosure and the duty of good faith, as well as Delaware's treatment of class actions and shareholder derivative disputes as equitable in nature.²⁰ The Court of Chancery's specialization therefore resulted from its jurisdictional boundaries and its early caseload.

While the Delaware Court of Chancery is unique because of the continuing division between law and equity in Delaware,²¹ other factors also contribute to its success as a corporate forum. The Court of Chancery sits without a jury, and appeals from the court go directly to the Delaware Supreme Court.²² The appeals process creates a system of quick and consistent dispute resolution because litigants deal with a limited number of judicial viewpoints from one chancellor,

16. See Dreyfuss, *supra* note 14, at 5. See generally Maurice A. Hartnett, III, *The History of the Delaware Court of Chancery*, 48 BUS. LAW. 367 (providing a brief overview of the Delaware Court of Chancery's history).

17. See William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792-1992*, 18 DEL. J. CORP. L. 819, 831-34 (1993) (describing the transition of the court of chancery into the nineteenth century and its emergence as a forum for litigating corporate disputes).

18. See Ad Hoc Committee on Business Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947, 956 (1997). In April of 1994, Delaware created a specialized business litigation panel, made up of trial judges from its superior courts and the Delaware Court of Chancery. *Id.* Delaware directed the panel to hear controversies that involve more than one million dollars and in which at least one party is a Delaware citizen. *Id.* Parties using this panel agree to waive jury trial rights and the opportunity to seek punitive damages. *Id.* As of July of 1996, no parties had submitted cases to the panel. Delaware's most overt action designed to attract businesses to incorporate in Delaware was a revision of their corporate law statute in 1967, but those statutory maneuvers are beyond the scope of this Note. See Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85, 88-92 (1990) (discussing the explanations for Delaware's dominance in corporate law).

19. Dreyfuss, *supra* note 14, at 5; see also DEL. CONST. art. IV, § 10, DEL. CODE ANN. tit. 10, § 341 (2001); *Monroe Park v. Metro. Life Ins.*, 457 A.2d 734, 738 (Del. 1983) (noting that under Delaware's constitution, the court of chancery has jurisdiction to hear and determine all matters and causes in equity).

20. Dreyfuss, *supra* note 14, at 25.

21. See *Monroe Park*, 457 A.2d at 738.

22. Alva, *supra* note 14, at 903.

four vice-chancellors, and five Delaware Supreme Court justices.²³ The limited number of judges deciding cases and the right of direct appeal to the supreme court, when coupled with Delaware's long history as a corporate forum and its associated line of precedent, make it a structurally attractive forum for litigating corporate disputes.²⁴

Delaware's unique judicial structure and long history as a corporate forum make it a difficult model to transport to other states, however.²⁵ States cannot easily copy Delaware's processes, because even if a state wished to separate its courts of law and equity, such a step would likely require revising and restructuring the state's court system from top to bottom. This restructuring would upset long-standing tradition and would most likely be met with great resistance.²⁶ Such a structural change would not be limited to business disputes, but would affect every case brought before the state's tribunals.²⁷ Structural and procedural concerns aside, the wholesale adoption of Delaware statutes or case law would not put a state on par with Delaware. Much of the value of Delaware law derives from intangible factors, including the nuanced way in which it is applied to novel facts, making it difficult to emulate without a judiciary experienced in its application.²⁸

Separating the courts of law and equity would likely require amendments to the state constitution and might not actually result in specialization. Thus, states must turn to different methods in order to compete with Delaware. In choosing those methods, states must analyze and consider the actual and perceived benefits of Delaware's system rather than the means by which Delaware has achieved its success.²⁹ States and scholars continue to struggle to identify the factors that have led to Delaware's success and to determine alternate means of providing litigants with those same benefits. Before comparing Michigan's and Maryland's courts to Delaware's system, it will be helpful to provide a general overview of the various means that other courts have proposed. After examining how these new business courts will operate, one can determine if the new methods will produce benefits comparable to those provided by the Delaware court system.

23. *Id.*

24. See Quillen & Hanrahan, *supra* note 17 (describing both the evolution of the Delaware Court of Chancery into the preeminent corporate forum and its influence on the law throughout America's history).

25. See Dreyfuss, *supra* note 14, at 25.

26. See *id.*

27. See *id.*; see also Section VII.A.2.

28. See Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1954-55 (1998).

29. *Id.*

III. ACTIVELY PURSUING BUSINESS: THE ARGUMENT FOR BUSINESS COURTS AND THEIR PROLIFERATION

A. *The Increase in the Specialization of Law*

As Adam Smith predicted, specialization has become a part of professional life in America.³⁰ In modern society it is difficult to describe a person's career adequately using a general label such as "doctor," "banker," or "teacher." A quick look at the American Bar Association's ("ABA") organizational chart reflects increased specialization in the legal profession as well.³¹ The ABA has twenty-eight sections, the business law section has eighty committees, and the banking law committee provides further division into thirteen substantive subcommittees.³² Although lawyers are becoming more specialized, the majority of judges remain generalists.³³ Proponents of specialization have begun to argue that generalist judges lead to greater costs for litigants because of the increased time required to educate generalist judges in each case. These proponents predict that litigants will only be willing to bear that expense for so long.³⁴

Business has become more specialized and faster paced as well, and that change has created an increasingly complex legal environment.³⁵ Professors Chris Carr and Michael Jencks identify several factors leading to this change.³⁶ First, they point to an increasing number of businesses that work in several locations around the country, thus creating forum, choice-of-law, judgment

30. See Richard A. Posner, *Will the Federal Courts of Appeal Survive until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 776 (1983) (discussing Adam Smith's prediction and endorsement of using specialization to get more out of society's resources).

31. R. Franklin Balotti & Roland E. Brandel, *Business Bench: Are Special Courts the Future?*, BUS. L. TODAY, Jan./Feb., 1995, at 25.

32. *Id.*

33. See Ad Hoc Committee on Business Courts, *supra* note 18, at 948. This comparison is not to say that the judiciary is entirely generalist. See 17 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4107 (3d ed. 2000). Several specialized courts exist in the federal court system, including the Federal Claims Court, the Court of International Trade, the Court of Appeals for the Federal Circuit, the Temporary Emergency Court of Appeals, tax courts, and bankruptcy courts. *Id.*

34. See Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudicatory Fundamentals*, 39 UCLA L. REV. 1067, 1185 (noting the higher costs of generalist judges in an administrative law setting); Edward V. DeLillo, Note, *Fighting Fire with Firefighters: A Proposal For Expert Judges at the Trial Level*, 93 COLUM. L. REV. 473, 482 (1993) (discussing the high cost of educating generalist judges on technical matters).

35. See Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L.J. 183, 194 (1999-2000).

36. See *id.* at 194-97.

enforcement, and discovery problems.³⁷ Second, Carr and Jencks note the proliferation of secondary rights, such as contract rights, patent law rights, and rights under unfair competition law.³⁸ Third, the authors point to the increased speed of business, specifically stating that high-technology markets often change several times over by the time litigation is resolved.³⁹ Finally, Carr and Jencks highlight business's dissatisfaction with the new law merchant, the entity that provides decisions in a previously unfamiliar area of law—in other words, the entity parties go to to develop law and norms to govern a new industry.⁴⁰ In a sense, businesses are so new, and changing so fast, that there are no satisfactory established norms. Therefore, companies in emerging markets must turn to the courts for dispute resolution more often than established markets.⁴¹ In turn, the courts must adapt quickly to fill gaps in the existing law, or the parties will turn to alternative dispute resolution (“ADR”) as a means of solving their problems quickly.⁴²

Changes in business speed and specialization might not cause concern in state legislatures were it not for the litigation backlog.⁴³ In fact, ninety-four percent of business executives and eighty-two percent of in-house counsel surveyed in 1997 indicated that they believe there has been a litigation explosion in the last ten years.⁴⁴ Further, eighty-six percent of business executives and seventy-nine percent of in-house counsel feel that less than half of lawsuits involving businesses are resolved within an appropriate amount of time.⁴⁵ The issues in business litigation not only require rapid resolution, but they also are complex and may divert judicial resources from other parts of the justice system.⁴⁶ Thus, business litigation results in a disproportionate

37. *Id.* at 194-95.

38. *Id.* at 195-96.

39. *Id.* at 197.

40. *Id.* at 198.

41. *See id.* at 197-98. For example, see Henry H. Perritt, Jr., *Dispute Resolution in Electronic Network Communities*, 38 VILL. L. REV. 349 (1993) (noting that electronic networks is an area of high-technology law that struggled with generating norms and effective legal precedent).

42. *See Carr & Jencks, supra* note 35, at 197-98.

43. *See Carrie E. Johnson, Comment, Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CAL. L. REV. 225-26 (1997) (commenting that the delay in civil litigation has become intolerable).

44. John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executive's Opinions*, 3 HARV. NEGOT. L. REV. 1, 26 (1998).

45. *Id.* at 36.

46. *See Diane P. Wood, Law, Truth, and Interpretation: A Symposium on Dennis Patterson's Law and Truth Speech: Generalized Judges in a Specialized World*, 50 SMU L. REV. 1755, 1764 (1997).

use of judicial resources by demanding fast litigation, while at the same time producing the most time-consuming cases.⁴⁷ Therefore, specialized treatment of business cases may reduce the backlog in all areas of the law and benefit other types of litigants. After considering these facts, it is not surprising that states have advanced business court proposals to deal with the perceived and actual need for increased speed and specialization in the court system.⁴⁸

B. Dealing with the Need for Speed and Specialization: Specialized Business Courts and the Rocket Docket

In response to the changing business world, increased specialization, dissatisfaction with the court system, the litigation explosion, and the subsequent litigation backlog, a number of states have enacted or proposed the creation of specialized business courts.⁴⁹ At the same time, the federal courts have begun creating “rocket dockets” to deal with the civil litigation delay.⁵⁰ The basic structure of a rocket docket is simple. In order to implement a rocket docket, a court makes a firm commitment early in the discovery and pretrial process to establish firm dates for all pretrial proceedings.⁵¹ The development of rocket dockets in the federal courts responds to an admonition from Congress,⁵² but courts, rather than the legislature, generally implement their key components through local court rules.⁵³ This Note will discuss two courts, the North Carolina Business Court and the United States District Court for the Eastern District of Virginia, as predecessors to the high-tech attempts made in Michigan and Maryland to demonstrate how these states combine specialized business courts, rocket dockets, and technology to improve the adjudication of high-technology business disputes and thereby to attract business to their respective states.

47. *See id.*

48. *See generally* Johnson, *supra* note 43, at 226.

49. Ad Hoc Committee on Business Courts, *supra* note 18, at 955-59 (providing an overview of specialized business courts in Delaware, New Jersey, Illinois, New York, North Carolina, Wisconsin, and Virginia, as well as proposed business courts in Pennsylvania, California, Florida, and Massachusetts). This Note will provide a description of the North Carolina Court of Business as a subject for comparison to the Michigan and Maryland approaches.

50. *See* Johnson, *supra* note 43, at 225.

51. *Id.* at 233.

52. *See* 28 U.S.C. §§ 471-482 (2000) (establishing a requirement that federal courts develop and implement a delay reduction plan designed to improve their efficiency).

53. Heather Russell Koenig, *The Eastern District of Virginia: A Working Solution for Civil Justice Reform*, 32 U. RICH. L. REV. 799, 803-04 (1998).

1. Specialization: The North Carolina Business Court

North Carolina established its business court in January of 1996 when Governor Hunt appointed Ben F. Tennille as North Carolina's first Special Superior Court Judge for Complex Business Cases.⁵⁴ North Carolina worked within its existing court system by amending Rule 2.1 and adopting Rule 2.2 of the General Rules of Practice for the Superior and District Courts to change the way in which North Carolina handles complex business cases.⁵⁵ The new Rules 2.1 and 2.2 allow the chief justice, upon motion of the court or the parties, to designate certain controversies as "complex business cases" and refer them to the North Carolina Business Court.⁵⁶

North Carolina uses a flexible definition of complex business cases.⁵⁷ Instead of adopting a rigid framework, North Carolina's legislature and supreme court contemplated cases involving several of the state's business-oriented statutes.⁵⁸ The state directed courts to consider factors including the effect and implications of the litigation beyond the two parties, the predictability that would result from a written disposition of the case, court procedural implications such as time sensitivity, the number of discovery disputes, complexity of legal and evidentiary issues, and the involvement of multiple parties and jurisdictions.⁵⁹ Once a judge designates the case as a complex business dispute, it is automatically assigned to a superior court judge appointed by the Chief Justice of the North Carolina Supreme Court for adjudication.⁶⁰

After designation, the complex business judge hears the case in the county where it was filed or in another appropriate venue.⁶¹ The same judge handles all pretrial motions and discovery, thus increasing consistency and reducing the possibility of conflicting decisions.⁶² A key provision of the North Carolina Business Court is that, as is the case in the Delaware Court of Chancery, every case resolved in court

54. Stephen C. Keadey, *Into the Danger Zone: Massey v. City of Charlotte and the Fate of Conditional Zoning in North Carolina*, 79 N.C. L. REV. 1155 (2001) (examining a complex business case heard by the North Carolina Business Court); see also NORTH CAROLINA BUSINESS COURT, HISTORY, available at <http://www.ncbusinesscourt.net/history.htm> (last visited Nov. 13, 2002).

55. N.C. GEN. R. PRAC. R. 2.1-2.2.

56. See R. 2.1(a), (b).

57. R. 2.1(d).

58. R. 2.1 cmt.

59. R. 2.1(d).

60. R. 2.2.

61. See R. 2.1.

62. R. 2.1(b).

must result in a written disposition of the case.⁶³ North Carolina reasons that this requirement will enhance predictability and reduce future similar litigation.⁶⁴

The North Carolina Business Court is one of the few courts that has as one of its goals attracting corporations to the state.⁶⁵ It has, however encountered a considerable number of difficulties in practice. Professors Kahan and Kamar observe that North Carolina's court has too broad a jurisdictional grant, jury retention problems, and unavailability of opinions which are always written but inexplicably not published in any state or regional reporter.⁶⁶ As discussed below, all of these are potential problems for Michigan's and Maryland's cyber courts as well.

2. Speed: The Eastern District of Virginia's Rocket Docket

Concerns related to speed and the perceived backlog in the court system have led to the development of another tool for accelerating litigation: the rocket docket.⁶⁷ A brief look at the Eastern District of Virginia demonstrates how a successful rocket docket operates.⁶⁸ Heather Russell Koenig, a former clerk for the Eastern District of Virginia, observes that the first key to the Eastern District's success is early intervention in, and control over, the litigation process through the creation and enforcement of a pretrial calendar.⁶⁹ Once the calendar is set, the court will not grant parties' requests for continuances unless they demonstrate good cause, and the court will not excuse counsel's failure to proceed promptly with the normal processes of discovery.⁷⁰ Beyond imposing a strict calendar, the court also hears oral argument on only half of the motions filed. When the court does hear arguments, it hears them at the earliest possible opportunity.⁷¹ Depositions and discovery are limited to the bare necessities with an eye toward reducing the number of depositions,

63. R. 2.1(b); *see also* NORTH CAROLINA BUSINESS COURT, BUSINESS COURT OPINIONS (presenting a list of unofficial, electronically formatted copies of court opinions), available at <http://www.ncbusinesscourt.net/opinions> (last visited Nov. 17, 2002).

64. *See id.*

65. *See* Kahan & Kamar, *supra* note 10, at 56.

66. *Id.* at 57.

67. This Note will address how Michigan and Maryland are implementing and potentially improving on the rocket docket concept, *infra* Part VII.

68. Koenig, *supra* note 53, at 804.

69. *Id.*

70. *Id.* (citing E.D. VA. LOC. R. 16(B)).

71. *Id.* at 805-06. There are some differences between the divisions in the district, but these variations do not substantially alter the general practice of speedy resolution of motions. *See id.* at 806-07.

interrogatories, and discovery disputes, along with the travel expenses and time required to take depositions outside of the district.⁷² The Eastern District of Virginia has improved the speed with which it disposes of cases because of these measures and has become one of the most efficient federal district courts.⁷³

IV. TECHNOLOGY IN THE COURTROOM: A BRIEF OVERVIEW OF RECENT DEVELOPMENTS

Initially, courts were slow to introduce technology into the courtroom.⁷⁴ Technology entered the courtroom on an ad hoc basis by way of case-specific hardware used to present evidence.⁷⁵ Today, courts are becoming more technically proficient, and public demand has provided even more motivation for courts to become proactive in implementing technological advancements.⁷⁶ In at least one instance, a court has allowed the use of videoconferencing to substitute for the plaintiff's appearance in court in a prisoner litigation suit.⁷⁷ Courts have also begun using electronic filing and case management, increasingly advanced hypertext CD-ROM-based legal briefs,⁷⁸ evidentiary materials,⁷⁹ E-mail service of process,⁸⁰ and videoconferencing and videotaped depositions.⁸¹

72. *Id.* at 807-09.

73. *Id.* at 812-14 (discussing data placing the Eastern District of Virginia as one of the fastest courts in the country).

74. In practice and in legal education, technology has made a larger impact more quickly. For the effects of technology-enhanced research on the practice of law and legal education, see Molly Warner Lien, *Technocentrism and the Soul of the Common Law Lawyer*, 48 AM. U. L. REV. 85 (1998).

75. Fredric I. Lederer, *Trial Advocacy: The Road to the Virtual Courtroom? A Consideration of Today's—and Tomorrow's—High-Technology Courtrooms*, 50 S.C. L. REV. 799, 801 (1999).

76. See James Crowell, *Legal Update: The Electronic Courtroom*, 4 B.U. J. SCI. & TECH. L. 10 (1997); Lawrence P. Wilkins, *The Ability of the Current Legal Framework to Address Advances in Technology*, 33 IND. L. REV. 1 (1999) (observing the increasing role that technology has begun to play in the current legal system).

77. *Edwards v. Logan*, 38 F. Supp. 2d 463 (W.D. Va. 1999).

78. For a detailed discussion of CD-ROM technology, CD-ROM legal briefs and their legal status, see Joanne M. Snow, Comment, *CD-ROM Briefs: Must Today's High Tech Lawyers Wait Until the Playing Field is Level?*, 17 J. MARSHALL J. COMPUTER & INFO. L. 615 (1999).

79. See Fred Galves, *Where the Not-So-Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance*, 13 HARV. J.L. & TECH. 161 (2000) (providing an overview of the increased use of computer-generated evidence in the courtroom and addressing systematic concerns). This Note will not discuss the use of computer-generated evidence. Instead, this Note will instead focus more narrowly on the use of technology in the actual conduct of the trial, because the specialized courts in question increase the use of technology in procedure but not necessarily in presentation. See *infra* Part V.

At the forefront of such technological change stands the Courtroom 21 project, spearheaded by Fredric I. Lederer and located at the Marshall-Wythe Law School at the College of William and Mary, which is aimed at researching and improving courtroom technology.⁸² Courtroom 21, while not affiliated directly with any practicing court, is the most advanced courtroom facility in the United States, and provides a picture of what a technologically advanced court may look like in the near future.⁸³ Along with the capability to take remote witness testimony, Courtroom 21 is the only courtroom in the world that contains a multimedia court record system that simultaneously records audio and video synchronized to a real-time transcript.⁸⁴ In addition, Courtroom 21 takes remote witness testimony to a new level through the use of a forty-inch television that displays an almost life-size image of the witness behind the witness stand.⁸⁵ On the other end, the witness can see several views of the courtroom and the speaker.⁸⁶

In order to examine how technology, specifically the technology that Michigan utilizes in its cyber court, has gained acceptance in the legal system, this Note will explore videoconferencing⁸⁷ and its gradually increasing role and acceptance in the courtroom. Use of videoconferencing has increased slowly; in fact, before 1965, courts not only frowned upon the use of a video camera in the courtroom, but also considered it a violation of due process.⁸⁸ Today, declining costs and improvements in technology have prompted states to begin using videoconferencing for routine matters while evaluating the possibilities for future expansion.⁸⁹ The Federal Rules of Civil

80. *In re Int'l Telemedia Assoc., Inc. v. Diaz*, 245 B.R. 713, 719-20 (Bankr. N.D. Ga. 2000) (allowing E-mail service of process when an individual could not feasibly reach an individual by other means).

81. Lederer, *supra* note 75, at 801, 810.

82. See COLL. OF WM. & MARY & NAT'L CTR. FOR STATE CTS., COURTROOM 21 (containing a wealth of information about the court and its technological capabilities, as well as news and updates on new developments in courtroom technology), available at <http://www.courtroom21.net> (last visited Feb. 24, 2002).

83. *Id.*

84. Lederer, *supra* note 75, at 811.

85. *Id.*

86. *Id.* at 819-20.

87. Videoconferencing is a two-way communication technology that allows parties at different locations to speak to each other in close to real time. Michael D. Roth, *Laissez-Faire Videoconferencing: Remote Witness Technology and Adversarial Truth*, 48 UCLA L. REV. 185, 189 (2000).

88. Michael A. Stodghill, *Recent Decisions: The United States Court of Appeals for the Fourth Circuit*, 55 MD. L. REV. 921, 1015-16 (1996).

89. Roth, *supra* note 87, at 191-92.

Procedure allow the use of remote witness testimony “for good cause shown in compelling circumstances and upon appropriate safeguards.”⁹⁰ In *Maryland v. Craig*, the Supreme Court allowed remote testimony under the Federal Rules in a child abuse case. The Court refused to hold that remote witness testimony is unconstitutional per se, and opened the door for all courts to allow testimony when individuals were beyond the subpoena power of the court or unable to travel.⁹¹ Further, many states have codified the Supreme Court’s holding and have specifically provided for the use of videoconferencing and remote witness testimony in child abuse and sexual assault cases.⁹²

The growing acceptance of videoconferencing has raised some questions about its ability to accurately re-create the adversarial process. One commentator mentions several possible concerns associated with videoconferencing: telegenic distortions⁹³, demeanor testimony, and issues relating to witness credibility.⁹⁴ Essentially, most concerns focus on the fear that litigants will employ technology-driven methods to distort the jurors’ perceptions of a witness.⁹⁵ Roth counters this concern by stating that, even today, jurors and judges sitting as triers of fact do not see a pure representation of a witness because of the techniques many lawyers use to improve the appearance of credibility.⁹⁶ Roth advocates loose regulation of videoconferencing technology and accepts it as another tool in the adversarial process.⁹⁷ Aside from the comparison to coaching live witnesses, initial studies conducted as a part of the Courtroom 21 project demonstrate that jurors do not perceive individuals testifying via videoconferencing as any more or less likely to tell the truth than witnesses testifying in person.⁹⁸

A recent civil commitment hearing before the Fourth Circuit Court of Appeals in *United States v. Baker*⁹⁹ demonstrates that courts have become more accepting of videoconferencing technology in the

90. *Id.* at 193 (citing FED. R. CIV. P. 43).

91. *Id.* at 193-96; *see also* *Maryland v. Craig*, 497 U.S. 836 (1990).

92. *Id.* at 194 n.43 (listing state statutes that allow remote witness testimony in child abuse cases to aid a child witness testifying about sensitive material).

93. *Id.* at 198-99 (citing the 1960 Nixon-Kennedy debate as the classic case where perceptions differed between television viewers and individuals witnessing the event in person).

94. *Id.* at 199-204.

95. *Id.* at 202-04 (describing ways in which a video may be shot in order to influence perception).

96. *Id.* 206-07.

97. *Id.*

98. Lederer, *supra* note 75, at 820.

99. 45 F.3d 837 (4th Cir. 1995), *cert. denied*, 516 U.S. 871 (1995).

courtroom as well as how they have addressed some of the concerns it raises.¹⁰⁰ In *Baker*, the court allowed the use of expert testimony via videoconferencing in a civil commitment hearing, which can closely resemble a criminal case and which thus implicates substantial due process concerns.¹⁰¹ Although the court limited its holding to the special circumstance of a civil commitment where demeanor and persuasiveness is less important than an expert's qualifications, it permitted the use of video testimony and held that it did not violate due process rights even where there was potential for a substantial imposition on the individual's liberty.¹⁰²

The rapid development of technology will inevitably change the way lawyers conduct a trial. In response to the increased use of videoconferencing, it may not be long before law firms employ makeup artists and television producers to present themselves more effectively in front of the jury. In light of the rapid advancement and acceptance of technology in the courtroom, Lederer may be correct in postulating that the ultimate question is not "what we can do with the technological options available to us, but rather for what purposes we may wish to use technology?"¹⁰³

V. COMBINING HIGH TECHNOLOGY AND BUSINESS COURTS: HOW MICHIGAN AND MARYLAND LEGISLATURES PROPOSE TO ATTRACT HIGH-TECH BUSINESS TO THEIR STATES

As described above, states have begun enacting and creating courts designed to handle the needs of complex litigation in an efficient, consistent, and attractive manner.¹⁰⁴ Given this drive for increased specialization and speed, and the increased acceptance of technology in court proceedings, the time may be right for courts to combine technology and specialization. Two states, Maryland and Michigan, are developing courts designed to combine specialization in business and technology matters by increasing the use of technology in the courtroom to entice high-tech businesses to relocate or

100. *Id.*

101. *Id.* at 842-43. *But see* *United States v. Navarro*, 169 F.3d 228 (5th Cir. 1999) (holding that the use of videoconferencing at a sentencing hearing violated Rule 43 of the Federal Rules of Criminal Procedure).

102. *Id.* at 847. *But see* *Stodghill*, *supra* note 88, at 105 (stating that the court's reasoning in *Baker* may be problematic because it does not always consider the liberty interest at stake to be as great as that for criminal imprisonment, but also maintaining that the court's reasoning is consistent with *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

103. Lederer, *supra* note 75, at 802-03.

104. See Ad Hoc Committee on Business Courts, *supra* note 18.

reincorporate in their states.¹⁰⁵ Generally, the logic is similar to that supporting general business courts. Businesses in general need fast, efficient, and predictable courts, but high-tech businesses in particular require subject-matter specialization and speed because of that market's specialized legal and technical concerns and its fast evolution and operation.¹⁰⁶ Therefore, Michigan and Maryland reason, these businesses may be particularly interested in utilizing specialized judges and technologically advanced procedural methods to accelerate litigation.¹⁰⁷

A. *The Michigan Approach*

In his 2001 State of the State address, Michigan Governor John Engler outlined a series of initiatives designed to attract inventors, entrepreneurs, small-tech, and information technology firms to the state.¹⁰⁸ One of the initiatives was the creation of a connected court that could satisfy the demands of high-tech business.¹⁰⁹ Engler stated that such a court would give Michigan the opportunity to be to high-tech companies what Delaware is to traditional corporations.¹¹⁰ The plan took shape quickly, and by December 13, 2001, the Michigan House of Representatives passed an amendment to the Revised Judicature Act of 1961 adding Chapter 80 and establishing the Michigan Cyber Court.¹¹¹

The Michigan Cyber Court proposal contains several provisions directing the court to accommodate out-of-state litigants. First, the court will "sit in facilities designed to allow all hearings and proceedings to be conducted by means of electronic communications, including, but not limited to, video and audio conferencing and internet conferencing."¹¹² In fact, the law requires that all matters in the cyber court be heard via electronic communication and allows the

105. A brief look at the possible substantive concerns of high-tech business follows *infra* Section VII.A. This Section only addresses the possible differences in the desired *manner* of adjudication.

106. See David Hechler, *Bill Would Fast-Track Business Cases*, NAT'L L. J., Sept. 17, 2001, at A15 (Michigan Governor John Engler commented, "You're dealing with entities that move at warp speed . . . And we've got to realize that they can be created and go out of existence in the time it takes a lawsuit to move through normal channels.")

107. *Id.*

108. Engler, *supra* note 11.

109. *Id.*

110. *Id.*

111. 2001 Mich. Pub. Acts 262.

112. § 8001(3).

clerk of the court to issue oaths and affirmations electronically.¹¹³ This procedural rule enables the court to reach parties far beyond Michigan's borders with more ease than traditional courts. In fact, the statute specifically requires the court to accommodate out-of-state litigants and to broadcast its proceedings on the Internet.¹¹⁴ Not only does this law allow out-of-state litigants to appear more easily, but it also allows other interested parties in those states to "attend" hearings in Michigan.¹¹⁵

The House Bill also directs the Michigan Supreme Court to assign only those judges who request assignment to the cyber court and also to consider the applicant's experience in presiding over commercial litigation and interest in the application of technology to court proceedings.¹¹⁶ Further, the statute directs the Michigan Judicial Institute to provide specific training for judges assigned to the cyber court.¹¹⁷ These provisions effectively create expert judges who will be interested and trained in business law and technology.

The Michigan Legislature also provided the cyber court with special jurisdictional limits.¹¹⁸ Unlike North Carolina's flexible assignment plan,¹¹⁹ Michigan limits the court's jurisdiction to enumerated business disputes where the amount in controversy exceeds \$25,000.¹²⁰ What distinguishes Michigan from North Carolina,

113. §§ 8015, 8017. Some lawyers, most likely those with offices in Michigan, may be able and willing to attend a hearing in person. The Michigan court will have to determine if it will require a party willing to travel to the court's physical facility to use electronic means when the opposing party is not willing to appear in court in person. A controversy could occur when one party could easily travel to the court in person, while the other is an out-of-state litigant who cannot travel without great expense. In order to avoid potential bias, the court should require that if one party is using electronic communication, the other must do so as well. See *In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. 424 (D. P. R., 1990) (establishing procedures for live remote satellite television testimony).

114. § 8001(4). For concerns related to using the Internet in out-of-state legal representation see Louise Ellen Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-line Dispute Resolution*, 70 *FORDHAM L. REV.* 985, 990 (2001) (discussing the effects of on-line interstate practice on the nature of a law practice and professional responsibility).

115. § 8001(4).

116. § 8003(1). It is important to note that the term and selection process contains some state-specific constitutional issues. Those issues are outside the scope of this Note. For information on similar constitutional and fiscal problems in another state, Pennsylvania, see Kimberly A. Ward, Note & Comment, *Getting Down to Business—Pennsylvania Must Create a Business Court, or Face the Consequences*, 18 *J.L. & COM.* 415, 418-20 (1999).

117. § 8003(5).

118. § 8005.

119. N.C. R. GEN. PRAC. 2.1(d) (detailing the factors which may be considered in North Carolina to determine whether to designate a case, or a group of cases, as "exceptional" or a business as a "complex business").

120. § 8005(1)-(2).

and other states, is the legislature's direction that the cyber court hear disputes involving "Information Technology, Software or Website Development, Maintenance or Hosting."¹²¹ Such a provision broadens the court's jurisdiction when compared to other business courts and allows the cyber court to hear matters particular to high-tech business, even if they might not normally fall within a standard business court's jurisdiction. The Act loosely defines "business and commercial actions" to mean disputes between business owners, associates, competitors, or between a business entity and its customers.¹²² The statute provides several nonexclusive examples, including internal organization, contractual agreements involving trade secrets, covenants not to compete, disputes arising out of commercial transactions including those with banks, business or commercial insurance, and commercial real property other than landlord/tenant.¹²³ The law excludes certain disputes including those involving torts, landlord/tenant relationships, employee/employer relationships, administrative agencies, criminal matters and proceedings to enforce judgments.¹²⁴ Thus, the Michigan Cyber Court is not limited to cases that involve corporate law disputes but may hear a wider variety of claims, so long as they involve high-tech businesses.

The cyber court law also includes several procedural rules designed to address potential due process concerns. First, the cyber court is a voluntary forum. Defendants may remove the action to an appropriate, so long as they do so within fourteen days after the deadline for filing an answer.¹²⁵ Second, unless one of the parties removes within that time, the court will assume that both parties have waived their right to a trial by jury.¹²⁶ As a result, judges conduct trials without a jury, which are normally subject to a new trial under the same standards applicable in other Michigan courts.¹²⁷

While the cyber court statute certainly differs from proposals in other states, the real difference in the Michigan approach stems from an addition to the Michigan Court Rules: Chapter 2A Electronic Practice.¹²⁸ The draft rules emphasize and promote the use of the

121. § 8005(2)(A).

122. § 8005(2).

123. § 8005(2)(B)-(F).

124. § 8005(3)(A)-(F).

125. § 8011(1).

126. § 8013.

127. § 8019.

128. STATE BAR OF MICHIGAN CYBER COURT RULES WORKGROUP, MICHIGAN COURT RULES: SPECIAL RULES FOR ELECTRONIC PRACTICE IN CYBER COURT (Sept. 10, 2001), *available at*

Internet and electronic forms for a variety of court procedures. The rules provide for the electronic filing of certified copies, sworn statements,¹²⁹ motions,¹³⁰ depositions,¹³¹ electronic appearance of witnesses,¹³² electronic proof of service,¹³³ and service via E-mail.¹³⁴ Collectively, these rules create one of the most far-reaching implementations of required electronic procedure in the courts.

To ensure that the parties will be qualified to use all of these procedures, the court rules call for parties to be authorized as electronic filers.¹³⁵ The rules require these filers to sign an agreement complying with all of the court's electronic security measures, maintain a current E-mail address of record, pay any applicable fee, and remain in good standing as an authorized filer.¹³⁶ Further, the court places the risk of any difficulties in transmission on the filer.¹³⁷ Michigan justifies these requirements by stating that because the cyber court is a voluntary forum, it is acceptable to place minimal conditions on litigants to ensure the court's integrity.¹³⁸

Finally, the court rules create a cyber court website designed to be the "front door" of the cyber courtroom.¹³⁹ The cyber court website will contain all the relevant contact and jurisdictional information, as well as the electronic filer agreement, the docket information, information on accessing documents filed in the cyber court, a menu of ADR techniques, and technical filing information.¹⁴⁰ As part and parcel of the menu of ADR options, the cyber court draft rules contain a provision making the court and its facilities useful as quickly as

http://www.michbar.org/frame maker.cfm?content_dir=news/releases&content=cybercourt.html
(last visited Jan. 23, 2003).

129. R. 2.001D (stating that the original must be provided upon request).

130. R. 2.001F.

131. R. 2.001G.

132. R. 2.000E (allowing a party or witness may appear using two-way interactive video technology, videoconference technology, or Internet broadcast technology).

133. R. 2.001H (requiring that proof of service be sent to recipient's registered E-mail address or by facsimile, with acknowledgement).

134. R. 2.001I.

135. R. 2.102A.

136. R. 2.102A.

137. R. 2.102A(C).

138. R. 2.102A, workgroup cmt.

139. R. 2.105A, workgroup cmt.

140. R. 2.015A. For current information regarding the Cyber Court, see <http://www.michigancyberrcourt.net> (last visited Feb. 26, 2002).

possible to settle disputes through ADR.¹⁴¹ These provisions make the cyber court an environment ripe for creative dispute resolution.¹⁴²

B. The Maryland Approach

The Maryland legislature created a special task force to recommend court reform aimed at attracting high-tech business to Maryland.¹⁴³ The Act reflected the Maryland legislature's intent to treat business and technology matters effectively and efficiently in the judicial system, through recommendations generated by discussions between the state's business and legal communities.¹⁴⁴ The Maryland Business and Technology Task Force ("Task Force") set forth a proposal for reform in the Maryland Business and Technology Court Task Force Report ("Maryland Task Force Report").¹⁴⁵

Maryland's approach differs from that of Michigan in two ways. First, instead of creating an entirely new court, the Task Force recommended a statewide Business and Technology Case Management Program within Maryland's existing Differentiated Case Management ("DCM") system.¹⁴⁶ By using the existing framework, Maryland follows North Carolina's lead and takes a more cautious approach than Michigan.¹⁴⁷ Second, Maryland does not advocate or require as much use of technology and does not provide for courts to conduct hearings and proceedings via video or audio conferencing or to broadcast them over the Internet.¹⁴⁸ Like that in Michigan, the Maryland approach advocates a loose definition of the types of cases courts should refer to the management track and allows parties to opt out of the program if they so choose.¹⁴⁹ As is the case with most Business Courts, Maryland proposes to limit jurisdiction to disputes with more than \$50,000 in controversy and to issues of a complex nature where specialized treatment is likely to improve the expectation of a fair trial.¹⁵⁰ In addition, Maryland includes disputes arising out of technology development, maintenance and consulting

141. R. 2.106A. For a general examination of on-line dispute resolution, see generally Teitz, *supra* note 114.

142. R. 2.106A, workgroup cmt.

143. 2000 Md. Laws 10 (referring to Bill 15).

144. *Id.*

145. MARYLAND BUSINESS AND TECHNOLOGY COURT TASK FORCE (2000), available at <http://www.courts.state.md.us/finalb&treport.pdf>.

146. *Id.* at 7.

147. Rivkin, *supra* note 8.

148. 2001 Mich. Pub. Acts 262, § 8001(4).

149. MARYLAND TASK FORCE REPORT, *supra* note 145, at 8.

150. *Id.*

agreements, and network and Internet website development.¹⁵¹ Again, such provisions enlarge the traditional business court jurisdiction to include a higher percentage of technology cases.¹⁵² As is the case in North Carolina, the Maryland Task Force takes a flexible jurisdictional approach and provides presumptively included cases instead of drawing bright lines.¹⁵³

By using the existing court system, Maryland gives litigants more choice. When there are disputes, the court will assign an administrative judge to determine whether the case is properly assigned to the program.¹⁵⁴ Litigants can also choose between two tracks within the program. One track is established for cases where discovery is limited and the court sets a trial date within ninety days of filing an answer.¹⁵⁵ Another standard track exists for cases requiring complicated discovery where the trial date is set within nine months of filing.¹⁵⁶ The same judge handles all of the filings, including discovery motions.¹⁵⁷ Publication rules remain the same as for all of the other Maryland courts, with a special admonition for the judges to confer to ensure consistent opinions.¹⁵⁸

Finally, the task force addressed ADR and determined that Maryland's current DCM system already encouraged several types of ADR.¹⁵⁹ Similar to the Michigan approach, the Maryland Task Force provides that judges should recommend ADR for all cases coming through the business and technology track.¹⁶⁰ Maryland goes further than Michigan, however, by proposing the creation of a special training program for mediators working on cases within the track's jurisdiction.¹⁶¹

Much like Michigan, Maryland provides for E-filing and the electronic exchange of court documents.¹⁶² As with the rest of the program, this provision grows out of the Maryland court system's

151. *Id.* at 8-10.

152. *Id.* How the word "technology" broadens the definition of business cases remains to be seen, but ostensibly, "technology" could add any case involving technology companies or a large amount of highly technical evidence to the court's jurisdiction.

153. *Id.* at 9-10.

154. *Id.* at 11.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 11-12.

159. *Id.* at 14.

160. *Id.*

161. *Id.*

162. *Id.* at 15.

existing practices.¹⁶³ Further, the commission also recommends the use of on-line repositories of evidentiary materials, multimedia briefs, double-blind bidding software for settlements, and the use of Internet and videoconferencing.¹⁶⁴ Essentially, Maryland has integrated many of the same components as Michigan. However, the Maryland approach fits within a more familiar background, because it merely adds another existing track to the current court system.

VI. A FRAMEWORK FOR ANALYSIS: WHY DELAWARE?

An analytic framework is necessary in order to evaluate the potential success of the Michigan Cyber Court and the Maryland Task Force proposal in attracting high-technology businesses to their respective states. As stated above, it is no secret that Delaware's corporate law is the envy of most states.¹⁶⁵ Therefore, an overview and analysis of some competing theories that attempt to explain Delaware's success and to identify the benefits that businesses derive from Delaware courts will provide a useful method for determining whether or not these new business law courts can replicate the Delaware model.¹⁶⁶

One could argue, however, that despite its dominance in the race for corporate charters, Delaware is not an appropriate basis for comparison. One reason may be that the goals Michigan and Maryland seek to achieve may be different from those already accomplished in Delaware.¹⁶⁷ Michigan and Maryland have chosen not to compete with Delaware across the board but have specifically tailored their new specialty courts to attract high-tech businesses.¹⁶⁸ Further, Michigan and Maryland may not be competing for corporate charters, but instead may be more interested in attracting businesses to locate their operations in their states, thereby creating jobs for their

163. The Baltimore County courts have had considerable experience in using E-filing to manage over ten thousand asbestos cases. *Id.* at 16.

164. *Id.* at 17 n.8.

165. See Engler, *supra* note 11.

166. This Note, however, will not cover competition through revision of substantive corporate law. Some states, including Nevada and Texas, have adopted this approach. For a more detailed analysis of statutory considerations pertaining to the choice of a state of incorporation, see generally David Mace Roberts & Rob Pivnick, *Tale of the Corporate Tape: Delaware, Nevada and Texas*, 52 BAYLOR L. REV. 45 (2000). The states examined in this Note have chosen to keep their existing corporate codes intact and instead effect the process through judicial matters. Such a change may have just as much of an impact on the choice of a state of incorporation as states with altered corporations codes.

167. See Engler, *supra* note 11.

168. *Id.*

residents.¹⁶⁹ This Note will address this concern in two ways. First, in Part VII, this Note pays special attention to how high-tech business needs may be different with regard to general access to the courts. Second, in Part VIII, this Note will posit that location may be more important to Michigan and Maryland than incorporation. This Note also will explore some substantive corporate, employment, and trade secret law differences that high-tech firms may desire and demonstrate how Michigan and Maryland may attract businesses to locate, and potentially incorporate, in their states.¹⁷⁰

A second problem is that the general measure of Delaware's success—the large number of companies that have incorporated¹⁷¹ and filed their corporate charters in Delaware—may not be attributable to the nature of the Delaware judiciary or judicial system.¹⁷² Jeffery Stempel argues that the incorporation decision may have less to do with the choice of law, or judicial efficiency, than “tax rates, the degree of regulator scrutiny, inertia or other favorable factors only loosely related to the state's judicial structure.”¹⁷³ Furthermore, Professors Marcel Kahan and Ehud Kamar contend that Michigan and Maryland, like all other states in the corporate charter race, decline to compete with Delaware with regard to judge-made law.¹⁷⁴

This Note addresses these concerns in the following two ways. First, it acknowledges that substantive corporate law factors may be important but avoids a substantive analysis of corporate law statutes under the assumption that many *statutory* differences—interpretation notwithstanding—could be remedied by a legislature willing to adopt the Delaware Corporate Code in toto. Second, this Note recognizes that a by-product of specialization may be increased understanding and consideration of issues important to high-tech businesses and consistency. Further, in Part VIII, this Note examines certain areas of

169. See, Kahan & Kamar, *supra* note 10 (suggesting that competition for corporate charters is a myth).

170. See discussion *infra* Section VII.A.

171. Incorporation in Delaware is not limited to businesses located within the state. DEL. CODE ANN. tit. 8 § 101(a) (2000) (“Any person, partnership association or corporation . . . without regard to such person's or entity's residence, domicile or State of Incorporation, may incorporate or organize a corporation under this chapter.”) It is apparent that incorporation is important to Michigan and Maryland. The only way that corporations will use improved judicial procedures is if they incorporate in the forum state. For an explication of choice-of-law issues and the internal affairs doctrine, see *Rogers v. Guarantee Trust Co. of N.Y.*, 288 U.S. 123, 130 (1933), and *Draper v. Gardner Defined Plan Trust et al.*, 625 A.2d 859 (Del. 1993). Therefore, Michigan and Maryland must want to encourage incorporation behavior, because if they did not, there would be no discernable reason to create a more efficient judiciary.

172. Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 73-74 (1995).

173. *Id.* at 74.

174. Kahan & Kamar, *supra* note 10, at 46.

substantive law that may be particularly important to high-tech corporations.

VII. MEETING DELAWARE'S CHALLENGE: HOW DO MICHIGAN AND MARYLAND COMPARE TO THE PERCEIVED BENEFITS OF INCORPORATING IN DELAWARE?

Putting aside for a moment the hypothesis that Michigan and Maryland are more interested in location than incorporation, this Note first addresses how successful their proposals will be in each of their quests to become the Delaware of high-technology business.¹⁷⁵ Legal scholarship has not produced a clear answer as to why Delaware is so successful in the race for corporate charters.¹⁷⁶ One commentator, Rochelle Dreyfuss, provides a workable framework for analyzing specialized courts in general and the Delaware Court of Chancery in particular.¹⁷⁷ This framework provides a model for comparing the Michigan and Maryland approaches to Delaware. Dreyfuss's framework, however, requires some tweaking in response to Michigan's and Maryland's specialized aim. After exploring Dreyfuss's basic framework, this Note will address specific high-technology concerns to predict how Michigan and Maryland will fare with respect to the especially fast-paced and new world of high-technology business.¹⁷⁸

Dreyfuss considers three general factors for determining the effectiveness of specialized adjudication: the quality of decision-making, efficiency, and the appearance of due process.¹⁷⁹ In order to evaluate the quality of decisionmaking, Dreyfuss argues that one should examine three interrelated concepts: accuracy, precision, and coherence.¹⁸⁰ Dreyfuss defines accuracy as the extent to which the law produces the correct result; precision as the reproducibility of that result; and coherence as assuring continuity with current law.¹⁸¹ Efficiency relates to the court's ability to decide its cases within the time limits that its litigants require.¹⁸² The appearance of due process includes compliance with traditional due process concerns such as

175. Engler, *supra* note 11.

176. Romano, *supra* note 6, at 709 (noting Delaware's preeminence in the market for corporate charters).

177. Dreyfuss, *supra* note 14, at 11.

178. See discussion *infra* Part VIII.

179. Dreyfuss, *supra* note 14, at 11.

180. *Id.* at 12.

181. *Id.* at 12-13.

182. *Id.* at 14.

notice, a meaningful opportunity for a hearing, compulsory process, and a neutral adjudicator.¹⁸³

A. Quality of Decisionmaking

1. The Danger of "Overspecialization"

Dreyfuss notes that specialized courts usually do quite well with regard to the quality of decisionmaking, due to expertise in their subject area and their ability to attract high-profile judges, but adds one caveat:¹⁸⁴ If specialized courts are isolated in their thinking, the lack of exchange with other courts may affect the quality of decisionmaking.¹⁸⁵ Dreyfuss argues that Delaware has avoided the overspecialization problem through flexible application of its laws to new situations, the skilled nature of practitioners in front of the Delaware courts, the wide variety of academic literature available, and the Delaware judges' willingness to use that literature as a part of their decisionmaking process.¹⁸⁶

Along with a potentially narrow view of the law, specialization may lead to increased industry capture of judges.¹⁸⁷ Specialization also creates a smaller battlefield for debating issues and increases the possibility of one academic ideology or political party taking hold, which results in more drastic swings in the law and destroys the consistency expected from a specialized judiciary.¹⁸⁸ In addition, from a pragmatic standpoint, specialized judges could become more expensive over time, as they are more prone to underutilization when the caseload shifts from one area of the law to another.¹⁸⁹ Therefore, one could reason that the tax base would become more important, and the satisfaction of taxpaying businesses and legislators might be of paramount importance for specialized judges. As a result, specialized

183. *Id.* at 15-16.

184. *Id.* at 16-17.

185. *Id.* at 17.

186. *Id.* at 18. Dreyfuss compares the New York Court of Appeal's opinion in *Auerbach v. Bennett*, 47 N.Y.2d 619 (N.Y. 1979), with *Maldonado v. Flynn*, 413 A.2d 1251 (Del. Ch. 1980), *rev'd in part*, *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1980), and observes that while both cases use the business judgment rule to invalidate a special litigation committee's decision, "New York uses the rule as a blunt instrument. . . . In contrast, Delaware has developed a test aimed at distinguishing disabling conflicts of interest from the conflict inherent in every situation in which derivate suits are dismissed." *Id.*

187. Posner, *supra* note 30, at 783. Posner also argues that political influence is only detrimental if society wishes to limit the influence of special interest groups. *Id.* at 784.

188. *Id.* at 781.

189. *See id.* at 788-89 (discussing criticisms that the Court of Claims and the Court of Customs and Patent Appeals have not had enough work to do).

judges might be inclined to render decisions favorable to these constituencies.

Specialization of function is not the only means of increasing the quality of decisionmaking. Judge John J. Gibbons states that quality of decisionmaking does not necessarily derive from specialization, but instead from the judicial selection process.¹⁹⁰ On this point, Gibbons observes that Delaware's success relates to the fact that its judges are appointed, not elected, and therefore are not as likely to succumb to political pressure in their decisionmaking.¹⁹¹ Furthermore, Delaware considers politics in their selection process, and Delaware requires that the governor to balance judicial appointments between the two political parties.¹⁹²

Judge Gibbons seems to recommend judicial selection based upon merit,¹⁹³ but merit selection has its own problems. Some commentators postulate that merit-based selection processes move politics out of the public eye and into the back room.¹⁹⁴ Professor Peter Webster observes that

while judicial elections are becoming increasingly politicized, the evidence indicates that appointments are most often based principally upon political considerations, rather than qualifications. Clearly, the appointive method does nothing to lessen the effect of partisan politics upon the selection of judges. On the contrary, it would appear that, at the very least, there is significant potential for partisan politics to play the determinative role in the selection of judges in states using an appointive method.¹⁹⁵

Studies comparing state court judges, who are usually elected, with federal court judges, who are appointed with life tenure in accordance with Article III of the United States Constitution, have also generated conflicting results regarding the effect of majoritarian pressures on judicial outcomes.¹⁹⁶ Even if there is some difference between elected and appointed courts, one could hypothesize some

190. John J. Gibbons, *The Quality of the Judges Is What Counts in the End*, 61 BROOK. L. REV. 45, 47 (1995).

191. *Id.* The United States Constitution represents this same choice in giving the President the power to appoint judges, subject to the consent of the Senate, and provides that those judges "shall hold their Offices during good Behavior." U.S. CONST. art. III, § 1.

192. DEL. CONST. art. IV, § 3.

193. Gibbons, *supra* note 190, at 48-49.

194. See, e.g., Judith L. Maute, *Selecting Justices in State Courts: The Ballot Box or the Back Room?*, 41 S. TEX. L. REV. 1197 (2000). For an answer specific to Michigan's decision to implement an elected judiciary, see Kurt M. Brauer, *The Role of Campaign Fundraising in Michigan's Supreme Court Elections: Should We Throw the Baby out with the Bathwater?*, 44 WAYNE L. REV. 367 (1998).

195. Peter D. Webster, *Selection and Retention of Judges: Is there One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 16 (1995).

196. MARTIN H. REDISH & SUZANNA SHERRY, FEDERAL COURTS: CASES, COMMENTS, AND QUESTIONS 274 (5th ed. 2002) (collecting sources).

benefits to elected courts that may be particularly important in the business law area—namely accountability to the public—that mitigate any perceived deficiencies. The debate continues without any clear answer as to exactly what effect election, as opposed to appointment, has on the quality of decisionmaking or on the potential for capture. It is difficult to rest any criticisms of business courts merely on the effect of selection because the scholarship—which is beyond the scope of this Note—provides no empirical answers.

Generalist appellate judges may prove useful in eliminating the problems associated with overspecialization. There are many hypothesized advantages associated with generalist judges. Such judges require lawyers to frame issues in less technical language and in doing so force “the bar to demystify legal doctrine to make the law comprehensible.”¹⁹⁷ Generalists deal with a wide variety of legal issues and doctrines, and their experience with myriad legal problems presumably will lead to better cross-fertilization of ideas.¹⁹⁸ By virtue of cross-fertilization, generalists create consistent rules and standards across various areas of the law.¹⁹⁹ Generalist appellate judges may be able to counter the effects of overspecialization by injecting the law with the advantages of their broader perspective.

Some commentators argue, however, that generalist review of specialized court rulings is a mixed blessing.²⁰⁰ Intense review of specialized court rulings may remove all of the stated benefits of specialization, including the predictability and stability that specialization purports to provide.²⁰¹ In the end, no bright-line rule seems sound. Instead, reviewing courts must take special care to balance the need for imposing generalist viewpoints on specialized courts in order to maintain the benefits of specialization for litigants.²⁰²

197. Wood, *supra* note 46, at 1767.

198. *Id.* But see Posner, *supra* note 30, at 787 (arguing that specialization reduces cross-pollination).

199. Wood, *supra* note 46, at 1767-68 (using due process as a paradigmatic example).

200. Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 128, 130 (1997) (stating that a specialized bankruptcy appeals panel would be desirable and superior to nonexpert federal district courts).

201. *Id.* at 124-30 (discussing the potentially harmful effects of generalist review of bankruptcy decisions).

202. One could draw an analogy to administrative agencies and judicial review of their decisions because of the analogous expertise, consistency, and capture concerns. There is a wealth of literature on the subject, and this Note does not seek to recount the various viewpoints of how much review of agency action is appropriate. Furthermore, there are of course some different considerations when dealing with a court as opposed to an agency, and the comparison may only prove useful as a source of guidance in relatively uncharted territory. For the opposing opinions of two Supreme Court Justices on the subject, writing outside the confines of the

The most daunting task for courts competing with Delaware is meeting the challenge of Delaware's high quality of decisionmaking while avoiding the dangers of overspecialization. Michigan and Maryland both follow the general premise that specialized judges will produce a higher quality of decisionmaking by creating more accurate, precise, and coherent results.²⁰³ Notwithstanding the general arguments that specialized jurists will create bias,²⁰⁴ Michigan and Maryland will both have difficulty answering Dreyfuss's admonishment that specialized judges need to remain attuned to the world beyond their specialty.²⁰⁵

One potential problem with Michigan's and Maryland's approaches to creating specialized high-tech business courts may be that the court will be even more specialized than other business courts and therefore particularly prone to problems that may develop from specialized jurisprudence. Michigan gives its cyber court jurisdiction over business and commercial actions and places specific emphasis on cases involving technology.²⁰⁶ Unlike the Delaware Chancery Court, which hears some nonbusiness cases, there is no provision that allows the judges in either the Michigan or Maryland system to hear cases outside of their area of specialization.²⁰⁷ Furthermore, Delaware law is accompanied by a great deal of legal scholarship that is not present in many other states, including Michigan and Maryland. Therefore, a greater-than-normal danger exists that the cyber court in Michigan or the business and technology track in Maryland, will become too insulated from the general legal debate.

The specialization problems are, in some sense, unavoidable, but Michigan and Maryland can certainly decrease their effect in two ways. First, they may do so through careful generalist appellate review. In order to counter the Delaware Court of Chancery's specialization by circumstance, Michigan and Maryland must be proactive in creating a narrower jurisdiction.²⁰⁸ Ultimately, however, as in Delaware, the generalist appellate courts hold considerable

courtroom, see Justice Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, 1989 DUKE L.J. 511 (1989) and Justice Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

203. 2001 Mich. Pub. Acts 262, §§ 8003(1), 8005.

204. See Romano, *supra* note 6, at 170-73 (highlighting the classic Cary-Winter debate in corporate law over the extreme uncertainty regarding what effect state competition would have on substantive law).

205. Dreyfuss, *supra* note 14, at 17.

206. § 8005(1).

207. See DEL. CONST. art. IV, § 10; DEL. CODE ANN. tit. 10, § 341 (1983); *Monroe Park v. Metro. Life Ins.*, 457 A.2d 734 (Del. 1983).

208. MARYLAND TASK FORCE REPORT, *supra* note 145, at 9.

review power over the cyber court.²⁰⁹ Therefore, the intermediate appellate courts and the Michigan Supreme Court, and likewise the Maryland Court of Appeals, must retain an active role in corporate litigation and be willing to intervene and overrule the cyber court or business and technology track judges if they fail to produce good decisions.²¹⁰ Further, the cyber court or business and technology track judges must respect and follow higher court precedent.²¹¹ Michigan's and Maryland's appellate courts must not fall into a trap of relying too heavily on the decisions of the specialized courts merely because they are specialized.²¹² Michigan and Maryland have not addressed concerns of generalist review ameliorating the benefits of specialization, and neither state has a supreme court or intermediate appellate court, with the same amount of experience as those in Delaware.²¹³ In essence, Michigan and Maryland must rely upon their appellate judges to review cases in a way that satisfies the delicate balance between assimilating a generalist viewpoint and retaining the benefits of specialization.

Second, Michigan and Maryland can counter the effect of overspecialization by insulating specialized judges from the political process.²¹⁴ As previously described, the Michigan Cyber Court law specifies that the supreme court choose judges for the cyber court from those who have been elected²¹⁵ in the state and have asked the supreme court to consider them for service on the cyber court.²¹⁶ Maryland's Court of Appeals judges are nominated by the governor and confirmed by the senate, but other judges in Maryland must be

209. 2001 Mich. Pub. Act 262, § 8021 (authorizing appeal to the court of appeals under Michigan Supreme Court Rules).

210. Steve R. Johnson, *The Phoenix and the Perils of Second Best: Why Heightened Appellate Deference to Tax Court Decisions is Undesirable*, 77 OR. L. REV. 235, 285 (1998) (concluding that a rule requiring increased deference to tax courts would be worse than no reform at all).

211. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 812, 872 (1994) (examining the benefits and arguing for the importance of lower courts holding true to higher court precedent).

212. Johnson, *supra* note 210, at 285 (1998).

213. Dreyfuss, *supra* note 14, at 28-29 (noting that because Delaware is so small, corporate cases make up a large amount of the Delaware Supreme Court's docket as well, and because of this the Delaware Supreme Court has more expertise in the corporate law area than many generalist supreme courts); see also DELAWARE SUPREME COURT: GOLDEN ANNIVERSARY 1951-2001 ch. 5 (Justice Randy J. Holland & Helen L. Winslow eds., 2001) (addressing the Delaware Supreme Court's influence on corporate law).

214. See Gibbons, *supra* note 190, at 48-49. Maryland may have similar issues because it assigns judges to the business and technology track. Maryland Business and Technology Task Force Report, *supra* note 145, at 7.

215. MICH. CONST. art. 6, § 2 (stating that justices are elected to the Michigan Supreme Court); art. 6, § 12 (providing that circuit court judges also elected).

216. 2001 Mich. Pub. Acts 262, § 8003.

elected. Both the judges sitting on the Maryland technology track and those on the Michigan Cyber Court were previously elected then appointed to a special track.²¹⁷ In making the final determination, the legislature calls on the supreme court to assess the person's experience and interest in the application of technology in the courtroom.²¹⁸ In one sense, this method of selection does not remove the judges from the political process because the supreme court selects judges from a pool of elected judges. On the other hand, because the supreme court selects the cyber court judges, and because no judge is elected directly to the cyber court, the supreme court has a responsibility to ensure that judges appointed to the cyber court demonstrate legal ability in the corporate law area. By giving the supreme court discretion in appointing those judges, if it takes a nonpartisan approach, the Michigan Supreme Court can assure that it satisfies Judge Gibbon's goal by placing talented and nonpartisan corporate judges on the bench.²¹⁹

Michigan's proposal does not create any further insulation of the political process, because the supreme court still must select the cyber court's members, and therefore these judges will be wed not only to the electorate, but also to the supreme court. The supreme court exercises control over all judges in the Michigan court system, and additionally, if the court does not approve of the cyber court rulings, it is free to reverse them.²²⁰ Ultimately, the decision to elect judges is a basic policy decision for each state, but in the cases of specialized business and technology courts, the Michigan Supreme Court and the Maryland Court of Appeals have an opportunity to insulate the specialized courts from political influence and to reduce the potential problems associated with overspecialization. However, if businesses or the public are not confident that the supreme court will temper the political nature of the process, the state could, as in Delaware, provide that appointments to the cyber court must be balanced between the prevailing political parties.

217. MARYLAND TASK FORCE REPORT, *supra* note 145, at 7. For a brief overview of Maryland court structure, see U.S. DEPT. OF JUSTICE, STATE COURT ORGANIZATION 25 (1998) [hereinafter STATE COURT ORGANIZATION], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco9808.pdf> (last visited Jan. 23, 2003).

218. MARYLAND TASK FORCE REPORT, *supra* note 145, at 7.

219. See also Maute, *supra* note 194, at 1243-44 (advocating an objective screening process for judicial candidates).

220. § 8021 (providing that appeal from the cyber court goes to the Michigan Court of Appeals).

2. The Value of Precedent

Beyond specialization and the selection of judges, another important factor affecting the quality of decisionmaking is the existence of a well-developed and predictable body of case law.²²¹ Several commentators have noted that Delaware's rich body of case law provides a wealth of precedent upon which firms and lawyers can rely.²²² It is this settled precedent, or alternatively, as discussed below, the way that the Delaware judiciary deals with the indeterminate precedent, that is the most difficult aspect of Delaware's model for another state to follow. Ostensibly, predictable case law and well-developed legal rules reduce the transaction costs of litigation by decreasing the time spent researching the law and the volume of litigation, because parties are operating under a system of well-developed and settled rules.²²³ Some commentators argue that if this predictability holds, and is an essential ingredient to Delaware's success in the world for corporate charters, then no state will be successful in emulating the Delaware model without producing a large number of consistent opinions.²²⁴

The public perception of stability in Delaware may be somewhat misguided. Commentators dispute the contention that Delaware corporate law is settled and predictable.²²⁵ Professor Ehud Kamar argues that not only is Delaware law indeterminate, but that this indeterminacy prohibits other states from easily adopting and following Delaware precedent because the indeterminacy places a great deal of responsibility on the shoulders of Delaware's experienced corporate judiciary.²²⁶ Kamar goes even further to state that Delaware's changing corporate law functions as a method of price discrimination, making it costly or extremely difficult for other states to adopt its corporate law principles and pull themselves up to Delaware's level in terms of consistency and settled precedent.²²⁷

221. See Alva, *supra* note 14, at 902-03.

222. Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1508 (1989); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 227 (1985); see also Dreyfuss *supra* note 14, at 25-26; Fisch, *supra* note 7, at 1070-71.

223. Fisch, *supra* note 7, at 1070-71.

224. Dreyfuss, *supra* note 14, at 28-29.

225. Fisch, *supra* note 7, at 1071.

226. Kamar, *supra* note 28, at 1933 (1998). Kamar also points out that increased reliance on the Delaware judiciary makes the Delaware model even harder to transport to another state. *Id.*

227. *Id.* at 1954 (noting that such discrimination is not necessarily conscious). See also Kaban & Kamar, *supra* note 10.

Several commentators concede that Delaware corporate law and jurisprudence are indeterminate but also argue that corporate law benefits from some degree of indeterminacy.²²⁸ Professor Jill Fisch argues that Delaware law may be indeterminate but attests that this indeterminacy makes it flexible.²²⁹ She claims that Delaware law is unique because it leaves major corporate law components, including the business judgment rule, the duty of loyalty, and responses to hostile takeovers, to the judiciary.²³⁰ In sum, Fisch argues that the effect of the pseudo-legislative activity of the Delaware courts and their use of standards rather than rules creates a unique judicial process that may prove to be of great benefit to litigants desiring fair, flexible, and timely rulings.²³¹

Professor Douglas Branson also argues that Delaware law is indeterminate but reasons that Delaware law remains predictable unless the parties are engaged in high-stakes litigation.²³² In those high-stakes cases, Delaware's courts do not have the stabilizing influence of interest groups concerned with jobs and the effect on local communities, and those states do not have a strong corporate bar influence.²³³ Branson posits that Delaware corporate bar's influence on litigation increases indeterminacy, because Delaware's lawyers derive a benefit from advising out-of-state law firms on complex issues of Delaware law—especially in complex high-stakes cases. Therefore, the Delaware corporate bar's interest in complex law balances corporations' desire for consistency and simplicity.²³⁴

In sum, all of the contentions about indeterminacy of Delaware law and, alternatively, the appearance of settled precedent, lead to the conclusion that states cannot compete directly with Delaware²³⁵ but instead should seek their own niche where Delaware has not yet blazed a trail.²³⁶ Michigan and Maryland can answer this call by targeting their approach toward high-tech litigants rather than the larger public corporations on which Delaware already has a strong

228. Fisch, *supra* note 7, at 1071.

229. *Id.*

230. *Id.* at 1074.

231. *Id.* at 1099-1100.

232. Branson, *supra* note 18, at 112-13.

233. *Id.* at 113 n. 134.

234. *Id.* at 92-93.

235. Kamar, *supra* note 28, at 1955.

236. See Romano, *supra* note 6, at 714-18 (discussing the possible effects of product differentiation on other state's laws and the competition for corporate charters in general).

grip, because, as noted above, it is difficult to beat Delaware on its own turf.²³⁷

B. The Appearance of Due Process: Reconciling the Cyber Court's and Litigants' Expectations

Legitimacy has always been an important part of the court system. As legitimate and appropriate fora for resolving disputes, courts must preserve litigants' due process expectations.²³⁸ Professor Dreyfuss notes that for a court to be successful, it must allay concerns raised when the specialized tribunal departs from the status quo.²³⁹ Two of the most common problems raised by specialized tribunals are specialized rules of procedure and the threat of increased lobbying for judicial appointment.²⁴⁰ It follows that if litigants do not trust the court's procedure or if they believe that the judges are too political or too partisan in their decisionmaking, then they will not take advantage of the forum, and Michigan and Maryland will be less likely to succeed in their ultimate goal of attracting businesses to their state.

Increased lobbying occurs because it is more cost-effective when the court is specialized.²⁴¹ A corporation may not receive a sufficient return on its investment if it spends money on a generalist judge who may or may not hear many business cases. With specialized courts, the industry knows that the judge will be setting precedent in her particular area of expertise and therefore that it will receive a better return on its investment. Thus, because of the increased return, businesses will be more likely to invest money and time toward lobbying or electing specialized judges.²⁴² Further, litigants will be aware of lobbying and may seek to increase the public perception that the political process influences judges, even if judges are actually impartial in their decisions.

Court procedure and structure in Delaware address both of these substantive concerns. First, Delaware is a traditional court system and does not implement any special methods or procedures outside of its little-used special litigation panel.²⁴³ Further, because Delaware appoints its judges in a purposefully bipartisan manner,

237. For a discussion of Michigan's and Maryland's abilities to capture the high-tech sector, see *infra* Section VII.A.

238. Dreyfuss, *supra* note 14, at 15.

239. *Id.*

240. *Id.* at 21.

241. *Id.* Lobbying can also disrupt the quality of decisionmaking. See *supra* Part VII.A.1.

242. *Id.*

243. See *supra* note 18.

rather than electing them, the state avoids problems arising from campaign finance and lobbying during the election process.²⁴⁴ In addition, corporations in Delaware tend to be repeat players, finding themselves on both sides of an issue, and lobbying efforts therefore often balance out.²⁴⁵ Commentators also note that because of a rich history of business litigation, Delaware has a powerful and influential corporate bar with a vested interest ensuring certain that Delaware does not become too biased in any one direction.²⁴⁶

When considering the effect of these new court procedures on the perception of due process and confidence in the courts' decisions regarding substantive law, the analysis differs for the Maryland proposal and the Michigan Cyber Court. While the Maryland proposal advocates technological advancements such as electronic filing,²⁴⁷ it does not go as far as the Michigan Cyber Court in establishing a court with facilities that will conduct all hearings using audio, video, and Internet conferencing.²⁴⁸ Maryland, in fact, proposes to act within its Differentiated Case Management System, which already separates out certain cases for special treatment, and the proposal only plans to extend that option to litigants with business- or technology-oriented disputes.²⁴⁹ Maryland's proposal to act within the existing court system and its less radical departure from the state's judicial norms would probably raise fewer fairness concerns from litigants.²⁵⁰

Michigan's move marks a larger departure from the normal course of hearing cases. Michigan's response to concerns that a potential litigant may have is to allow removal to the intermediate appellate courts by either party under section 8011 of the Cyber Court Act.²⁵¹ This provision also has the added benefit of removing any problems caused by a disparity in the parties' technological capabilities and helps to allay the concern that solo practitioners working in small firms will be disadvantaged by large-firm, large-

244. DEL. CONST. art. IV, § 3 (providing that Delaware judges are appointed by the governor and then approved by the legislature).

245. Dreyfuss, *supra* note 14, at 22-24.

246. Branson, *supra* note 18, at 113.

247. MARYLAND TASK FORCE REPORT, *supra* note 145, at 15-16.

248. 2001 Mich. Pub. Acts 262, § 8015.

249. MARYLAND TASK FORCE REPORT, *supra* note 145, at 6-9.

250. Admittedly, all of these due process concerns are somewhat subjective; this Note does not attempt to determine whether or not these courts can deprive litigants of their due process protections. It is likely that no substantial due process concerns exist because of the limited jurisdiction of these courts, and the option, already the law in Michigan, that either party may remove the case to a nonspecialized court. § 8011.

251. § 8011. Presumably, this waiver, along with the parties' voluntary assent to the use of videoconferencing will remove any constitutional due process concerns. See *supra* Part IV (discussing *United States v. Baker*).

budget use of the cyber court's technology.²⁵² The need to consent to the use of videoconferencing and to a high-technology method of conducting hearings and trials also reduces a litigant's concerns that technology may distort perceptions. Again, as discussed above,²⁵³ videoconferencing can be viewed as another adversarial tool, like coaching witnesses to improve their credibility, and therefore may not skew a trial as much as one might initially assume.²⁵⁴

The removal provision, however, is not without its problems. To allay due process concerns, Michigan has reduced the court's ability to establish predictable precedent. Allowing a litigant to remove the case to a court of general jurisdiction certainly reduces the cyber court's ability to establish reliable precedent and reduces a corporation's ability to rely on the cyber court as a forum in which it can resolve disputes. In fact, the removal provision could become a litigation strategy—if time is of the essence to one party and not the other, as the other party may choose to remove the case specifically to delay resolution.

The removal provisions also fail to address adequately concerns regarding the effect on third parties to the litigation.²⁵⁵ Even if a party never chooses to bring a case in front of the Michigan Cyber Court, by virtue of using section 8011, it may still have to address cyber court precedent. This consideration is especially relevant if courts accord greater deference to cyber court opinions than to business law opinions from general trial courts. If Michigan seeks to create a cyber court with predictable outcomes, it must demonstrate to litigants that the cyber court protects due process concerns and must make an effort to create consistent precedent at the appellate level.²⁵⁶ Although resolving some disputes in the business court and others in courts of general jurisdiction may not lead to certainty as quickly, it will offer the appellate courts a broader view of the law and therefore may

252. Lederer, *supra* note 75, at 831-32.

253. *See supra* Part IV.

254. *See* Roth, *supra* note 87, at 206-07.

255. Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Federal Law*, 105 HARV. L. REV. 1437, 1485 (1992) (noting that states engaging in the race for corporate charters focus on the potential corporate litigants and not on third parties potentially affected by adjudications).

256. *See* Dreyfuss, *supra* note 14, at 27-29. Certainly, this is of special concern in Michigan, where removal could be to any one of the fifty-seven circuit courts with 210 judges. STATE COURT ORGANIZATION, *supra* note 217, at 27; *see also* Part VII.A (discussing how generalized appellate review may serve to eliminate concerns of disparate precedent).

improve the quality of the appellate courts' rulings, reducing the effects of overspecialization discussed above.²⁵⁷

Unless Michigan can level the playing field, ensure that all qualifying parties are able to use the cyber court effectively, and adequately compensate for any doubts in the trustworthiness of audio, video, and Internet conferencing, concerns for due process concerns will be raised, and public confidence in the court may diminish. However, as Frederic Lederer points out, the development of state-run and state-funded cyber courts with their own technology and facilities for use by any qualifying party may actually reduce any perceived disparity between large firms and solo practitioners.²⁵⁸ Therefore, small practitioners may be as willing as large firms to use a technology court, if the state makes the technology affordable and accessible. Further, disparity in the skill and capability of the parties is inherent in the legal system. Simply put, some lawyers and law firms are better suited than others to some cases, and it is legal inadequacy rather than unequal advocacy that the law requires for relief.²⁵⁹ Litigants therefore may be willing to accept some disparity in these cyber courts because they accept disparity in other forums.

Michigan and Maryland may be in a special situation, however, because of the focus of their courts. Both states focus not just on business, but high technology business,²⁶⁰ and firms that deal with and create technology on a daily basis may be more willing to accept technology in the courtroom and throughout the legal process. Further, technology industries may be able to accept greater inconsistency in the general corporate or business law in exchange for judges who are more familiar with the evidentiary and substantive legal aspects of high-technology industry.²⁶¹

257. See Posner, *supra* note 30, at 785-86 (discussing the effects of judicial monopoly on decisions).

258. Lederer, *supra* note 75, at 832-33. Lederer also points out that the assumption that solo practitioners will be less skilled in the use of technology may be inaccurate, because lawyers in small firms often have little or no support staff and will have to become more familiar with technology on their own. *Id.* at 832. For a solo practitioner's view on the use of technology, see Jesse J. Richardson, *How a Sole Practitioner Uses the "Electronic Office" to Maintain a Competitive Law Practice*, 3 DRAKE J. AGRIC. L. 141 (1998).

259. Lederer, *supra* note 75, at 832.

260. 2001 Mich. Pub. Acts 262, § 8001(f) (stating the purpose of "supplement[ing] other state programs designed to make the state attractive to technology driven companies"); see also MARYLAND TASK FORCE REPORT, *supra* note 145, at 1 (stating that "the Task Force recommends establishing a statewide program to resolve substantial disputes affecting business entities, including the *unique and specialized issues involving technology*" (emphasis added)).

261. See discussion *supra* Part VIII.

C. The Rocket Docket Takes off into Cyberspace: Will Michigan's Cyber Court Improve Efficiency?

Dreyfuss contends that a court's efficiency, defined as the court's ability to resolve disputes within the time frame that litigants require, is key to its success as a specialized business court.²⁶² Dreyfuss states that Delaware excels in this area: "Cases cannot be adjudicated any more efficiently than Delaware is currently adjudicating them. Therefore, the only way states could move their dockets more quickly would be to compromise on the due process or quality parameters."²⁶³ Specifically, she notes that when the Delaware Chancery Court reviewed the complex dispute involving QVC and Viacom's tender offers for Paramount, the court was able to finish the briefing in two-and-a-half weeks and then to assimilate and review over four hundred pages of briefs in a mere nine days.²⁶⁴

Efficiency generally decreases litigation costs through firm trial dates and faster procedures. Attorneys will spend less time and money on trial preparation, because they are less likely to have to prepare for trial more than once as a result because of fewer continuances.²⁶⁵ Less pretrial time also means less time spent deposing witnesses and preparing and answering interrogatories.²⁶⁶ Delay may also deny justice by causing inequitable settlement when one party can afford to wait and the other cannot, resulting in a disproportionate benefit to the party who is able to retain the value of a judgment throughout the delay.²⁶⁷

Other commentators provide further explanation for Delaware's impressive efficiency record.²⁶⁸ Delaware's small judiciary and small population reduce the number of cases competing for the judges' time and limits the influence of potentially disparate precedent created by a large number of judges.²⁶⁹ Furthermore, Delaware simplifies appeals and the generation of precedent by allowing direct appeals to the Delaware Supreme Court. Commentators observe that courts in Delaware are not prone to localized concerns, such as the

262. Dreyfuss, *supra* note 14, at 14.

263. *Id.* at 37.

264. *QVC Network Inc. v. Paramount Communications, Inc.*, 635 A.2d 1245 (Del. Ch. 1993), *aff'd*, 637 A.2d 34 (Del. 1994); Dreyfuss, *supra* note 14, at 20-21.

265. Johnson, *supra* note 43, at 230.

266. *Id.*

267. *Id.* at 230-32.

268. Alva, *supra* note 14, at 917-19.

269. *Id.*; *see also* Kamar, *supra* note 28, at 1925-26.

creation of jobs and the effects on local communities, that complicate corporate disputes in other jurisdictions, because most of the companies incorporated in Delaware have their principle places of business in other states.²⁷⁰ The best explanation identifies a lack of local concerns coupled with a small judiciary and a large body of case law as the factors that allow Delaware to resolve disputes quickly.

Michigan and Maryland do not imitate Delaware by providing a limit on the number of judges involved with corporate law decisions. Maryland's proposal places the business and technology track within the same confines as all other trial courts in the state. Therefore, no additional expedited or simple appeals process exists beyond that offered to all Maryland litigants.²⁷¹ In Michigan, appeals from the cyber court proceed to the appropriate Court of Appeals in Michigan and not directly to the Michigan Supreme Court.²⁷² A litigant, and other interested parties, therefore a second time before receiving a definitive answer from Michigan's highest court. This is especially problematic given the voluntary nature of these forums and the resultant potential for competing precedent from the general and specialized courts.²⁷³ Again, it becomes apparent that Delaware is in a truly unique position because of its small population and its court system dominated by corporate litigation.²⁷⁴ Instead of reducing, expediting, or sending the appeals to a specialized appellate court, Michigan and Maryland must counterbalance Delaware's small judiciary and corporate caseload with the use of potentially superior procedures for processing cases and judges familiar with high-technology litigation.

To say that there is no way for any court to compete with or improve upon Delaware's efficiency ignores the potential impact of technology and novel avenues for streamlining the judicial process.²⁷⁵ Here, comparison with Delaware may be less relevant. While

270. Alva, *supra* note 13, at 918-19.

271. MARYLAND TASK FORCE REPORT, *supra* note 145, at 12-13.

272. 2001 Mich. Pub. Acts 262, § 8021.

273. See Hon. Barbara A. Crabb, *In Defense of Direct Appeals: A Further Reply to Professor Chemerinsky*, 71 AM. BANKR. L.J. 137, 147 (1997) (recognizing the decreased predictability in bankruptcy law when both district courts and bankruptcy appellate panels hear appeals from bankruptcy judges).

274. Alva, *supra* note 14, at 902-03.

275. One example outside the creation of specialized judges is the use of "special masters" to handle complex evidence or disputes. For an examination of the use of specialized master, see Margaret G. Farrell, *Coping with Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 927, 988-90 (1994).

Delaware responds to the litigants' timing needs,²⁷⁶ the proper basis of comparison for Michigan and Maryland to measure success in providing fast and fair adjudication may be the rocket docket in the Eastern District of Virginia.²⁷⁷ The Eastern District of Virginia does not have the systemic attributes of a particularized caseload mix and small judiciary like the Delaware judiciary, so that model is more readily exportable to another forum. However, neither Michigan, Maryland, nor the Eastern District of Virginia replicates Delaware's expedited appeals process, and that fact may prove as relevant as fast and fair proceedings at the trial level. Certainly, Michigan and Maryland believe that improvement upon, or equalization with, Delaware's speed is possible. Both the Maryland proposal and the Michigan Cyber Court attempt to increase speed with discrete procedures and with specialized judges who will take less time than generalist judges to become familiar with technology issues, both evidentiary and substantive.²⁷⁸

If meeting the parties' expectations is the key, the Maryland proposal provides litigants with a choice between two tracks within the business and technology program—an expedited and a regular track.²⁷⁹ The expedited track provides for a trial within ninety days, while the standard track provides for trial within nine months.²⁸⁰ The choice of tracks should meet litigants' expectations, but these tracks alone are insufficient. The Maryland proposal should include rules like those in the Eastern District of Virginia that ensure that these dates are firm from the outset and perhaps also discovery rules designed to reduce the amount of travel for depositions and the number of interrogatories and depositions taken.²⁸¹ Maryland can best replicate the effects of Delaware's small judiciary through the use of its existing expedited appeals system.²⁸² That system, coupled with the tracks within the Maryland court system, may force the courts to decide business disputes quickly and completely. No such option exists

276. Dreyfuss, *supra* note 14, at 20-21 (noting the chancery courts' knowledge of the financial markets and their ability to hear disputes quickly when necessary).

277. A number of other federal districts have created rocket dockets in response to the Civil Justice Reform Act's encouragement of sending cases to trial. See Johnson, *supra* note 43, at 233-34 (describing the permissibility of rocket dockets in the federal system).

278. MARYLAND TASK FORCE REPORT, *supra* note 145, at 6.

279. *Id.* at 11.

280. *Id.*

281. Koenig, *supra* note 53, at 807-09.

282. MARYLAND TASK FORCE REPORT, *supra* note 145, at 13.

in Delaware. Instead, the chancellors make subjective determinations when deciding how quickly they will decide cases.²⁸³

Michigan is further along in the process than Maryland, and the Michigan Cyber Court draft rules allow for a deeper analysis of efficiency measures. The first means of increasing efficiency is through the requirement that all litigants choosing the cyber court have audio and videoconferencing capability,²⁸⁴ and be certified as electronic filers in the cyber court.²⁸⁵ In the Eastern District of Virginia, the court places restrictions on taking depositions that involve travel in order to eliminate wasted travel time and expense,²⁸⁶ but the Michigan approach allows the court to go farther. No restrictions need be placed on travel, because litigants are able to depose and confer with the judge for hearings and other proceedings through the use of audio and video technology.²⁸⁷

Despite all of this technology, there is no equivalent in Michigan to the Eastern District of Virginia's Rule 16 obligating the court to limit continuances and extensions to those for good cause.²⁸⁸ Without this sort of commitment, no amount of technology will necessarily accelerate resolution of conflicts. However, because the very nature of the cyber court seems directed at increasing speed and efficiency, and because the cyber court is voluntary, it is unlikely that litigants choosing the court will move slowly. It is also unlikely that judges will allow parties to slow down the process, but a firm public commitment to the efficient resolution embodied in a cyber court rule would notify potential litigants and reinforce the court's commitment to speedy dispute resolution. Such a rule would reduce the potential for arbitrary decisions regarding the importance of a case or rulings on continuance requests by providing a standard on which judges should base those decisions.²⁸⁹

A possible drawback of rocket dockets for states looking to develop predictable corporate law is that while they speed the resolution of disputes through the use of their early and firm trial dates, they may increase the likelihood of settlement.²⁹⁰ Although this

283. However, as discussed earlier, Delaware does seem amenable to deciding cases on an expedited timetable when possible, so practice, rather than rule, may alleviate this concern. See *supra* note 211 and accompanying text.

284. 2001 Mich. Pub. Acts 262, § 8015 (stating that "all matters . . . shall be heard by means of electronic communication . . .") (emphasis added).

285. MICH. CYBER CT. DR. R. 2.102A.

286. E.D. VA. LOCAL R. 16.

287. § 8015.

288. E.D. VA. LOCAL R. 16.

289. See Johnson, *supra* note 43, at 255.

290. *Id.* at 240-41.

point is debatable,²⁹¹ and parties may be pleased to settle cases, it raises some concerns for states like Michigan and Maryland that seek to attract businesses.²⁹² Carr and Jencks raise several problems with encouraging settlement and ADR.²⁹³ Concerns about excessive private resolution of disputes include: loss of information, the reduction of the public welfare,²⁹⁴ the widening of the gap between the haves and have-nots,²⁹⁵ and a reduction in the power of the courts.²⁹⁶ The underlying theme of all of these concerns is the loss of information to the public.²⁹⁷ Further, some commentators have stated that a move toward increased ADR raises due process concerns, because private parties may be able to subvert substantive law by private and judicially enforceable dispute resolution.²⁹⁸ While some businesses do value secrecy, it is sometimes better for all litigants, and potentially for a particular business in the future, to come to a public resolution that will govern future conduct in that area of law. In this sense, Michigan and Maryland have a vested interest in ensuring that corporations actually utilize their new systems, because as the system develops law, it only becomes more attractive and more comparable to Delaware's highly developed body of case law.²⁹⁹ Neither state will become the Delaware of high-tech law until some foundation exists for judges, lawyers, and academics to use in determining and predicting corporate law in those states.

291. See *id.* (stating that delay, not speed, encourages settlement and noting that noneconomic considerations may influence the settlement process and that perhaps an early trial date will encourage parties to begin acting cooperatively earlier than if the trial date were far in the future).

292. Romano, *supra* note 222, at 227; see also Eisenberg, *supra* note 222, at 150; see also Dreyfuss *supra* note 14, at 25-26.

293. Carr & Jencks, *supra* note 35, at 228.

294. *Id.* at 228-29. Carr and Jencks use an example of an agreement between State Farm and Whirlpool Corporation to settle all subrogation claims through ADR. *Id.* Carr and Jencks argue that this method of resolution violates public policy by keeping the public uninformed of potential product flaws. *Id.* They claim that courts possess adequate measures to ensure secrecy, and that litigants should be encouraged to use those measures. *Id.*

295. *Id.* at 230-31 (suggesting that good judges will help to level the playing field between experienced corporate lawyers and young attorneys representing plaintiffs).

296. *Id.* at 231-32 (stating that business is a powerful force in society and that if it removes itself from the courts through ADR, courts will not have as much of an effect on society); see also Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 212-13 (2000) (highlighting the dangers of allowing private rules to substitute for public law).

297. See Chemerinsky, *supra* note 201, at 130 (discussing the advantages of court opinions as opposed to unreported ADR decisions in bankruptcy law).

298. See Thornburg, *supra* note 297, at 154.

299. See Kamar, *supra* note 28, at 1926 (stating that even if other states recruit experienced jurists, they would lose their advantage if those courts do not handle enough cases).

D. Conclusion: Will Michigan's and Maryland's Focus on High-Tech Businesses Provide an Avenue for Success?

The foregoing analysis leads to the conclusion that neither Michigan nor Maryland will overtake Delaware as the preeminent forum for resolving general corporate disputes. However, that objective may not be either state's goal in proposing or implementing new judicial tools for business dispute resolution. These two states have chosen not to target business in general, but instead to set their sights on high-tech business.³⁰⁰ Michigan and Maryland assume that high-technology businesses value speedy resolution of trials,³⁰¹ the use of technology in the courtroom, substantive consideration of the needs of high-tech firms, and judges skilled in business disputes who are committed to gaining training in the evidentiary nature of technology more than the benefits offered by the Delaware courts. In order to be successful, Michigan and Maryland must offer both procedural and substantive options that are more attractive to corporations than those available in Delaware—one without the other will not prove effective.

Success against Delaware, even in this narrow area, is unlikely. If Michigan's and Maryland's goal is to compete for corporate charters, then they must distinguish themselves from Delaware by relying on the idea that high-technology companies have different procedural and substantive needs than traditional businesses. Delaware may have a well-developed body of case law, but that precedent focuses on the needs of traditional large corporations rather than on the needs of emerging high-tech companies. Finally, the Delaware judges, while specialized in corporate law, lack specialization in handling the technological evidence that is presented to the court in a high-tech business dispute. Finally, Delaware does not have a firm grip on all of the noncorporate aspects of corporate existence, because while a majority of corporations have incorporated in Delaware, far fewer are actually located there. What effect the sum of these factors will have on *corporate* law—as opposed to on intellectual property law—is difficult to anticipate. In a sense, to win the race for corporate charters for high-technology corporations, Michigan and Maryland are counting on the fact that high-technology companies have different corporate law needs—for example, different fiduciary duty law—than traditional businesses. An analysis of

300. See Engler, *supra* note 11.

301. Carr & Jencks, *supra* note 35, at 197 (noting the particularly high speed at which high-tech companies operate).

Michigan's and Maryland's chances of success cannot be properly undertaken in a corporate law vacuum but must include the corporate and substantive law of the state of incorporation and of the state of location.

One consideration, which may provide an avenue for limited success, but which was not taken into account in the foregoing analysis, is the "developing" nature of many high-technology firms. High-technology firms, especially those that Michigan and Maryland seek to attract, are unlikely to be large public companies, but instead are more likely to be small corporations that have not yet had their initial public offering.³⁰² By capturing firms early, Michigan and Maryland may be able to keep those corporations past the initial start-up phase by inducing the firm to locate in the forum state, providing efficient dispute resolution, and thereby reducing the incentive to reincorporate. Delaware has not focused on small emerging businesses in this manner. Incorporation behavior seems to reflect the hypothesis that Delaware is dominant with regard to America's largest corporations rather than being a haven for small businesses.³⁰³ In fact, taken together, Delaware's high franchise fees and arguably the Delaware Law of Corporations and Business Organizations and case law only serve to illustrate that Delaware is not as concerned with small emerging businesses, nor is it as concerned with where businesses locate, than with where they incorporate.³⁰⁴ Given the fact that many corporations reincorporate in Delaware once they reach a certain size leads to the conclusion that this strategy will not be entirely effective.

VIII. LOCATION, LOCATION, LOCATION: COMPETING FOR LOCATION, NOT INCORPORATION

Michigan and Maryland may not actually be competing with Delaware for corporate charters but may instead be (or should be) engaged in competitive behavior in order to induce businesses to *locate* as opposed to *incorporate* in their states.³⁰⁵ Kahan and Kamar, in *The Myth of State Competition in Corporate Law*, observe that a number of

302. See Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQUIRY 679, 685-86 (1996) (stating that Silicon Valley is built on the venture capital used to fund and support start-ups, most of which do not survive until public offering).

303. See Fisch, *supra* note 7, at 1061.

304. See O'KELLEY & THOMPSON, *supra* note 4, at 1052-53.

305. See generally Kahan & Kamar, *supra* note 10 (stating that competition for corporate charters is a myth).

states are not really competing in the race for corporate charters and note that the advantages of winning the race for corporate charters do not outweigh the costs of engaging in the race.³⁰⁶ Ultimately, however, public statements, such as Michigan Governor John Engler's statement that the cyber court will allow Michigan to become the Delaware of high-tech law,³⁰⁷ seem to indicate that states *perceive* themselves as competing for corporate charters. States who wish to compete for corporate charters, even with regard to a particular sector of the economy, are unlikely to succeed. As such, those states should refocus their efforts and publicly change their stance to attracting businesses to locate, rather than to reincorporate, in their states.

Michigan's and Maryland's actions demonstrate a desire to go beyond attracting mere incorporation to encouraging location as well. For example, Michigan's jurisdictional grant goes beyond claims associated with corporations merely incorporated in the forum state by including contractual agreements, such as trade secrets, non-competes, disputes arising out of commercial transactions including those with banks, business, or commercial insurance, and commercial real property other than landlord/tenant.³⁰⁸ This broader grant demonstrates that, while perhaps not clearly stated, Michigan's goal is broader than the race for corporate charters, because it places areas of law within the cyber court's jurisdiction that have little bearing on the actions of a corporation merely incorporated in the forum state. Furthermore, while Governor Engler stated that he wanted Michigan to become the Delaware of high-tech law,³⁰⁹ he did so in the context of a speech full of directives designed to increase the *presence* of high-tech businesses in Michigan.³¹⁰ In this context, it seems that Michigan's goal, and perhaps Maryland's goal as well, is to increase the number of businesses located in the state and not necessarily to increase the number of corporations incorporated there.

Given that Michigan and Maryland may not actually be competing for corporate charters and may be more concerned with the location of a business, a comparison to Delaware alone seems insufficient. Many factors examined above, including efficiency, quality of decisionmaking, and due process concerns, apply equally to courts not specifically designed to address corporate law issues. However, to complete the analysis, one needs to explore an area of the country successful not in getting high-technology businesses to

306. *Id.*

307. Engler, *supra* note 11.

308. 2001 Mich. Pub. Acts 262, § 600.8005(2)(b)-(f).

309. See Engler, *supra* note 11.

310. *Id.*

incorporate, but where high-technology businesses have chosen to locate. California's Silicon Valley fits this description well. Silicon Valley boasts the highest concentration of technology companies, and examining its laws and the needs of emerging technology companies will demonstrate how Michigan and Maryland may be able to attract high-technology businesses to locate, as well as incorporate, in their states.³¹¹

Suchman and Cahill attribute much of Silicon Valley's success to the availability of venture capital and the role that lawyers play in managing the uncertainty inherent in adapting existing corporate law to the nature of high-tech business.³¹² Suchman and Cahill describe an environment in which lawyers deal with uncertainty by absorbing transaction-specific uncertainties, by educating newcomers, and by establishing practices that guide judicial interpretation of the preferred contractual provisions.³¹³ In Michigan and Maryland, courts familiar with high-technology businesses' concerns may provide the legal support needed to develop an emerging high-technology firm.

Other commentators relate Silicon Valley's success to the labor market and trade secret and covenant-not-to-compete laws that support its high-technology industry.³¹⁴ Professor Ronald Gilson posits that high-technology industries will benefit from different legal rules than traditional businesses in areas governing intellectual property and employee mobility.³¹⁵ Gilson notes that a key aspect of Silicon Valley's legal infrastructure is California's refusal to enforce covenants not to compete, which facilitates knowledge transfer between firms and encourages innovation.³¹⁶

Instead of recommending that states emulate California's refusal to enforce covenants not to compete, Gilson advocates an industry-by-industry approach to structuring covenants not to compete and fashioning appropriate rules to protect intellectual property and prohibit or encourage employee mobility.³¹⁷ Gilson states that the best legal infrastructure may be one with the flexibility to

311. See Suchman & Cahill, *supra* note 302, at 684-85 ("Over 60% of the American Electronics Association's 1,800 members have their corporate headquarters in California . . . in 1990 more than 3,000 high-technology establishments of one kind or another were operating in the region, employing roughly 267,000 people.")

312. *Id.* at 690-91 (stating that Silicon Valley lawyers foster market development and suppress business disputes).

313. *Id.* at 709.

314. See Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999).

315. *Id.* at 577.

316. *Id.* at 577-78.

317. *Id.* at 628.

balance the needs of external economies with the protection of intellectual property rights.³¹⁸ Michigan and Maryland do not include employment in their cyber court jurisdictions, but those courts will hear cases involving trade secrets, non-compete disputes, and business-to-business disputes regarding high-technology information and movements of the labor force and information.³¹⁹ Certainly, expertise and experience in dealing with high-technology disputes would improve the courts' understanding of the flow of intellectual capital in the high-tech industry and would provide an excellent forum for balancing the need for intellectual property protection with the need for employee mobility.

In states like Michigan and Maryland, one could reason that what is most important is that some group (whether it be lawyers, the legislature, or judges) be able to deal with uncertainty when fashioning law geared toward the high-risk, high-turnover environment and close corporate structure that is central to the high-tech community.³²⁰ Such specialization in dealing with high-tech businesses, which are more likely to be closely held corporations, could open a door for Michigan and Maryland to capture a piece of the market to which Delaware does not directly appeal.³²¹ Further, if given the opportunity to deal with high-tech disputes on a regular basis, Michigan and Maryland courts may develop a specialty in employment, trade secret, and covenant-not-to-compete laws and may be able to design their laws to meet the needs of a developing high-technology community.³²²

The unique importance of a highly skilled and specially trained workforce in the high-tech sector may cause high-tech businesses to prefer a court system developing predictable laws upon which those corporations can rely to protect their trade secrets and intellectual capital. Also, because the high-tech industry changes so quickly, the advanced use of technology and a rocket docket system may allow these companies to settle disputes rapidly and therefore will allow high-tech firms to resolve disputes before the technology or skills that they are using become obsolete. Michigan and Maryland business courts' jurisdiction includes trade secrets and covenants not to compete,³²³ and the ability to balance those intellectual property

318. *Id.* at 629.

319. 2001 Mich. Pub. Acts 262, § 600.8005(3)(a)-(f); *see also* MARYLAND TASK FORCE REPORT, *supra* note 145, at 9-10.

320. *See* Suchman & Cahill, *supra* note 303, at 685-86.

321. *See* Eisenberg, *supra* note 222, at 1525-26.

322. *See* Gilson, *supra* note 314, at 629.

323. § 600.8005(3)(a)-(f); *see also* MARYLAND TASK FORCE REPORT, *supra* note 145, at 9-10.

concerns, deal with high-tech evidence, and provide a fast resolution of disputes may influence some companies to locate their operations in Michigan or Maryland.

All of this speculation should not be taken to mean that there is no value to corporate law specifically addressing high-tech or small corporate concerns. Professor Melvin Eisenberg provides evidence of one instance in which close corporations and public corporations will differ—the need for contractual freedom.³²⁴ Other commentators agree and state that as business moves into the next century, private ordering will become more important.³²⁵ One area in which private ordering affects existing legal rules is with regard to fiduciary duties.³²⁶ Eisenberg concludes that closely held corporations need contractual freedom in creating their internal governance rules but they also need mandatory fiduciary rules applicable to private agreements to prevent the dangers of systematic unforeseeability and exploitation of minority interests.³²⁷ The variation in control and fiduciary rules that small firms desire is more problematic for, and perhaps more damaging to, publicly held corporations, because such changes could reduce the accountability of inefficient managers and make those managers difficult to remove.³²⁸

Perhaps the most difficult counterarguments as to why high-tech companies might not want to break new ground by locating (or incorporating) in Michigan and Maryland relate to investor response and the nature of high-tech litigation. First, investors who invest in a new high-tech corporation are investing in a potentially risky field.³²⁹ Because investors are taking a risk on the success of a corporation's product,³³⁰ they may not be willing to take a risk with regard to the choice of law and therefore may prefer the default choice of

324. Eisenberg, *supra* note 222, at 1525-26. High-tech firms may have different concerns than traditional businesses in other areas as well. See Henry J. Perritt, Jr., *Dispute Resolution in Electronic Network Communities*, 38 VILL. L. REV. 349, 365 (1993) (noting the special consideration needed to govern electronic networks); see also Joseph Bankman, *The Structure of Silicon Valley Start-Ups*, 41 UCLA L. REV. 1737 (1994) (noting the special considerations and tax implications of emerging technology companies).

325. Symposium, *What Business Will Look for in Corporate Law in the Twenty-First Century*, 25 DEL. J. CORP. L. 6, 22 (2000) (remarking that while Delaware is the place to be right now, in the future corporations will look to fora that support private ordering).

326. See Eisenberg, *supra* note 222, at 1470.

327. *Id.*

328. *Id.* at 1524-25.

329. Suchman & Cahill, *supra* note 311, at 685 (stating that over sixty percent of start-up companies will enter bankruptcy before investors can recoup their original stake and that less than ten percent reach their initial public offering).

330. *Id.* at 687.

Delaware.³³¹ This choice may reflect the investors' belief that only Delaware is sufficiently committed to its corporate law because of the state's heavy reliance on proceeds from franchise taxes.³³²

Further problems stem from the federal nature of much of the law that is important to high-technology firms. The types of law that are typically associated with high-technology firms are copyright, patent, trademark, and other intellectual property concerns. Those laws have become increasingly federal in nature, and thus resolution of those issues remains firmly in the hands of the federal courts.³³³ Software and high-technology firms do have an interest in the rapid resolution of their business claims, but the fact that the federal government has limited the state's role in intellectual property may reduce a high-tech business's incentive to reincorporate or locate in Michigan or Maryland. However, as Gilson notes, state law still has a significant effect on intellectual property through trade secret law and covenants not to compete,³³⁴ and therefore such a federal preemption argument may not carry as much weight as it seems at first blush.

The nature of these potential substantive law differences highlights the importance of the court system reforms in Michigan and Maryland. Substantive law changes alone are insufficient to attract corporations to locate in a forum state, because many of the noncorporate substantive law issues could be integrated into a contract through a choice-of-law provision. Adding a choice-of-law clause to a contract between businesses located outside of Michigan or Maryland provides no benefit to the forum state, as parties using such clauses do not have to pay any fee to that state nor be located or incorporated in that state. Thus, in order to derive any value from laws friendly to high-technology businesses, Michigan and Maryland

331. Herd behavior may play an important role in the success of Delaware's corporate law. See Marcel Kahn & Michael Klasner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior, and Cognitive Biases*, 74 WASH. U. L.Q. 347, 366 (1996) (noting that standardization may even cause firms to use contractual terms and choose laws that do not maximize their value). There also seems to be evidence that firms reincorporating in Delaware see significant gains. See, e.g., Peter Dodd & Richard Leftwich, *The Market for Corporate Charters: "Unhealthy Competition" Versus Federal Regulation*, 53 J. BUS. 259, 275, 281 (1980) (finding firms that reincorporate in Delaware enjoy positive returns greater than thirty percent over a twenty-five-month period pending reincorporation).

332. Kamar, *supra* note 28, at 1927.

333. In fact, this is one area in which the federal courts have become quite specialized. United States patent law requires that most patent infringement appeals be brought in the United States Court of Appeals for the Federal Circuit. As a result, that circuit has developed a great deal of expertise and specialization in that area of law. 28 U.S.C. § 1295(a)(4). For a detailed analysis of the court's functioning, its successes, and its failures, see Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989).

334. See Gilson, *supra* note 314, at 629.

must provide an added service that is only available to businesses conferring a benefit on Michigan and Maryland. The cyber court systems provide this benefit. In order to use the court systems, a business must act in a way such that it or its business partner is subject to the jurisdiction of Maryland or Michigan's courts. In doing so, they presumably will have contact with Michigan or Maryland—either by doing business there or by locating there. Either way, Michigan and Maryland will receive a tangible benefit in the form of commercial activity in the state—which is quite possibly the real goal of these business court proposals.

Ultimately, only time will tell whether high-technology firms will have specialized needs in state court proceedings that would require a different cost-benefit analysis when choosing a state in which to locate. However, the playing field for competition in the race for location, as opposed to incorporation, is more open, and a strong argument can be made that Michigan and Maryland have taken an important step to augment their attractiveness to new businesses. Battling Delaware for incorporation may be a fruitless endeavor, but improving the court system to serve litigants located in the forum state may provide some benefit.

IX. CONCLUSION: SOME RECOMMENDATIONS FOR STATES CREATING SPECIALIZED BUSINESS COURTS

From the foregoing discussion, it is apparent that while Michigan and Maryland will not be able to compete directly with Delaware for corporate charters, these states can provide a forum that will appeal to certain types of businesses deciding where to locate. Furthermore, much of the law and expertise that high-tech firms seek is not determined by the state of incorporation, but rather by the state of location, and Delaware has certainly not cornered the market in terms of business location. However, in order to meet these demands, state courts like those in Michigan and Maryland must institute several safeguards to compete with Delaware.

To serve the constituency a state desires to attract, state legislatures must carefully define the scope of the specialty court's jurisdiction and tailor it to the areas of law most important to that type of business. In so doing, states should remember that incorporation does not equal increased business activity in the state and should provide law based on the state of location, not incorporation. Also, states should take special care to make certain that appellate court review consolidates opinions emanating from both the business or specialty courts and the general courts.

To create a reliable and consistent legal environment and to avoid encouraging an excess of ADR, courts should create a body of written opinions upon which future litigants may rely.³³⁵ Courts should also take a proactive approach and use cases as an opportunity not only to resolve current disputes, but also to guide future business activity.³³⁶

To avoid the heightened risks of industry capture associated with specialized tribunals, states should create procedures that will both select qualified and interested judges and insulate them from the political process by adopting standards for selection based on experience, interest, and aptitude.³³⁷ In addition, states should create a balance between political parties and ideologies to prevent the law from vascillating.³³⁸

To create confidence in the court's decisions, states should enact appropriate measures to reduce litigants' due process concerns. Beyond just creating good court rules, states should promote their courts and demonstrate their ability and fairness to the public, because when jurisdiction is voluntary, public perception can be as important as actual rules.³³⁹ Furthermore, states should develop rules designed to deal with the potential for conflicting cases and generalist review without destroying the benefits of specialization.

To combat the problems of judicial backlog and to address resulting efficiency concerns while reducing the public's due process concerns, states should give litigants the option of selecting fast-track litigation and should keep judges committed to speedy resolution of justice through court rules.

In order to avoid remaining in Delaware's shadow, states should encourage courts to review and consider Delaware case law on important points of law, but to avoid following the herd and directly adopting Delaware law.³⁴⁰ Instead, states should offer some distinguished difference targeted to a subset of businesses or addressing a particular legal concern, because direct competition with

335. See Carr & Jencks, *supra* note 35, at 221-33 (describing the dangers inherent in increased privatization).

336. See Fisch, *supra* note 7, at 1079-80.

337. See Gibbons, *supra* note 190.

338. See Branson, *supra* note 18, at 90-91 (describing how Delaware is in the unique position of having strong lobbying groups on both sides of most corporate law issues).

339. See Dreyfuss, *supra* note 14, at 15 (stating that "compliance, or the appearance of compliance with constitutional norms is not always enough to allay public concern").

340. See Kamar, *supra* note 28, at 1938 (stating that herd behavior plays a role in the convergence of corporate law).

Delaware for all large corporations will be less successful than a focused approach.³⁴¹

Ultimately, only time and experience will determine the success of the Michigan Cyber Court and the Maryland proposal. Each proposal has its own advantages: Maryland may attract more litigants because of its less radical departure from current norms, while Michigan's potential for efficiency and its ability to reach out-of-state litigants may prove more effective. However, even if neither state succeeds in its goal of attracting high-technology businesses to the forum state, reducing the strain on trial courts through the removal of time-consuming business cases is likely to improve the states' judicial systems.

Furthermore, especially in Michigan's case, the cyber court may prove to be a useful model for states to transport from the business arena to other areas of law. If these high-tech methods prove successful in increasing efficiency, each state has the responsibility not to withhold this technology from other, less powerful interest groups. In the interest of fair and impartial justice, each state should offer effective technology to all litigants, whenever constitutionally permissible.³⁴² Such an effort would remove some of the speculation that specialized business courts are elite forms of justice that cater only to the haves and not the have-nots.³⁴³

*Jacob A. Sommer**

341. For a discussion of innovation in other states' laws, see Romano, *supra* note 6, at 713-17.

342. See Lederer, *supra* note 75, at 844 (arguing that unless courts turn away from technology, the virtual courtroom will become ubiquitous).

343. See Ember Reichgott Junge, *Business Courts: Efficient Justice, or Two-Tiered Elitism?*, 24 WM. MITCHELL L. REV. 315, 318 (1998) (observing that business courts may benefit the elite at the expense of the poor); see also Bebhuk, *supra* note 255, at 1509 (observing that state competition may favor management and controlling shareholders over public shareholders).

* I would like to extend my thanks to Professor Robert B. Thompson at the Vanderbilt University School of Law and Professor Ehud Kamar at the University of Southern California Law School for reviewing this Note and for providing invaluable insights. I am also greatly indebted to my editors, Tara Kilfoyle, Molly Van Etten Smith, Laura Domm, and the Vanderbilt Law Review's Senior Editorial Board for their help in fixing my errors. I must also thank my parents John and Sue Sommer for always being supportive of me no matter what I choose to do. Finally, and most importantly, I would like to thank my fiancée Emilie for all of her love and support.
