

**THE BUSINESS LITIGATION SESSION IN  
MASSACHUSETTS SUPERIOR COURT: A STATUS REPORT**

*Business Litigation Session Resource Committee*

Gael Mahony, Esq., Co-Chair  
Holland & Knight LLP

Beth I.Z. Boland, Esq., Co-Chair  
Mintz, Levin, Cohn, Ferris,  
Glovsky and Popeo, P.C.

Michael P. Angelini, Esq.  
Bowditch & Dewey, LLP

Paul T. Dacier, Esq.  
EMC Corporation

John J. Egan, Esq.  
Egan, Flanagan & Cohen, P.C.

Robert A. Gelinas, Esq.  
Bulkley, Richardson and Gelinas, LLP

Andrew R. Grainger, Esq.  
New England Legal Foundation

Franklin H. Levy, Esq.  
Dwyer & Collora, LLP

Harry L. Manion, III, Esq.  
Cooley, Manion & Jones LLP

James J. Marcellino, Esq.  
McDermott, Will & Emery

James D. O'Brien, Jr., Esq.  
Mountain, Dearborn & Whiting LLP

Charles V. Ryan, Esq.  
Crevier & Ryan, LLP

Deborah L. Thaxter, Esq.  
Nixon Peabody LLP

Steven H. Wright, Esq.  
Holland & Knight, LLP

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## FOREWORD AND ACKNOWLEDGEMENTS

The dedication of a separate session of the Superior Court to the resolution of business disputes has been considered for some time in the Commonwealth both by the judiciary and by legal practitioners. It was not until October 2000 that this possibility became a reality when Superior Court Chief Justice Suzanne V. DeVecchio launched the Business Litigation Session of the Suffolk Superior Court as a two-year pilot program, with Superior Court Associate Justice Allan van Gestel presiding.

To assist with this ambitious program, Chief Justice DeVecchio also appointed a committee of attorneys from a variety of backgrounds to provide input and feedback to the public and the Chief Justice. In an effort to obtain informed responses about the impact of the Business Session on the practice of law in the Commonwealth and the experiences of practitioners with the Session, members of the Committee traveled the state, speaking with practitioners in every county. The Committee examined how other states had implemented business litigation courts, and commissioned a professional survey of attorneys with cases before the Business Session. Committee members also consulted the judges appointed to the Business Session and the Chief Justice of the Superior Court regarding various aspects of the operations of the Session.

This report is the written culmination of the work of the Committee over the past two years. It is intended to provide members of the legal and business community with information on the operation of the Business Session in its first two years, and to make recommendations concerning the future of the Session.

This report was prepared with the assistance of numerous individuals and institutions, to whom we are grateful. In particular, we wish to acknowledge the New England Legal Foundation for its financial support, and EMC Corporation and Chris Goode at EMC for their valuable in-kind assistance. A number of attorneys and paraprofessionals from Hill & Barlow, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, Holland & Knight, and McDermott, Will & Emery assisted in the work of the Committee and the preparation of this report, including Sarah Herlihy, Melissa Nott, James Wodarski, Lauren Benowitz, Rebecca Weiss, Amy LaPrade, and Terrence McNeil.

The Committee would also like to acknowledge the assistance of Chief Justice DeVecchio, Business Session Presiding Justice Allan van Gestel, and Associate Justice Margot Botsford. During the two-year pilot program, they have provided valuable information and assistance to the Committee and have been extremely generous in discussing the inner workings of the Business Session.

As a final note, the members of the Committee would like to express our sadness upon the passing of one of our members, Richard Testa. While his legacy reverberates within the larger legal community of which he was such an integral part, we are fortunate to have benefited from his insight as well.

*The Business Litigation Session Resource Committee  
February 2003*

## EXECUTIVE SUMMARY

The establishment of the Business Litigation Session of the Suffolk County Superior Court in October 2000 represented the culmination of a long-discussed innovation within the Massachusetts trial court system. After considerable debate among the judiciary and members of the bar, in September 2000 Superior Court Chief Justice Suzanne DeVecchio announced a two-year pilot program in which a session of the Superior Court sitting in Suffolk County would be set aside for complex commercial litigation, with Associate Justice Allan van Gestel presiding.

The decision to create the Business Session was not without controversy. Numerous members of the bar and the judiciary voiced concern that a separate session for complex cases would be “elitist” and would be used to dispense “better” justice to the business community than to less-affluent litigants; that it would unnecessarily impede the appropriate allocation of judicial resources within the Superior Court civil sessions, when other mechanisms such as special assignments could be utilized more efficiently; and that it would require judges who would prefer to serve as generalists into forced specialization of their docket. Yet there also existed strong countervailing policy reasons to support a specialized business tribunal: commercial disputes in particular were being increasingly litigated through alternative dispute resolution services which provided a system of private justice not available to many litigants, which did not produce publicly-available judicial opinions, and which deprived the public of a broader jurisprudential foundation in the field of business law. Complex commercial cases requiring specialized knowledge were many times assigned through the rotation system to judges with little experience in the area. And, the Commonwealth’s reputation as a judicial forum hostile to business litigation deepened.

Meanwhile, state courts around the country have increasingly adopted specialized business courts, with positive results. Building on the experience of other states, the Business Litigation Session in Suffolk County Superior Court was born. After two years of operation, all indicators suggest that the experiment has been highly successful and should not only be made permanent, but should be expanded to other counties. In particular, the Committee recommends that the session include cases from Middlesex, Norfolk, and Essex counties in addition to Suffolk County, with the expectation that the session will ultimately encompass cases filed statewide as the structure is refined and the pool of interested and experienced judges is expanded.

### ***Committee Findings and Recommendations***

- The recent trend in state court administration -- concurrent with the trend in the practice of law -- weighs heavily in favor of establishing specialized tribunals for commercial litigation;
- Massachusetts's reputation as a forum for business dispute resolution ranks in the bottom twenty percent in the nation, for reasons which can in part be addressed by the continued operation and expansion of a business litigation tribunal;
- In a survey of Business Session practitioners conducted in the spring of 2002, the vast majority (88%) stated they were extremely "satisfied" or "very satisfied" with their experience in the Business Session;
- 83% of the survey respondents reported that the existence of the Business Session had enabled them to provide better legal service to their clients. The primary reasons cited by the respondents were (i) the assignment of one judge throughout the case, (ii) the timeliness of hearings and decisions, and (iii) the establishment of firm trial dates;
- Nearly two-thirds of all respondents (60%) reported that they are more likely now to recommend that a client file suit in the Business Session rather than using private dispute resolution services, and a similar number (58%) rated their experience with the Business Session more favorable than their experience with ADR for resolving commercial disputes;
- Nearly all respondents (95%) stated that the Business Session should be made permanent, with 89% indicating that it should be expanded to counties other than Suffolk County;

- The best practices which have emerged from business courts established in other states include (i) the assignment of cases to a single judge from filing to trial, (ii) early and active judicial involvement in case management, (iii) early application of ADR as a complement to judicial resources to expedite case resolution, and (iv) the incorporation of appropriate technology to support the court's case management and trial activities. While the Business Session has adopted a number of these best practices, the lack of adequate resources for technology will substantially hinder the fulfillment of the Session's potential to adjudicate complex business disputes in the future;
- The Business Session pilot program in Suffolk County should be made permanent;
- Cases filed in Middlesex, Norfolk, and Essex counties should be eligible for acceptance into the Business Session, in addition to those filed in Suffolk County;
- In all other counties, parties should be allowed to "opt in" to the Session by mutual agreement, and a small pool of interested judges with extensive experience in complex commercial cases should be named to receive special assignments for disputes satisfying the criteria for acceptance into the Business Session;
- The locus of the Business Session should remain in Suffolk County for the present; and
- The criteria for acceptance of cases into the Business Session should not be currently expanded to encompass non-commercial complex disputes, although such an expansion may be advisable in the future.

Much credit for the apparent success of the Business Session lies with the selection of the judges who have agreed to serve in it: Presiding Justice Allan van Gestel, Judge Margot Botsford, Judge Nonnie Burnes, and Judge Gordon Doerfer have all brought necessary experience and wisdom to the Session. As in the past, the Committee believes that the key to the future success of the Business Session will lie in the identification of judges with similar experience and interest in presiding over the types of complex commercial litigation which comprise the bulk of the Session's docket.

## **BACKGROUND OF THE BUSINESS LITIGATION SESSION**

The establishment of the Business Session in the fall of 2000 capped a five-year process involving input from numerous members of the bar and the judiciary. While the Delaware Chancery Court has long stood at the forefront of business litigation through an experienced judiciary well versed in the development and promulgation of business jurisprudence, until recently few other states had followed suit. In the wake of the establishment of a separate Commercial Division of the Supreme Court in New York in 1995, the Corporate Law and Business Litigation Committees of the Boston Bar Association, with the approval of then BBA President Joel Reck, began studying the feasibility of establishing a similar specialized tribunal for complex commercial litigation in Massachusetts.<sup>1</sup>

The New York model has proved instructive. In January 1993, four judges of the state Supreme Court were assigned administratively to hear commercial cases in New York County (Manhattan), and in November 1995 a more formal Commercial Division was established. In November 1996, the Chief Administrative Judge of the New York State Unified Court System reported that since the tribunal's inception, overall there had been:

- A 29% reduction in the average time to dispose of cases
- An 85% increase in the number of cases settled before trial
- A 26% decrease in the volume of pending cases
- A 6% increase in case dispositions.<sup>2</sup>

Of particular note was the fact that the Commercial Division was created through the court's rule-making powers, with no new courthouses or courtrooms needed to institute the Division.

The experiment has been received favorably within the New York business community:

according to the Chairman of the Business Council of New York State and then-Chairman of the

Board and Chief Executive Officer of Texaco, Inc., Peter I. Bijar, “[W]e have now gone . . . from a court system that often evoked frustration among businesses, to a business court that is the envy of other states . . . [T]he Commercial Division is an asset to the business community in New York State.”<sup>3</sup>

Meanwhile, after almost a year of inquiry and study, the BBA committee began conferring with the Superior Court judiciary regarding the feasibility of establishing a similar session in the Commonwealth. During those discussions a number of issues were raised, such as, for example, concern regarding the necessity for such a tribunal in light of the availability of special assignments for complex commercial cases. Others were concerned with the potential perception that the business tribunal would serve as an “elite” court, dispensing “better” justice on a selective basis to the business community and to the detriment of other litigants. In addition, some raised very pointed concerns regarding the effect of such a tribunal on the ability of the Chief Justice to appropriately allocate judicial resources, particularly in the event there were not a sufficient number of cases to keep the business judges occupied.

Such concerns echoed those identified by the American Bar Association in a May 1997 report issued by the ABA Ad Hoc Committee on Business Courts.<sup>4</sup> In response, the ABA Ad Hoc Committee, along with other bar association and judicial committees, identified numerous policy considerations in favor of such tribunals. Many states, including Massachusetts, have experienced a shift from public to private dispute resolution providers, such as the American Arbitration Association or other ADR services. To the extent such cases do not re-enter the judicial system, the development of comprehensive decisional case law on business and financial matters necessary for providing jurisprudential predictability is hindered. And by matching judges with appropriate expertise to litigation requiring that expertise, judicial resources may be

appropriately targeted through the removal of otherwise time-consuming cases from the regular docket: as the ABA Ad Hoc Committee observed, “the work of more than four generalist judges can be accomplished by three specialty business judges.”<sup>5</sup> Such resource allocation issues can be even further alleviated if the business jurists are made available for other assignments if workloads became uneven. Also, the concerns surrounding “elitism” have to some extent been undercut by the existence of other well-accepted specialty courts such as those handling probate, family, juvenile, traffic, drug-related, or criminal matters. Recently, for example, some members of the Massachusetts bar have advocated for the establishment of a specialized trust and estate session of the Probate and Family Court.<sup>6</sup>

Finally, as the ABA Ad Hoc Committee observed in response to the argument that many judges and lawyers simply enjoy remaining generalists:

Unfortunately, the failure to build an expertise and the cost of being a Renaissance lawyer exacts a high price which must be paid by someone. In the case of the private bar, that someone, namely the public that retains lawyers to provide services, simply refused any longer to pay the price for the non-expert lawyer to dabble in various fields. The public has forced reluctant lawyers to develop experience, expertise and knowledge in the field of law which they practice . . . There are no similar direct pressures on the judiciary, but to the extent that it resists specialization, it imposes significant costs on society.<sup>7</sup>

In light of these policy considerations, many states have adopted specialty business litigation tribunals in the last decade:

- Since 1992, Illinois has maintained in Cook County (Chicago) a special commercial calendar;
- Beginning in 1993, New York adopted first a pilot program and then a formalized Commercial Division handling only commercial disputes;
- In 1996, the Governor of North Carolina appointed a state-wide Superior Court Judge to hear complex business cases where the amount in controversy exceeds \$500,000;
- In 1996, Wisconsin implemented a business court pilot program by designating two judges to the Special Business Court in Milwaukee County;



- In 2000, the Court of Common Pleas of Philadelphia County, Pennsylvania has assigned two judges to hear commercial cases;
- In 2000, California instituted a three-year pilot program to create six urban centers to serve as regional clearinghouses for complex litigation;
- In 2000, the Colorado Governor’s Task Force on Civil Judicial Reform recommended that a business court be created for Denver;
- In 2002, Michigan authorized the nation’s first “cybercourt,” an online tribunal with jurisdiction to hear non-jury commercial cases, designed to take advantage of existing technology to minimize the necessity for the physical presence of lawyers and judges in the courtroom; and
- In January, 2003, Maryland implemented a specialized track to handle complex and technology cases, assigning two or three judges in each circuit to receive special training and hear cases that qualify for this track.

In Massachusetts, the impetus for establishing a specialized tribunal was exemplified in a recent survey conducted by the United States Chamber of Commerce on perceptions regarding the state’s reputation for its ability to effectively handle business litigation. The nationwide survey, conducted among corporate and in-house counsel in 2001, placed Massachusetts near the bottom of the country in a variety categories. According to that survey (relevant portions of which are included as Appendix A hereto), Massachusetts ranked:

- 42<sup>nd</sup> in overall treatment of tort and contract litigation;
- 45<sup>th</sup> in timeliness of summary judgment decisions and dismissal of cases;
- 44<sup>th</sup> in juries’ predictability and 34<sup>th</sup> in juries’ fairness;
- 39<sup>th</sup> in efficiency of discovery;
- 37<sup>th</sup> in treatment of class action suits;
- 30<sup>th</sup> in judges’ impartiality; and
- 29<sup>th</sup> in judges’ competence.<sup>8</sup>

In 1999, members of the Massachusetts legislature filed a bill to adopt a Complex Case Division within the trial court. Then-BBA President Lauren Rikleen appointed an *ad hoc* committee to study the feasibility of the legislation; that committee concluded that specialization within the court was desirable but could be achieved through a different mechanism than that proposed by the legislation. Specifically, the BBA Committee recommended that two judges be assigned to a special business court division of Suffolk County to hear cases that involve certain defined issues. The BBA Committee further recommended that cases be eligible for the business court division based solely on the issues in the case, without regard to the amount in controversy (except that the amount must meet the minimum *ad damnum* for all Superior Court cases) or whether the parties in the case were individuals or entities. In so doing, the BBA Committee also considered whether the special assignment system -- already available for complex cases -- could address the needs of complex cases without the addition of a business court division; the committee concluded that it would not satisfy the need for a specialized judiciary to develop a comprehensive decisional law on business and financial matters.

In the summer of 2000, Superior Court Chief Justice Suzanne V. DeVecchio announced the creation of a special session in the Suffolk Superior Court to hear business-related cases. The Business Litigation Session was initiated as a two-year pilot program commencing on October 2, 2000, with the Honorable Allan van Gestel, an Associate Justice of the Superior Court, presiding.

## **OPERATION OF THE BUSINESS LITIGATION SESSION**

### **A. Criteria**

According to the Notice to the Bar announcing the opening of the Business Litigation Session of the Suffolk Superior Court (attached as Appendix B hereto), cases involving the following issues may be admitted into the Business Session:

- claims relating to the governance and conduct of internal affairs of business entities;
- claims relating to employment agreements affecting the governance or internal affairs of business entities;
- claims relating to liability of shareholders, directors, officers, partners, etc.;
- shareholder derivative claims;
- claims relating to or arising out of securities transactions;
- claims involving mergers, consolidations, sales of assets, issuance of debt, equity and like interests;
- claims to determine the use or status of, or claims involving, intellectual property;
- claims to determine the use or status of, or claims involving, confidential, proprietary or trade secret information;
- claims to determine the use or status of, or claims involving, restrictive covenants;
- claims involving breaches of contract or fiduciary duties, fraud, misrepresentation, business torts or other violations involving business relationships involving complex issues;
- claims under the U.C.C. involving complex issues;
- claims arising from transactions with banks, investment bankers and financial advisers, brokerage firms, mutual and money funds involving complex issues;
- claims for violation of antitrust or other trade regulation laws;
- claims of unfair trade practices involving complex issues;
- malpractice claims by business enterprises against professionals involving complex issues;

- claims by or against a business enterprise involving complex issues to which a government entity is a party; and
- other commercial claims, including insurance, construction, real estate and consumer matters involving complex issues.<sup>9</sup>

The venue and jurisdictional limits of the Business Session pilot program have been confined to Suffolk County. While venue can, in some cases, be waived, jurisdiction cannot be waived. Cases filed in the Business Session are reviewed to confirm that venue and jurisdiction are appropriate.

As with any new process, there has been some confusion regarding the proper procedures for filing cases in the Business Session. In Devellis v. Hewlett-Packard Co., Sup. Ct. Civil Action No. 01-0169 (June 21, 2001) (attached as Appendix C hereto), Judge van Gestel clarified the methods by which cases may be accepted into the Session:

1. By plaintiffs' filing with the Suffolk Civil Clerk's Office and utilizing the special BLS Civil Action Cover Sheet describing why counsel believes the case belongs in the Session; after which the Presiding Justice of the BLS will review the complaint to assess its appropriateness.
2. On motion filed in another session by either party in a case considered appropriate for the BLS. In this instance the motion may be determined, at least preliminarily, by the Justice in that session.

If the session Judge denies the motion then there is no appeal to or right to reconsideration by the Presiding Justice of the BLS. If, however, the session judge allows the motion, the Presiding Justice of the BLS still retains the discretionary authority to consider and decide upon the appropriateness of the transfer before it becomes effective.

The Justice in another session where a motion to transfer to the BLS is filed may, but need not, transfer the motion to the Presiding Justice of the BLS for decision in the first instance.

3. A justice in another session, may, on his/her own determination, send a case to the BLS for discretionary review by the Presiding Justice.
4. A party in another session may file a motion to transfer directly in the BLS. In this latter instance, the Justice in the session from which the

transfer is sought ought to be given the courtesy of notice because the potential for transfer may affect scheduling and other issues.

As these guidelines make clear, once jurisdictional and venue considerations are satisfied, the Presiding Justice of the Business Session has the final authority to decide whether to accept a case into the Session.

**B. Operation**

During its two-year existence, several Superior Court judges have been assigned to adjudicate cases within the Business Session, with Associate Justice Allan van Gestel serving as the Presiding Justice of the Session since its inception. Prior to his appointment to the Appeals Court, Judge Gordon L. Doerfer served as the Session “back-up” judge, handling cases that Judge van Gestel could not adjudicate due to substantive or scheduling conflicts. With an increasing caseload and Judge Doerfer’s departure, Judge Nonnie S. Burnes was selected to serve as “back-up” judge for the Session. The necessity for appointment of a second judge to the Business Session soon became apparent, and Judge Margot Botsford joined the Session in January 2002. Judge Botsford currently manages the coordinated asbestos litigations pending in Superior Court that had previously been administered by the Honorable Hiller Zobel until his retirement, with the remainder of her docket comprised primarily of cases within the Business Session. New cases accepted into the Business Session are assigned alternately to Judge van Gestel or Judge Botsford. Each of the judges who have served in the Business Session were selected based upon his/her experience with and interest in adjudicating complex business litigation.

Cases accepted into the Business Session are assigned to a single judge and are expected to remain with that judge throughout the life of the case. The continuity of a single judge permits ongoing management of discovery and the narrowing of legal issues throughout the case.

Shortly after assignment of a case to the Business Session, a Rule 16 conference is scheduled to establish a case-specific tracking order. At that time, a presumptive trial date is identified by the Business Session judge in consultation with the parties. The dates selected for trial are blocked out on the calendar of the judge, and will not be changed absent extraordinary circumstances.

Initial concerns that a specialized business court would not carry a large enough caseload appear unwarranted. In all, 610 cases have been accepted into the Business Session from October 2, 2000 through January 28, 2003, with the frequency of filings increasing over time: currently, approximately 5-7 new cases are accepted into the Business Session each week, with that number continuing to rise as attorneys become more familiar with the Session. Upon the Business Session's inception, 81 cases satisfying the case intake criteria that were already pending in Suffolk Superior Court were transferred into the Session either *sua sponte*, by motion of one of the parties, or on the recommendation of a judge in the regular session. As of January 28, 2003, 529 new cases have been accepted into the Business Session and 59 cases have been rejected (mostly for venue-related reasons but increasingly due to a lack of complexity). Of the 610 cases in the Session, 374 have been disposed of; of those, 188 have settled, and the remainder have been resolved by trial, dispositive motion, or, in a few instances, removal to federal court. While the total number of cases currently handled by the Business Session is less than the docket found in other civil sessions, cases accepted into the Session generally appear to be more consistently complex than the case load found in such other sessions.

Data regarding the types of cases admitted into the Business Session indicate that practitioners are using the Session for the complex types of business litigation originally contemplated by the Notice to the Bar. A substantial percentage of the cases accepted into the Business Session involved claims for breach of contract or tortious conduct involving business

relationships, followed by other commercial claims (including insurance, construction, real estate and consumer matters) involving complex issues and claims involving restrictive covenants; the remainder of the Business Session docket consists of a wide range of commercial litigation, ranging from shareholder derivative claims to corporate governance issues to intellectual property and trade secrets.<sup>10</sup>

## **SURVEY RESULTS**

In order to ascertain the progress of the Session, the Committee, through subcommittee chairs Andrew Grainger of the New England Legal Foundation and Paul Dacier of EMC Corporation, commissioned a telephone survey of attorneys practicing in the Business Session at the end of the Session's first year and a half of operation. The survey was conducted by an independent research organization, Atlantic Research & Consulting, in order to (i) measure overall satisfaction/dissatisfaction levels with the Business Session, (ii) measure satisfaction/dissatisfaction with individual aspects of the Session, (iii) determine attorneys' willingness to recommend the Session to clients and peers, and (iv) gauge interest in geographic expansion of the Session.

The survey indicated an extremely high degree of satisfaction with the Session. Among the key survey findings:

- 88% of survey respondents stated they were "extremely satisfied" or "very satisfied" with the Business Session overall;<sup>11</sup>
- 83% of respondents stated that the Business Session enabled them to give better legal service to their clients. When asked to describe how the Business Session allowed them to do so, respondents cited in particular the assignment of a single judge throughout the case, the timeliness of decisions and hearings, and the firm trial dates;
- 94% of respondents were "extremely satisfied" or "very satisfied" that the judge was prepared for their case;

- 91% of respondents were “extremely satisfied” or “very satisfied” with the firmness of the schedule established by the Business Session for their case;
- 55% of respondents had filed an emergency motion requiring prompt resolution, with 87% of those respondents reporting they were “extremely satisfied” or “very satisfied” with the efficiency of the Business Session’s response to that motion;
- 58% of respondents stated that their experience with the Business Session was “more favorable” than their experience with private ADR, and 60% stated that their experience in the Business Session would make them more likely in the future to recommend the Session to their clients than ADR;
- 97% of respondents would recommend the Business Session to their colleagues and clients; and
- 95% stated they believed the Business Session should be made permanent, with 89% favoring expansion to other counties.

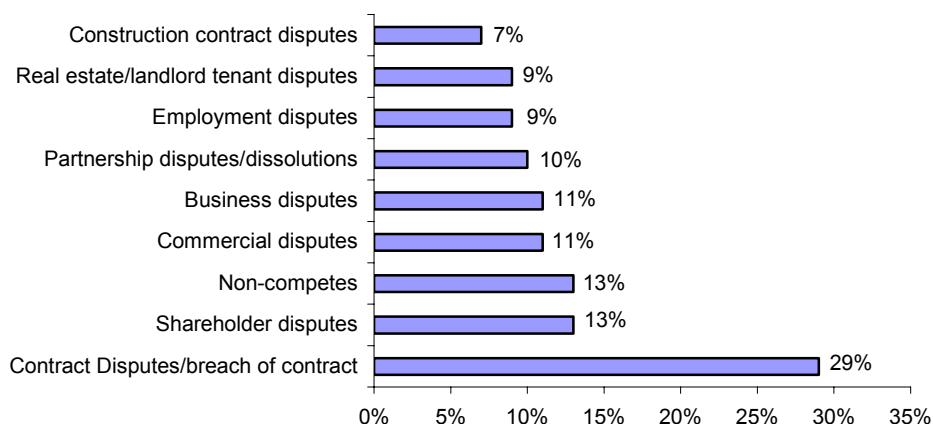
A copy of the survey results is attached as Appendix E hereto.<sup>12</sup> Significantly, satisfaction levels among the survey respondents were consistent across all major analytic subgroups, such as practitioners from small, medium, and large firms, and those representing individuals versus corporations.

#### *Types of Cases Before the Business Session*

Respondents were first asked to indicate the nature of the case they litigated before the Business Session. The chart below categorizes all of the responses.



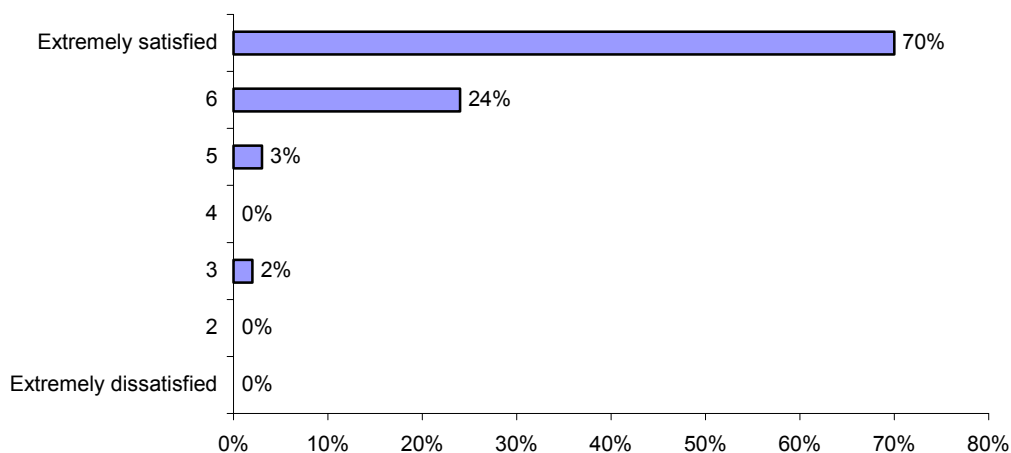
**What is the nature of your case? (Top Mentions) (Multiple responses accepted) (N=94)**



*Operation and Impact of the Business Session*

An overwhelming number of responding attorneys (94%) reported that they were satisfied (6 or 7 on a 7-point scale) that the judge was prepared for their case. No respondent reported dissatisfaction (1 or 2 on a 7-point scale) with the judge’s preparedness. The average satisfaction rating was 6.60.

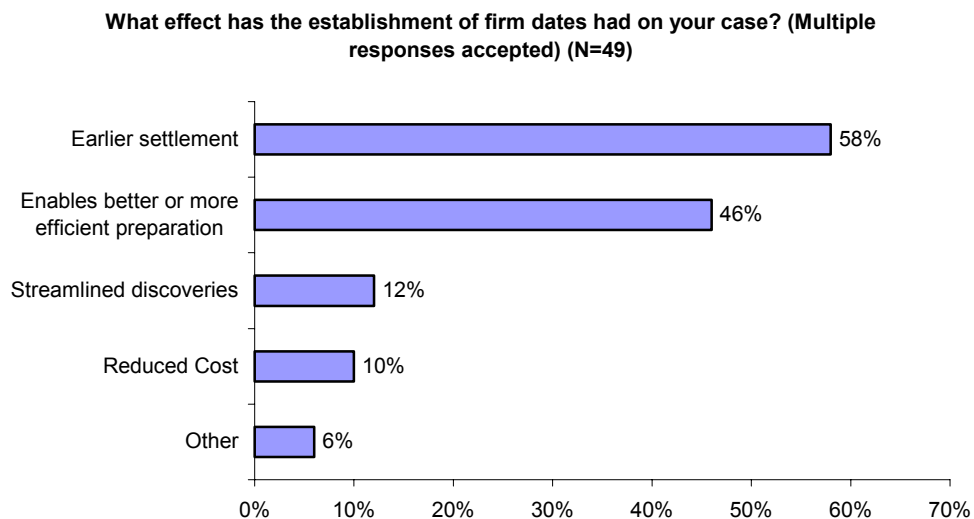
**How satisfied or dissatisfied are you that the judge was prepared for your case? (N=91)**



The survey further indicated that practitioners were pleased with the ability of the Business Session to establish firm dates for their cases. A strong majority of respondents (91%)

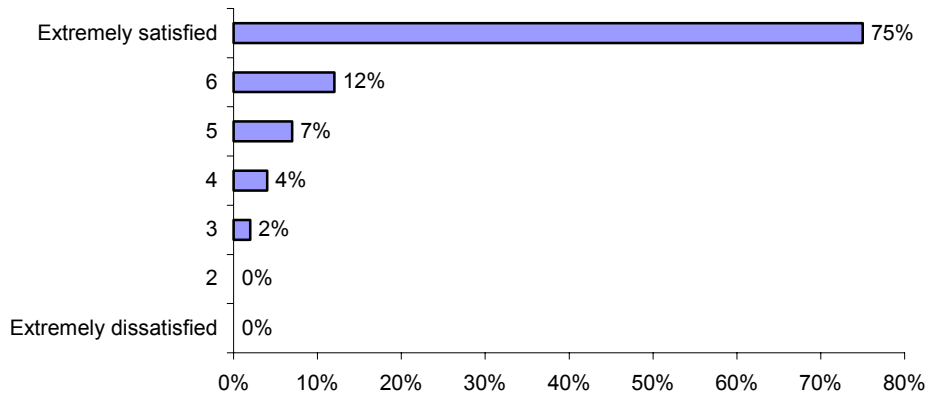
reported that they were satisfied (6 or 7 on a 7 point scale) with the firmness of the schedule established by the Business Session for their case. No respondent reported dissatisfaction (1 or 2 on a 7 point scale). The average satisfaction rating was 6.48.

The survey further suggested that the establishment of firm trial dates has had a positive effect on the progress of cases. Fifty-three percent (53%) of respondents agreed that the establishment of firm dates changed the way in which they litigated their case. More than half (58%) of responding attorneys indicated that the establishment of firm dates by the Business Session facilitated earlier settlement in their cases. Forty-six percent (46%) of respondents said that it has enabled them to better or more efficiently prepare for their case, while 12% reported that it has streamlined discovery, and 10% said it has reduced the costs of litigation.



A majority (55%) of respondents had filed an emergency motion requiring prompt resolution in the Business Session. The strong majority (87%) of those respondents who had filed an emergency motion reported that they were satisfied (6 or 7 on a 7-point scale) with the promptness and efficiency with which the Business Session ruled in their emergency motion. No respondent reported dissatisfaction (1 or 2 on a 7-point scale) with the promptness and efficiency of emergency motion rulings. The average satisfaction rating was 6.54.

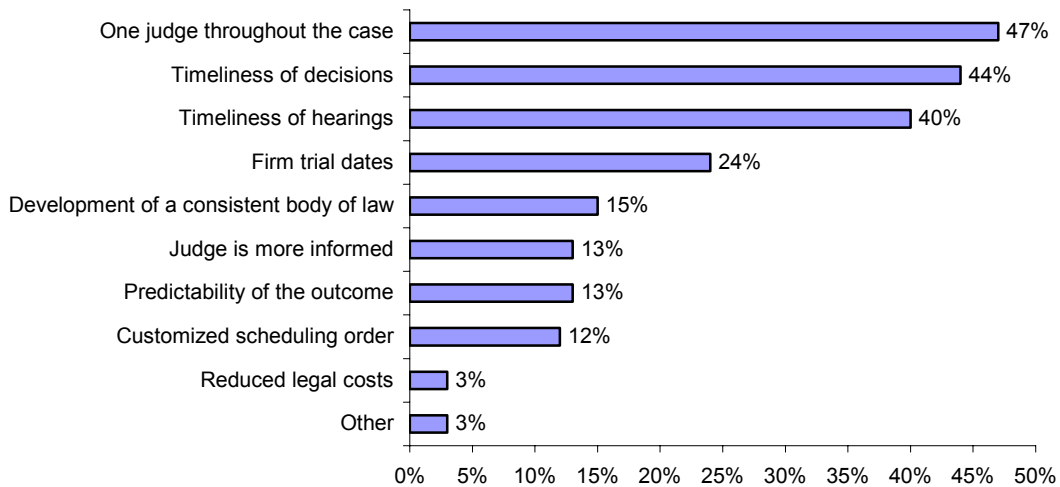
**How would you rate your satisfaction or dissatisfaction with the promptness and efficiency with which the BLS ruled on your emergency motion? (N=52)**



The survey also asked respondents to indicate the total number of motions they filed during the time period their case had been in the Business Session. Forty-five percent (45%) of respondents stated that they had filed three or more motions, 24% had filed two motions, 18% had filed one motion. Only 10% of respondents had not yet filed any significant motions at the time of the survey.

A full 83% of respondents reported that the Business Session had enabled them to give better legal services to their clients, primarily due to the assignment of one judge throughout the case (47%), and the Business Session's ability to set and maintain firm litigation deadlines (44% cited the timeliness of decisions, 40% cited the timeliness of hearings and 24% cited firm trial dates).

**In what way has the Business Session enabled you to give better legal service to your clients? (Multiple Responses accepted) (N=78)**

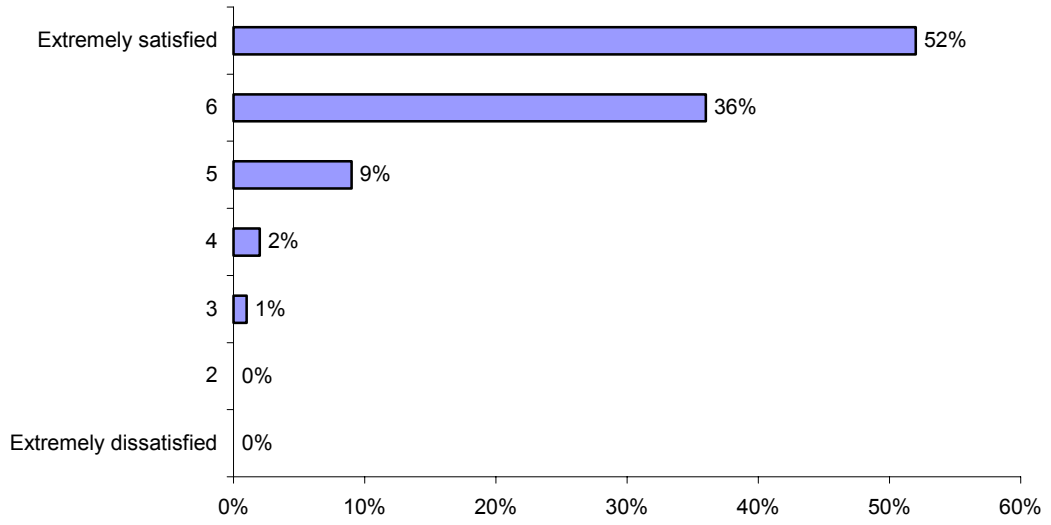


The survey results also suggested that the existence of the Business Session may result in recapturing some of the business litigation that has opted for private ADR service in recent years. Virtually all of the respondents (97%) reported they would recommend the Business Session to their clients, with a majority (60%) further indicating they would be more likely to recommend that a client file suit in the Business Session rather than using a private mediation or arbitration process. Fifty-eight percent (58%) of respondents stated that their experience with the Business Session compared more favorably to their experiences with private alternative dispute resolution.

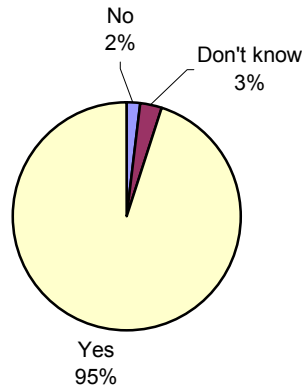
*Overall Satisfaction with the Business Session*

Respondents were nearly uniform (88%) in stating that they were very satisfied or extremely satisfied with the Business Session. Fully 95% expressed their opinion that the Business Session should be made a permanent fixture of the Superior Court.

**How would you rate the Business Litigation Section overall? (N=94)**



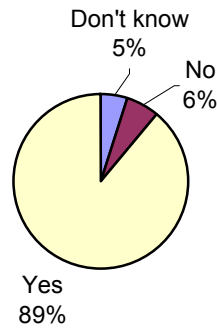
**Do you believe the Business Session should be made permanent? (N=94)**



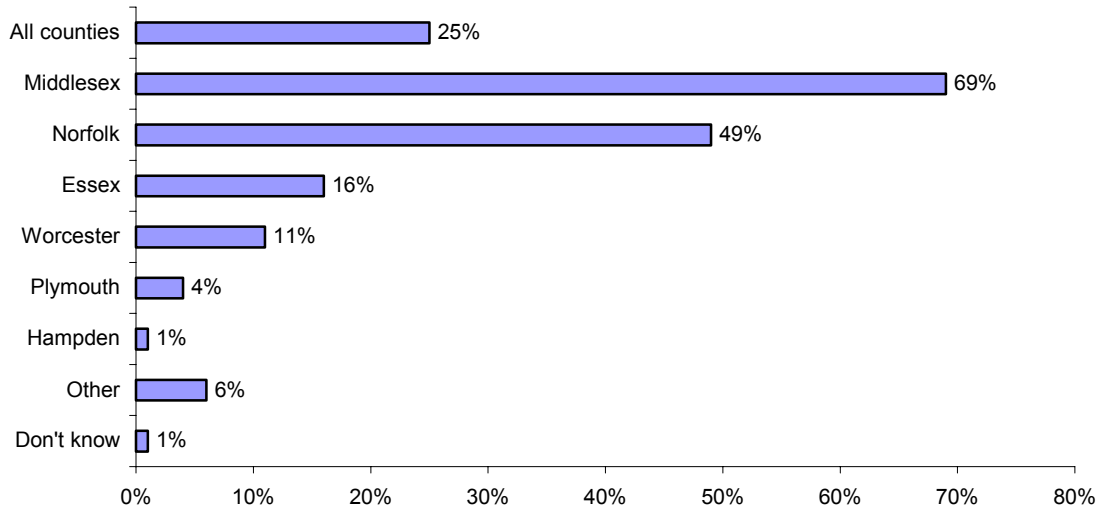
*Expansion of the Business Session*

Similarly, the vast solid majority (89%) of respondents believed that the Business Session should be expanded, with many (25%) stating that it should be expanded to all counties statewide. For those who specified individual counties for expansion, Middlesex County topped the list (69%), followed by Norfolk County (49%) and Essex County (16%).

**Do you think the current geographic jurisdiction of the Business Session should be expanded to other counties in Massachusetts?  
(N=93)**



**To where would you like to see the Business Session expand? (Multiple responses accepted) (N=83)**



The survey also provided respondents with an opportunity to provide comments regarding improvements to the Business Session. Several respondents suggested the addition of a law clerk dedicated to the Session; others recommended more judges for the increasing caseloads; and still others specifically expressed dissatisfaction with the circuit system in civil sessions other than the Business Session. There were also a number of positive comments regarding the quality of the justices in the Business Session.

In addition to gaining widespread acceptance as measured both by the survey responses as well as by the increasing frequency of cases applying for acceptance into the Session, the Business Session has become well integrated into the legal community. Chief Justice DelVecchio and Judges van Gestel and Botsford are regular fixtures on bar panels, in the local media, and in other public arenas discussing the Business Session. Numerous media articles -- including op-ed pieces by members of the Committee and bar journal articles by Session judges -- have been devoted to the operations of the Business Session. The center for Massachusetts Continuing Legal Education conducts an annual Business Litigation Conference which addresses the various legal issues handled within the Session and at which Session judges serve as keynote speakers. Session judges and members of the Committee have met with representatives from other states and from other countries regarding the operations of the Session. The Business Session has been increasingly woven into the fabric of the legal community in Massachusetts, and there appears a clear mandate to continue the work of the Session by making it permanent and considering means of expanding its scope.

## **“BEST PRACTICES” FROM BUSINESS COURTS IN OTHER STATES**

The Committee also considered in detail the “best practices” in business court administration gleaned from experiences in other states, and appointed a subcommittee, headed by Deborah Thaxter of Nixon Peabody and James Marcellino of McDermott, Will & Emery, to investigate such issues.

According to the National Center for State Courts, the four “best practices” for case management in business and complex litigation courts involve:

1. *Single Assignment* – cases are assigned to a single judge for all case management purposes from filing to trial.
2. *Early and Active Judicial Involvement* – the business court judge takes a direct and active role in managing the case, including developing the case schedule; appointing quasi judicial personnel (*i.e.*, mediators); oversight of frequent and meaningful case status conferences; and direct availability to counsel and parties to help resolve case management disputes and problems.
3. *Early Application of ADR* – ADR should be utilized as soon as possible once parties know the primary claims and before they have expended considerable time, expense and effort in discovery.
4. *Appropriate Technology* – judges should incorporate appropriate technology to support the court’s case management and trial activities including electronic filing and Internet technology; videoconferencing; interactive software to integrate key filings with references to statutory and legal citations; and presentation software to communicate trial evidence in a comprehensible format.<sup>13</sup>

The Committee’s review of the operation of specialized business courts in California, Delaware, New York and North Carolina reveal that these courts have incorporated, to a much greater degree than in Massachusetts, each of these best practices despite the fact that some of the courts are of roughly equal vintage as the Business Session here.<sup>14</sup>



## ***California***

California determined that it needed a specialized court for complex cases dealing with a broad range of subject matters, not just business issues. Accordingly, California developed a complex litigation department rather than a separate business court.<sup>15</sup>

California created the Complex Civil Litigation Pilot Program in six counties in 2000. The program was designed to give judges training and resources to help them manage complex civil cases with greater effectiveness and efficiency. The pilot program provided funds for augmenting the personnel and technological resources dedicated to complex civil cases. Courts used their grant funds to hire additional research attorneys and staff and to improve technology. Pilot courts held symposia to educate and share information with users of the complex litigation system regarding discovery, case management, ADR, substantive legal areas and the use of technology. Judges in the pilot program meet twice a year to exchange information and participate in continuing education. The Legislature allocated almost \$3 million per year to the pilot program.

As part of its initiative, California created and distributed the *Deskbook on Management of Complex Civil Litigation* to all judges in the state. The manual is intended to enable all judges to identify and handle complex cases more efficiently and equitably. California also created a specialized judicial curriculum devoted to complex civil case management and substantive law issues that frequently arise in complex cases.

Additionally, Orange County created a Complex Litigation Center. The center focused on creating an environment that allows parties to take advantage of technology in courtroom presentations. Each courtroom is wired to permit attorneys to easily display documents on monitors located throughout the courtroom. There are also specialized computer displays that

allow attorneys and witnesses to draw on the exhibits and maps, which can then be saved and stored. This technology was implemented by a private company and is available to parties on a per diem basis.<sup>16</sup>

### ***Delaware***

The Delaware Chancery Court was established in 1792 and has fully incorporated each “best practice” into its operation. The Chancery Court’s jurisdiction is purely equitable and all cases are heard without a jury. The judge handling a case is responsible for all fact finding, rulings and written final opinions. This approach results in an extensive body of case law on business matters. The scholarly culture of the Chancery Court is one of its chief benefits, and emphasizes opinion writing among the judges. Further, the geographic proximity of all the judges on the Chancery Court bench encourages collaboration and collegiality, allowing judges to consult each other on new and complex legal issues.<sup>17</sup>

In the Chancery Court, new cases are assigned to a judge on the day they are filed, allowing the judge to make initial decisions regarding scheduling orders. The early assignment to a single judge creates immediate accountability and responsibility for the progression of the case.<sup>18</sup>

Judges on the Chancery Court bench may refer cases to ADR where appropriate. Because Chancery Court judges have their own separate dockets, a matter referred to mediation may actually be mediated by another member of Delaware’s Chancery Court, or by other experienced members of the bar certified to mediate business disputes.

The Chancery Court is also active in incorporating technology to facilitate the disposition of business cases. The court allows attorneys to appear by videoconference for case conferences and hearings. Delaware has a virtual docketing system in place, allowing every member of the

court to see the entire docket as cases are filed. The Chancery Court also allows attorneys to submit briefs on CD-ROM with hyperlinks to case law. Electronic filing is used to expedite time sensitive cases.

### *New York*

New York instituted an administrative session for business litigation in 1993, which in 1995 expanded into a more formalized Commercial Division. Similar to the Business Session, the Commercial Division has judges with experience in handling commercial cases. Judges in the Commercial Division are assigned to a case from filing to resolution and are expected to set and strictly enforce deadlines and discovery.<sup>19</sup>

In 1996 the Commercial Division established the Alternative Dispute Resolution Program. Commercial Division judges may refer cases to ADR upon consent of the parties or on its own initiative. Parties may choose the form of ADR they wish to utilize (mediation, early neutral evaluation, arbitration, etc.). Parties ordered into the ADR program may choose to use the court's resources or private services. There is no charge for litigants who use standard ADR services through the Program.<sup>20</sup>

The Commercial Division maintains a website and regularly posts leading decisions. The Commercial Divisions in New York and Monroe Counties are pilot venues for electronic filing in New York. The e-filing system is voluntary.<sup>21</sup>

New York recently created the "Courtroom for the New Millennium" for the Commercial Division. The courtroom provides parties with state of the art technology and serves as a technological training ground for the rest of the state. The courtroom features:

- (a) real time court reporting;
- (b) electronic transcripts;
- (c) easily presentable electronic evidence;
- (d) interactive "whiteboard;"

- (e) touch screen monitor;
- (f) capabilities for computer generated animation;
- (g) customized integrated electronic podium;
- (h) personal computer docking stations;
- (i) video cassette recorder;
- (j) component computers designed to run all courtroom software.<sup>22</sup>

### ***North Carolina***

North Carolina established its Business Court in 1995. All cases in the Business Court are assigned there by the Chief Justice of the North Carolina Supreme Court. Judges in the Business Court are required to write an opinion on the final disposition of all cases. Delaware's experience indicates that the requirement of a written opinion on all cases will help North Carolina develop a consistent body of case law regarding business issues.<sup>23</sup>

A key element to the Business Court is case management. A single judge is responsible for a case from the time it enters the Business Court until its final disposition. The specialization of Business Court judges is another benefit of the system. Judges who address only business cases develop an expertise and proficiency that allows the judge to handle cases more efficiently.

The Business Court uses electronic filing and courtroom presentation extensively. The court is wired for videoconferencing and all participants in a trial have access to their own technology. The judge can control all the technology in the courtroom. Attorneys trying a case in the Business Court have a variety of technologies available to them to enhance presentation. Even witnesses are able to use tools such as a touch screen to help them illustrate their testimony. Private foundations provided the funding for development of the technology used by the Business Court.<sup>24</sup>

### ***Business Court "Best Practices" in Massachusetts***

Using the criteria identified by the National Center for State Courts, the Business Session has been successful in adopting certain "best practices" and not as successful in adopting others.

As is reflected in the survey results, the experience and capabilities of the judges assigned to the session have been exemplary. The adoption of strong case management techniques such as the assignment of a single justice throughout the life of a case, the establishment of customized tracking schedules, the use of frequent case management conferences, and the setting of firm trial dates has yielded very high satisfaction levels from litigants regarding the ability of the Session to effectively resolve disputes. And, the Session is beginning to produce an evolving body of commercial jurisprudence, especially in the area of trade secrets.

At the same time, the Session has not been particularly focused on engaging the use of ADR services in conjunction with its operations. While one of the goals of the Session is to provide a viable forum for business disputes which have increasingly turned to ADR, as the Session expands it may consider adopting more formalized mechanisms for incorporating alternative dispute resolution techniques into its case management approach. For example, the New York Commercial Division has established a formalized ADR process under the auspices of the Division, and in Delaware cases are often sent to other Chancery judges to serve as mediators.

Finally, Massachusetts is woefully behind many of its peers in its incorporation of technology into the Session. By necessity and by design, the Session has been budget-neutral, and has not required any additional facilities or personnel to maintain operations. This fiscal austerity, however, has had an opportunity cost: in stark contrast with the keen focus on technology exhibited in virtually all other business courts, at the present time, for example, the Session does not even regularly provide manual stenographic services to litigants for hearings. As noted above, California's Orange County has created a special "wired" courtroom for its complex litigation; Delaware allows attorneys to submit briefs on CD-ROM with hyperlinks to

case law; New York has built a “Courtroom for the New Millennium” featuring real-time court reporting, touch screen monitors, personal computer docking stations and customized courtroom software; North Carolina has tapped into a private foundation for funds to develop technology in its business court, which allow attorneys, judges, and even witnesses to access documents electronically; and, by proposing a new “cybercourt” designed to minimize even the need for a physical presence in the courtroom, Michigan hopes to take the process one step further. While the newly revitalized docket computerization program within the Massachusetts statewide court system will undoubtedly provide great improvements in the technological infrastructure, the Session has yet to realize its full potential on this score.

#### **THE FUTURE OF THE BUSINESS LITIGATION SESSION**

The Committee firmly recommends that the Business Session be made a permanent session in the Superior Court. The survey results speak for themselves regarding the endorsement of the Business Session among its practitioners: as noted above, virtually all respondents (95%) affirmatively indicated that they believed the Session should be made permanent. In these times of fiscal austerity, the Session has effectively served as a specialized tribunal without the expenditure of additional funds from the trial court budget. The pilot program has been a success; the Business Session has proven its value to the wider legal community; and the Session should be given permanent status.

There also appears to be strong support for expanding the session into other counties in Massachusetts as well. In addition to anecdotal comments in support of such expansion, the Business Session survey showed that the vast majority of respondents believed that the Business Session should be expanded, with many advocating for its expansion statewide.

Accordingly, a subcommittee, headed by Michael P. Angelini, Esq. of Bowditch & Dewey in Worcester, and former Worcester County Bar Association President James D. O'Brien, Jr., Esq., was created to consider and gather information from the legal community regarding the potential expansion of the Business Session, both geographically and in the types of cases accepted. Members of the subcommittee contacted Bar Association leaders from each county to solicit their views regarding the desire and/or need for expansion of the Business Session; these interviews were supplemented by contacts with lawyers from that county with business litigation practices. The subcommittee members then traveled to various regions of the Commonwealth to meet with bar leaders and business practitioners to discuss their thoughts on the future of the Business Session in their area.

After these meetings, the subcommittee determined that while there was significant business activity and a real interest in the Business Session outside of metropolitan Boston, the interest lessened the further the subcommittee ventured outside of Boston. As a result of these discussions and after consultation with the Business Session presiding judge regarding caseload considerations, the Committee has concluded that the following would be in the public interest:

1. Expand the Session to allow acceptance of cases from Essex, Middlesex and Norfolk counties, which were identified in the Business Session survey as the three most likely counties for expansion. Many practitioners with cases currently in the Business Session in Suffolk County carry a virtually identical caseload in those counties but have not been able to bring them into the Business Session simply due to its limited venue.<sup>25</sup>
2. Continue, for now, the locus of the Business Session in Suffolk County, even for cases from Essex, Middlesex, and Norfolk counties. The two current Business Session judges, in conjunction with the Chief Justice and the office of Suffolk County Clerk Michael Donovan, have developed procedures to efficiently handle the intake and administration of cases accepted into the Business Session; as in Delaware, the physical proximity of the judges here has also assisted their ability to coordinate the development of jurisprudence within the Business Session. The proximity of these counties to Suffolk should minimize inconvenience to

parties, especially given the fact that many of the cases anticipated to be filed in the Business Session are litigated by the same practitioners who practice in the Business Session now.

While a relatively high proportion of trials in the Business Session are non-jury trials, jury selection in the other cases should be addressed on a case-by-case basis; such issues may potentially be resolved by agreement of the parties or through the process available under Mass. Gen. L. ch. 234A, § 2. The two current judges anticipate they will initially be able to accommodate cases from other counties, but the post-expansion caseload should be closely monitored to determine whether additional judges should be added to the Business Session and, if so, where they should be located.

3. Allow parties from other counties to “opt in” to the Business Session by mutual consent and, in jury cases, by waiver of venue-driven jury selection.
4. Establish a limited panel of judges (perhaps five to seven) which would be a priority panel for appointment in qualified business cases for counties other than Suffolk, Middlesex, Essex, and Norfolk, and encourage special appointments in those cases.
5. Do not, for now, expand the subject matter of cases eligible for acceptance into the Business Session to include non-commercial complex cases. While such expansion may be desirable in the future, such decisions should be made after the results of the geographic expansion of the court are analyzed and addressed.

## **CONCLUSION**

Based upon all indicators, the establishment of the two-year pilot Business Litigation Session in Suffolk County has been a successful and cost-effective innovation within the Massachusetts court system. By providing a specialized forum staffed with judges experienced with and interested in adjudicating complex commercial disputes, and by adopting more active judicial oversight of cases within the session, the Business Session has been very well received by business litigation practitioners and by the broader legal community. Importantly, the Business Session has been cost-neutral, and has not required any additional facilities or personnel. These results mirror the success of similar business tribunals in other states, and



should serve to elevate Massachusetts's reputation regarding its ability to handle business litigation.

While a number of legitimate concerns were raised prior to the establishment of the Business Session, it appears that many of these concerns have either been addressed or have been counterbalanced by the other policy considerations favoring the permanence and expansion of the Session. For example, the concern regarding the provision of an "elite" session for a well-heeled few has to some degree been allayed by the results of the survey conducted last spring: as the survey noted, the positive reviews for the Session appear uniform across all demographic lines, including practitioners from small, medium, and large firms, as well as those representing individuals versus corporations. In addition, the Session appears not to have created any significant case resource allocation issues: a ready supply of complex commercial litigation has filled the Session's docket, and Judge Botsford in particular has taken on a substantial number of cases not formally accepted into the session. As with any administrative system, there exists a tension between providing specialized services and allocating resources most efficiently. The establishment of the Business Session appears to have achieved an appropriate balance between the two goals.

The Committee recommends that the two-year pilot program for the Business Session in Suffolk County be made permanent, and that the Business Session be expanded to allow acceptance of appropriate cases from Middlesex, Essex, and Norfolk counties. For cases filed in other counties, the Committee recommends that parties be allowed either to "opt in" to the Business Session, or to apply for special assignment from among a limited pool of judges named to accept complex commercial cases. Currently, the Committee does not recommend that the subject matter criteria for acceptance into the Business Session be expanded to include non-

commercial complex litigation, although expansion of the criteria may be desirable in the future. Finally, while the Committee anticipates that the two current judges assigned to the Business Session may continue to adjudicate cases from other counties while sitting in Suffolk County, their ability to do so should be closely monitored to determine whether additional judges should be added and, if so, where they should be located.

It has been the Committee's pleasure to provide analysis and make recommendations concerning the future of the Business Litigation Session. We welcome public comment on this very important issue within the state judiciary.

Respectfully submitted,

**Members of the Business Litigation Session Resource Committee**

Gael Mahony, Esq., co-chair

Beth I.Z. Boland, Esq., co-chair

Michael P. Angelini, Esq.

Paul T. Dacier, Esq.

John J. Egan, Esq.

Robert A. Gelinas, Esq.

Andrew R. Grainger, Esq.

Franklin H. Levy, Esq.

Harry L. Manion, III, Esq.

James J. Marcellino, Esq.

James D. O'Brien, Esq.

Charles V. Ryan, Esq.

Deborah L. Thaxter, Esq.

Steven H. Wright, Esq.

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<sup>1</sup> See “A Proposal for Adjudication of Complex Commercial Cases,” Boston Bar Association.

<sup>2</sup> *Ibid.*, citing Press Release of November 7, 1996.

<sup>3</sup> “New York Commercial Division Celebrates Fourth Anniversary,” *The Metropolitan Corporate Counsel* (December 1999).

<sup>4</sup> Report of the ABA Ad Hoc Committee on Business Courts, “Business Courts: Towards A More Efficient Judiciary,” 52 *Bus. Law.* 947 (May 1997).

<sup>5</sup> *Ibid.* at 952.

<sup>6</sup> See “Practitioners Pushing for Trusts and Estates Session.” *Massachusetts Lawyers Weekly* (May 28, 2001).

<sup>7</sup> *Ibid.* at 954.

<sup>8</sup> *U.S. Chamber of Commerce State Liability Systems Ranking Study*, Final Report, Jan. 11, 2002.

<sup>9</sup> The Notice to the Bar also specifies that the following types of cases are *not* eligible for assignment to the Business Session:

- matters subject to compulsory arbitration or to the exclusive jurisdiction of the Probate, Land and Housing Courts, the District Courts or the Boston Municipal Court;
- personal injury, survival or wrongful death matters;
- individual (non-class) consumer claims against businesses or insurers, including product liability and personal injury cases;
- environmental claims not involved in the sale or disposition of a business;
- eminent domain matters;
- malpractice claims other than those designated above for the Special Sitting Justice;
- employment disputes not involving written contracts and employment discrimination cases;
- administrative agency review under G.L. 30, § 14, zoning and other appeals from administrative agency orders;
- residential real estate and non-commercial landlord-tenant disputes; and
- occupational health or safety matters.

<sup>10</sup> A listing of the cases accepted into the Business Session, by category, is attached as Appendix D hereto.

<sup>11</sup> Participants were asked to rate their satisfaction levels on a scale of 1 to 7, with 7 being “extremely satisfied” and 1 being “extremely dissatisfied.” Responses of 6 on the 7-point scale were interpreted as “very satisfied.”

<sup>12</sup> The survey was made possible by a grant from the New England Legal Foundation, for which the Committee is grateful.

<sup>13</sup> See Paula Hannaford, David Rottman, Roxana Gonzalez, *Civil Action: A Briefing on Civil Justice Reform Initiatives: Focus on Business and Complex Litigation Courts*, National Center for State Courts (Aug. 2000).

<sup>14</sup> In addition to the four states discussed here, a number of other states, including Colorado, Illinois, Maryland, Michigan, Nevada, New Jersey, Ohio, Pennsylvania, Virginia, and Wisconsin are either considering or have implemented some method for handling complex business cases.

<sup>15</sup> See JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS, FACT SHEET: COMPLEX CIVIL LITIGATION.

<sup>16</sup> See Remarks by Chief Justice Ronald M. George at the Inauguration of Orange County’s Complex Litigation Center (Aug. 6, 2001), available at <http://www.courtinfo.ca.gov/reference/speech0801.htm>. See also DOAR, HANDS ON TECHNOLOGY AT THE CIVIL COMPLEX LITIGATION CENTER.

<sup>17</sup> See Hannaford, *supra*.

<sup>18</sup> *Id.*

<sup>19</sup> See The Commercial Division of The State of New York: Commercial Division Operating Statement, available at <http://www.courts.state.ny.us/comdiv/CD%20Operating%20Statement%202002%20-%20Introduction.htm>.

<sup>20</sup> See The Commercial Division of The State of New York: Commercial Division Alternate Dispute Resolution Program, available at [http://www.courts.state.ny.us/comdiv/ADR\\_Guide.htm](http://www.courts.state.ny.us/comdiv/ADR_Guide.htm).

<sup>21</sup> See The Commercial Division of The State of New York: Electronic Filing Overview, available at [http://www.courts.state.ny.us/comdiv/e\\_filing.htm](http://www.courts.state.ny.us/comdiv/e_filing.htm). The pilot program ran through July 2002.

<sup>22</sup> See The Commercial Division of The State of New York: Courtroom for the New Millennium, available at [http://www.courts.state.ny.us/comdiv/Courtroom\\_Millennium.htm](http://www.courts.state.ny.us/comdiv/Courtroom_Millennium.htm).

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<sup>23</sup> See North Carolina Business Court: About the North Carolina Business Court, *available at* <http://www.ncbusinesscourt.net/New/aboutcourt/>.

<sup>24</sup> See Report on Activities of the North Carolina Business Court 2000-2001, *available at* <http://www.ncbusinesscourt.net/ref/2001%20General%20Assembly.htm>.

<sup>25</sup> The expansion of the Business Session's venue can be accomplished in several ways. First, cases from other counties could be accepted into the Session by agreement and waiver of venue by all litigants. Similarly, waiver could be attained by the plaintiff's filing of an action in the Session and the defendant acceding to such filing. Or, the Supreme Judicial Court could be petitioned to use its powers under Mass. Gen. L. ch. 234A, § 2 to allow for acceptance of cases into the Session.