

COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT
BOSTON, MA 02108

ALLAN VAN GESTEL
ASSOCIATE JUSTICE

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February 6, 2006

Re: The Business Litigation Session

Dear Chiefs:

Enclosed is a report entitled, "The Business Litigation Session After Five Years." It seemed appropriate for me, now in my retired/recall status, to submit this report to you. It contains my analysis of the Session and some suggestions regarding its future. The views expressed are entirely my own and, respectfully, not intended to tread upon your positions in any way.

I also have sent copies to Michael B. Keating, Esquire, given his position as Chair of the Court Management Advisory Board established following the Monan Report by G.L. c. 211B, sec. 6A, and to Beth I.Z. Boland, Esquire, and Gael Mahony, Esquire, because of their positions as Co-Chairs of the Business Litigation Session Resource Committee.

Respectfully,

Hon. Allan van Gestel (Ret.)

cc: Michael B. Keating, Esq.
Beth I.Z. Boland, Esq.
Gael Mahony, Esq.

THE BUSINESS LITIGATION SESSION AFTER FIVE YEARS

by Hon. Allan van Gestel (Ret.)¹

February 6, 2006

On October 2, 2000, the Business Litigation Session opened as a pilot program in the Superior Court. It was an experiment designed to determine whether the Superior Court could employ a different, more efficient method of managing and litigating complex business-related cases in response to the needs and demands of the business community which then felt the court's approach to be insufficient for the task.

The very first paragraph of the Executive Summary in the 2003 Report of the Visiting Committee on Management in the Courts, (generally referred to as the "Monan Report"), reads as follows:

Today, the Courts of Massachusetts are mired in managerial confusion. The impact of high-quality judicial decisions is undermined by high cost, slow action, and poor service to the community. The administration and management of the Judiciary is uneven at best, and oftentimes dysfunctional. Morale is near the breaking point, and there is little concern for customer service. Employees cry out for leadership. The public wants reasonably priced, quick, and courteous service, but often receives the opposite.

While the foregoing criticism may apply more to Trial Court Departments other than the Superior Court, the public who read the Monan Report, including many members of the Bar, do not draw that distinction. In contrast to the Monan Report's seemingly overall assessment of the courts of Massachusetts, the Business Litigation Session has been a notable success, achieving many, if not all, of its goals. The Session has responded positively to essentially each of the areas felt deficient in the Monan Report.

The application of sound principles of institutional administration in originally

¹ Judge van Gestel was initially the sole Justice in the Session and, since its founding, until his retirement on December 3, 2005, served as its presiding judge. He has now been recalled to serve in the Session for perhaps the two years beginning January 1, 2006.

establishing the Business Litigation Session has proven successful. Massachusetts should not now let itself fall behind other states in its ability to handle business disputes.² The Superior Court's role is to decide fairly the cases before it, but part of the fairness of the process depends on the integrity of the system in which the decisions are made. As with any effectively managed system, the process of running a new court session requires accountability, resources, a clear mandate with direct lines of authority, a process for attracting and retaining sufficient talent to run it, and a stable succession plan. Moreover, the details for providing such a foundation may legitimately differ from other sessions already long in place – not because the new session is “better,” but simply because it is “different.”

This review of the Business Litigation Session is proffered to advance the argument as to why the Session ought to remain a permanent part of the Superior Court and to tender some suggestions as to what is needed to accomplish that objective.

Courts Elsewhere

To put the Massachusetts Business Litigation Session in context, it is useful to examine what is happening in other jurisdictions.

In the 18th century the Delaware Chancery Court began its long and historic career. This

² That these kinds of courts, overwhelmingly accepted by the business community and the lawyers involved, can fall behind without proper attention is demonstrated by the situation in North Carolina. See “Chief Justice’s Commission on the Future of the North Carolina Business Court,” (October 28, 2004). At pp. 3-4 the Commission observed: “Although North Carolina was a pioneer in the establishment of the Business Court in 1995, our State has since fallen behind. Currently, no other state than North Carolina has a specialized business court with only one judge and one geographic location. Illinois, Massachusetts, Nevada, New York, and Pennsylvania, for example, have all expanded their business court programs by adding additional judges and/or moving into additional counties. . . . As North Carolina’s business economy grows, so must its Business Court.”

court is a major reason why Delaware, one of the smallest states in both population and geography, has become the home address for more major corporate entities than all of the other states combined; and Delaware corporate law is often cited by the business community and the lawyers that represent it as the gold standard.

New York began its experiment with a business court in New York City in 1993. In November 1995, the experiment in New York City led to the creation, through the office of Court of Appeals Chief Justice Judith S. Kaye, of the Commercial Division in the Supreme Court of New York. See NYS Unified Court System's Comprehensive Civil Justice Program at III.1., New York Law Journal, (March 24, 1999).

The operating statement of New York County's Commercial Division identifies its goals as follows:

Absent vigorous case management, these cases tend to become protracted and expensive, and, indeed, to become a drag upon the court's inventory of non-commercial matters. By concentrating most of the commercial cases filed in New York County in the [Commercial] Division, before Justices familiar with commercial jurisprudence and litigation and who are charged with the task of active case management, court administrators hope that delay and expense can be reduced for all parties in commercial cases, and derivatively for litigants in non-commercial cases as well.³

Since their inception in 1993, New York State now boasts commercial litigation divisions in eight counties and one judicial district: Albany County; Erie County; Kings County; Nassau County; New York County; Queens County; Suffolk County; Westchester County; and the Seventh Judicial District.

Similar kinds of courts and sessions specializing in and focusing on complex business-

³ The Commercial Division of the State of New York, Commercial Division Operating Statement: Part I.

related cases have been established in Arizona, California, Connecticut, Florida, Georgia, Illinois, Maryland, Nevada, New Jersey, North Carolina, Pennsylvania, and Rhode Island; and many other states, including Colorado, Hawaii, Indiana, Louisiana, Maine, Michigan, Mississippi, New Hampshire, Ohio, Oklahoma, Oregon and West Virginia, have such courts under consideration.⁴

In Shanghai, in the Peoples' Republic of China, there is an Economic Court with at least three judges hearing business cases. Ptomsk, in central Siberia, has an Arbitrage Court with 27 judges handling commercial disputes.

The American College of Business Court Judges held its inaugural meeting at the Brookings Institution in Washington, D.C., October 30 to November 1, 2005. The author of this report participated in the meeting⁵ and was impressed with the quality of the judges in attendance, their strong interest in their own business courts, and the vibrancy of the programs presented and contemplated.

The American Bar Association, Section of Business Law, has published a brochure encouraging the establishment of business courts: "Establishing Business Courts in Your State."

In short, courts much like the Massachusetts Business Litigation Session are becoming the norm, particularly in more commercially oriented jurisdictions.

Why in Massachusetts

Massachusetts has a long history as a commercial and business leader, starting in the 18th

⁴ See, e.g., "A History of the Creation and Jurisdiction of Business Courts in the Last Decade," 60 *The Business Lawyer*, Number 1, pp. 147-275, (November 2004).

⁵ The author notes, at his own expense.

century, when sailing ships, laden with spices, tea and other treasures from the Orient, first docked at Salem. Now the Commonwealth is a center for high technology and biotechnology, sophisticated finance, the business of medical care, insurance, and the economic aspects of higher education. Should not Massachusetts be a part of this emerging area of judicial activity? The answer seems clear.

In response to efforts by a number of lawyers who regularly represented businesses in complex litigation and by some of their clients, particularly those in the high technology and biotechnology sectors, to create a “business court,” and spurred on by the Boston Bar Association, Chief Justice DeVecchio took a preliminary step forward by establishing on October 2, 2000 – on a two-year, pilot basis – a special session in the Suffolk Superior Court in Boston to hear and attend to certain business-related cases.

This pilot program was intended to demonstrate the versatility and ability of the Superior Court to respond to all of its constituencies’ litigation needs. While the business sector may not be entitled to special treatment over and above that of other litigants, neither should it be ignored. It is a significant component of our society and a major user and supporter of the Superior Court. Business litigators are vitally important to the strength of the Superior Court as an institution. When this segment of the litigating community, like any other that the court serves, comes forward and raises issues and presents situations that can be handled better, the court owes that segment a serious response.

The Massachusetts Superior Court, an institution of remarkable talent and diversity, is thought by many to be one of the finest common law trial courts in the nation. It can be, and should be, responsive to the needs of all of the litigating public. The Superior Court, therefore,

must continue to be responsive to those issues that otherwise will drive the business community to abandon it for courts in other jurisdictions or to private ADR. As it does now, the business community ought to continue to feel comfortable litigating its cases in the Superior Court, and the court should invite business litigators to work with it to perpetuate a modern, efficient and responsive justice system that is attentive to its needs. The business community's support for the Superior Court is important, and if ignored, will only redound to the detriment of the court.

Who should resolve the great regulatory issues between the Commonwealth and the regulated industries in Massachusetts? Who ought to protect companies' trade secrets, or safeguard employees' freedom to apply their own knowledge in competition? Who must decide if a lending institution has failed its borrower, or if the borrower has defaulted on its obligations? Where should complex contractual matters be resolved? Who is to determine the conflicts among shareholders of entities, or the breaches of the fiduciary duties of directors, partners or trustees? Where ought the insured business seek relief when the insurer declines coverage? Who must protect the shareholders or policyholders from the malfeasance of the company or insurer, and who should shield the company or insurer from the strike-suit or the hostile take-over? Who should interpret the new Massachusetts Business Corporation Act? Who ought to apply the other legislation coming from the General Court controlling or affecting the operation of the Commonwealth's businesses and the people who labor for them? Where should complicated malpractice claims between businesses and the professionals that serve them be resolved? The surface is hardly scratched, but the response must be obvious.

The resolution of disputes of great magnitude which affect the commercial heart of the Commonwealth ought to occur in its own Superior Court, with oversight by its Appeals Court

and its Supreme Judicial Court. A body of law that governs this Commonwealth's economic well-being ought to be forged in the crucible of the state's great trial court and refined on appeal in Massachusetts, not in the courts of Delaware, New York, the Federal system, or elsewhere. Such law is certainly not being produced in the cloistered conference rooms of alternate dispute resolution entities.

The business community has powerful interests and unusual abilities to provide support for those institutions that respond to its needs. If it finds the Superior Court to be effective, fair, responsive and efficient in the handling of its litigation, the business community should become a strong advocate for the court and its facilities. This, of course, will surely improve the Superior Court for the benefit of all of those who look to it for resolution of their legal conflicts. Thus, even without the growing competition from other states, the need for a court management system that can respond to these issues is obvious.

The Business Litigation Session has justified its continued existence. The initial expansion of its reach to cases that otherwise would have venue in Essex, Middlesex and Norfolk counties has been well received.⁶ Further, there now are serious suggestions of interest for further expansion to cases with venue in Worcester and Hampden counties.

How the Session Operates

Since January of 2002, there have been two sessions of the Business Litigation Session: the original session, now called BLS1; and the second session, called BLS2. Both sessions

⁶ This expansion, which took effect on March 3, 2003, is on a "waiver" basis. In other words, because the venue statutes have not been amended, all parties must waive their venue claim to the other counties in order for a case without Suffolk County venue to remain in the Session.

operate in essentially the same manner, with one notable exception. So far, the Justice in BLS1 has been on permanent assignment, having been taken off the circuit system of assignment for the task. The Justices that have served so ably in BLS2, however, remain circuit judges, although sometimes on somewhat longer assignments in BLS2.⁷

In its operation the Business Litigation Session uses as its model the Federal system, rather than the traditional Superior Court circuit approach. The basic elements are: a single judge, experienced in litigating complex business cases, assigned to a case from beginning to end, who participates with the lawyers in the management of the case as it proceeds to resolution.

Although nearly identical, the Massachusetts and Federal rules of civil procedure are not quite the same in certain aspects of their application. Particularly notable is Rule 16, heavily used in the Federal courts but rarely making an appearance in the circuit-riding Superior Court. In the Business Litigation Session, as soon as it is made aware that the issues are joined, the Court schedules and conducts a Rule 16 conference for the purpose of establishing a case-specific special tracking order. The progress of the case under that special order is then monitored as the various deadlines are met.

Also at the initial Rule 16 conference, the Court strives to establish a firm trial date. This is particularly important for cases that regularly have expert witnesses and important other testifying individuals from outside of Massachusetts or with schedules that are difficult to coordinate. Usually, only one case is assigned for trial on the date established, and the Court blocks out the estimated days or weeks thereafter to conduct that trial. As a result, the lawyers,

⁷ The lack of an essentially permanent Justice in BLS2 is, to this author at least, a factor that diminishes in an important way from the operation and success of that session. It will be discussed further later in this report.

their clients, their witnesses and their experts have certainty as to when the trial will occur.⁸ For the same reasons, however, this process dictates a somewhat rigid approach to trial continuances. If, many months in advance, the Court has given the litigants an exclusive trial date which the litigants themselves have participated in selecting, any subsequent change threatens not only to tread on such dates for others in a similar position, but also to leave the Court with more than the usual occasions without a case on trial.

On this latter point, of course, although jury trials are available in this Session on the same basis as elsewhere, complex business cases tend more often to be tried jury-waived, and always present extensive dispositive motions; thus the Court needs the writing time made available to explain its reasoning on the complex issues that come before it. When a judge is thinking about, researching, and writing decisions, he or she is doing the job just as much as when presiding over a trial.

The consistent involvement of the same judge throughout the evolution of a case enables the application of many other case management techniques that are quite familiar to lawyers trying cases in the Federal courts but not so frequently utilized in the Superior Court. For example, it enables the Court to compress hearings seeking injunctive relief with trials on the merits, or to bifurcate out and have special evidentiary hearings on the meaning of particular statutes or contract clauses that, once resolved, often facilitate without further Court intervention the resolution of the remaining elements of the case.

Control and management of discovery in complex matters is greatly facilitated by having

⁸ Whether the Session can continue this kind of trial scheduling, however, will depend greatly on the resources available as the docket continues to build.

a judge with full knowledge of the case, as well as the prior discovery history often based on that same judge's own earlier orders. Counsel tend to be more cooperative in resolving discovery disputes among themselves when they understand that the judge knows what is going on.

The constant availability of the same judge in the Session also makes for ready access for litigants on matters that need expeditious handling, like temporary or preliminary injunctive relief, attachments, and other items of an emergency nature.

Tellingly, the ABA Business Law Section in its pamphlet for establishing business courts included the following as support for doing so: "Improve [the] overall infrastructure of [the] entire community by creating a forum that makes conducting business in that region more attractive, predictable and reliable."

Additional reasons for establishing business courts, stated by the ABA are:

- Cases will be heard by judges uniquely experienced in business and commercial law and in handling business and commercial cases.
- [They] create a body of case law that promotes consistency and increases guidance for parties and lawyers so that litigation risks can be informatively assessed.
- [They move] business and commercial cases . . . more expeditiously and reduce litigation costs for the parties and the court system.
- [They] establish specialized dispute resolution programs and procedures which promote earlier and more frequent settlement of business and commercial cases, which are more amenable to ADR resolutions.
- [They permit] non-business cases [to move] more expeditiously by removing complex, time-consuming, business cases from general docket.
- [They are] competitive from an economic development standpoint with other states/jurisdictions which have established business courts.

A Discretionary Session

The Business Litigation Session is a discretionary session. Lawyers must first file their cases in the Suffolk Civil Clerk's Office and complete the special BLS Civil Action Cover Sheet that requires a statement of why the case belongs in the Session, or move in one of the three other designated counties for a transfer to Suffolk County. On the back side of the special Suffolk Cover Sheet is a listing of the kinds of cases, both presumptively and otherwise, considered suitable for the Session. Included are cases involving the governance and internal affairs of corporations, partnerships, joint ventures, business trusts and other entities; shareholder derivative claims; intellectual property, trade secrets, non-competition and similar agreements; complex contract matters; matters involving banks, investment bankers, financial advisers, brokerage firms, mutual and money market funds; claims for violation of antitrust or other trade regulation laws; unfair acts or practices involving business entities; matters involving financial dealings between lenders and borrowers; malpractice claims by business enterprises against professionals; matters involving governmental agencies and business entities; and a whole array of other kinds of cases of a business nature that require special handling because of factual, legal or other complexities.

Once filed in the Suffolk Civil Clerk's Office, the case file then is sent to the BLS1 Session for review and a determination by the presiding justice as to whether the case properly may be accommodated there.⁹ The considerations for inclusion or exclusion are not hard and fast rules of jurisdiction; rather, they are evolving as the needs and abilities of the Session dictate and

⁹ If a case comes over on a motion filed in Essex, Middlesex or Norfolk, it still requires screening for acceptance by the Justice presiding in BLS1.

the discretion of the presiding justice is exercised. Complexity and the need for special case management are the touchstones.

Venue and Jurisdictional Issues

As mentioned above, presently this Session has venue and jurisdictional limitations that are confined to cases properly brought in Suffolk County, unless there is a waiver of the venue requirements that would otherwise keep a case in Essex, Middlesex or Norfolk counties. Thus, lawyers contemplating filing a claim in the Session must examine carefully whether venue and jurisdiction are appropriate. The general venue laws for a transitory action call for a case to be brought in the county in which some party lives or has a usual place of business. G.L. c. 223, secs. 1 and 8. There are, however, other statutes that permit actions to be brought in Suffolk County regardless of the place of residence or business of any of the parties. See, e.g., G.L. c. 93, sec. 42A relating to injunctions to protect trade secrets.

Jurisdiction over subject matter – unlike venue, which in some circumstances can be waived – cannot be imposed upon the Session simply by the agreement of the parties or language in a contract. Therefore, a forum selection clause can only bring a case into the Business Litigation Session when that case otherwise properly belongs in the Superior Court for its litigation.

Appellate Practice

Appellate practice regarding cases in the Business Litigation Session is no different from that in any other case in the Superior Court and follows the same well-traveled routes to the Appeals Court and the Supreme Judicial Court.

Results of the First Five Years

During the five-year period from the Business Litigation Session's opening on October 2, 2000, through November, 2005, 1,456 cases were accepted into the Session and only 142 were refused.¹⁰

Seventy-eight of the accepted cases were already in the system before the Session opened and were transferred by the Suffolk Regional Administrative Justice to provide some start-up business. Since that time, 1,378 new cases have been taken in. These numbers reveal that cases come into the Session at a rate greater than one per court business day.

In the same first five years, 993 cases taken in already have been resolved by trials, dispositive motions, settlements, stays for arbitration and bankruptcies. Nearly 500 temporary restraining orders and preliminary injunctions have been acted upon.

As of November 30, 2005, since the expansion of venue on a waiver basis, 41 cases have come over from Essex County, 178 from Middlesex County, 77 from Norfolk County, and 498 originated in Suffolk County.¹¹ Thus, Suffolk County still counts as the place of origin for venue purposes for more than the other three counties combined.

It is clear beyond doubt that the firm trial dates, early assigned, and the close relationship and availability of the assigned judge to the litigants have been extremely effective in resolving

¹⁰ Nearly all of the cases meet the requirements of complexity and the need for special case management. Each of these cases is then being handled like a special assignment, except the judge does not move from county to county, taking the cases with him or her.

¹¹ These numbers are not entirely precise. It is not always possible to assign a single other county as the source of a case. For example, a plaintiff may be in Middlesex County and a defendant in Norfolk County. In the latter instance, this report considers the case as originating in the county of the plaintiff.

these very complex matters.

Reception to Date and the Future

To date, the business community and those who litigate for and against it appear to have found in the Business Litigation Session a system that responds well to their needs.¹² The Session may also be demonstrating some approaches that can, and should, be considered for utilization in other aspects of the Superior Court's litigation. Indeed, individual session judges in non-BLS sessions are already experimenting with different case management techniques to make the Superior Court more efficient and responsive to current litigation needs. Any complex case, either legally or factually, that requires constant involvement by a single judge from beginning to end benefits well from similar approaches, and the whole court gains immensely from the spread of new techniques and technology throughout its operation.

Expansion of the reach of the Business Litigation Session beyond Suffolk County to the entire state, on the basis of the waiver of venue system already in place for Essex, Middlesex and Norfolk counties, ought to be considered and welcomed by the trial bar. Keeping the sessions physically centralized in Boston, however, is desirable in order to avoid utilizing scarce courtroom facilities in other counties and to enhance cooperative efforts by the judges assigned to the Business Litigation Session. Further, the great majority of cases coming into the Session involve lawyers from the Greater Boston area or from outside of the Commonwealth and, therefore, Boston is a convenient locus. Still further, the continued ability of litigants to insist

¹² See, e.g., "The Business Litigation Session, Massachusetts Superior Court: A Status Report," by the Business Litigation Session Resources Committee, November 2003; and "The Massachusetts Business Litigation Session: Docket and Caseload Analysis," by the Business Litigation Session Resources Committee, December 2004.

upon their statutory venue rights in other than Suffolk County protects against any concern that all business litigation will be handled by “the Boston bar.”¹³

There are many reasons why a Business Litigation Session has been good for Suffolk County. Those same reasons argue well that the reach of such sessions would be equally beneficial all across the Commonwealth.

The Most Critical Needs for the Session

1. With the retirement of the Business Litigation Session’s first, and only, permanently assigned judge – notwithstanding the potential of his completing a two-year recall – the most significant and critical issue facing the Session relates to the permanency of the judges assigned thereto. The absence of a permanent, non-circuit riding judge in BLS2 has been a hindrance to that session’s ability to function effectively. The most significant and effective means of accomplishing what the business community seeks for its litigation, and what five years of experience beyond any doubt have demonstrated, is the assignment of cases to a single judge from beginning to end. A three-month, or even a six-month, assignment, even if repeated on a team basis, does not enable those judges to effectively see a case from start to finish. Also, the lack of continuity seriously interferes with the firm-trial-date concept that has worked so well in the BLS1 Session.

There is a particularized need for active management from beginning to end of the kinds of cases that come into the Session. Few, if any, organizations would suggest they that could adequately manage their business if they were to change and move key managers every three to

¹³ It should not pass unnoticed, however, that the Superior Court exists to serve those litigants who seek resolution of their disputes in a civilized and legal manner, not the convenience of judges or the business preferences of the bar.

six months. While the managers themselves might enjoy the change in scenery or the differing intellectual challenge in the new locus, the customers involved in the process would not be well served by such a rotation since it does not engender accountability. This aspect is particularly obvious in the Business Litigation Session. Not only do its cases proceed more effectively with a different kind of management, it attracts litigants who are very sensitized to the issue of accountability and efficiency. These litigants are business entities and their executive managers. They are constantly investing in the latest operational techniques, and they value very highly effective management and the predictability that it engenders.

Anecdotally, attorneys have reported to this author the reaction of in-house general counsel and CEOs when told that a case involving their company, if filed in the Superior Court – including the second session of the Business Litigation Session – will not have the same judge from the beginning to the end of the litigation, as “You have to be kidding. If that really is true, then do not file our case there.”

No state with a business court except Massachusetts has other than full-time, permanent judges assigned thereto.

2. Next in importance to the permanency of the Justices serving in the Business Litigation Session is the need to more effectively make the Session itself permanent. It exists now at the good graces of the Chief Justice of the Superior Court, with the support of the Chief Justice for Administration and Management. They have seen the Session’s merits and have kept it alive. There should, however, be more established permanency.

This author suggests the continuation of the Session by a special order or rule of the

Supreme Judicial Court,¹⁴ with any such order or rule leaving a wide swath for flexibility in the Superior Court Chief Justice's ability to modify and manage the day-to-day operation thereof. Such a rule or order could issue after consideration by the Massachusetts Judicial Conference. The General Rules of the Supreme Judicial Court, which establish the Judicial Conference, in Rule 1:04(4)(a) gives the Conference the authority to "consider and make recommendations on matters relating to the conduct of judicial business, the improvement of the judicial system, and the administration of justice in such manner as the Conference from time to time may deem appropriate."

Also, it is recommended that the Court Management Advisory Board, established after the Monan Report by G.L. c. 211B, sec. 6A, and the Business Litigation Session Resource Committee, established by the Superior Court Chief Justice, be asked to become involved in the consultative process.

Further, the Business Litigation Session Resource Committee should be retained to provide advice to, communication with, and coordination among the bench, the bar and the business community.

3. A third serious need is to establish ways and means to attract judges, either from among those already sitting on the Superior Court or to apply to and be appointed by the Governor to the Superior Court, to be particularly assigned, on a permanent basis, to the Session. Sitting judges seem to shy away from the Session for reasons not always apparent. The variety

¹⁴ Other states with business or commercial courts have established their sessions by orders from their high courts; examples are Maryland, Nevada and North Carolina. See "A History of the Creation and Jurisdiction of Business Courts in the Last Decade," 60 *The Business Lawyer*, Number 1, *supra*, at pp. 166, 184 and 190.

and intellectual challenge that these complex cases present is astonishing. For a judge with an interest and background in this area of law, and the personal lifestyle situation that permits the effort, to be a Justice of the Business Litigation Session is a very rewarding opportunity.

While Massachusetts certainly has a preferred method for selecting and appointing its judges, there are significant impediments to getting applicants for the Business Litigation Session from outside those already on the Superior Court. How can a trial lawyer, with significant business litigation experience, be lured into the Business Litigation Session when she or he must be ready to accept a dramatic reduction in compensation;¹⁵ probably notify partners and clients about the effort and begin transitioning those clients to others; apply to, and possibly not get through, the Judicial Nominating Committee; after getting through the JNC, possibly not be appointed by the Governor; if appointed, not be assured of assignment to the BLS; and all the while not knowing whether the BLS will even continue to exist? In short, the current situation does not suggest that qualified candidates can be expected to rush to serve.

Whatever the process for attracting/retaining judges in the Business Litigation Session, it would be prudent to have something in place by this fall when the 2007 calendaring assignments are created. Your author's recall term, if the SJC permits, expires at the end of 2007. A permanent replacement should be in office well before then.

4. The fourth need relates to resources, both personnel and otherwise. Permanent and experienced law clerks would help immensely. The present law clerk staff is full of bright and

¹⁵ Compensation for many of the experienced attorneys that might serve in the Session is currently five to ten times that of Superior Court Justices. Even associate lawyers in major law firms are hired right out of law school at compensation considerably more than that of Superior Court Justices. So too, the pay of Federal Magistrates is about \$38,000 per year more than that of a Superior Court Justice.

lovely people. As almost all of us were when just out of law school, however, they have limited experience in business or commercial matters. Further, they, like the rest of the judges, are on circuit, and even when they are in Suffolk County, they move around with far too much frequency to be of assistance in the Business Sessions. A clerk for a month or two, with limited knowledge of business matters, is of very little help.

Most, if not all, business courts across the country are staffed with full-time law clerk support.

By way of further personnel assistance, it would be very helpful to have a secretary dedicated to the Session and available to quickly prepare decisions, orders, etc. At present, this author does all of his own typing on the computer.

Enhanced computer legal research capability, particularly geared to the law in important business jurisdictions like Delaware and New York, is desirable.

Also, of course, all Superior Court Justices would welcome a return to the time when library facilities, one of a judge's most important tools, were kept current. As just one glaring example, Volumes 6 through 8A of the Massachusetts Practice Series, which contain Smith and Zobel's "Rules Practice," covering the Massachusetts Rules of Civil Procedure, have not been updated since the 2002 Pocket Part. These rules are used in the Business Litigation Session – indeed, in every civil session across the Commonwealth – on a daily basis.

Would anyone send a plumber to work without a wrench, or a carpenter without a saw?

Lastly on resources, in all Superior Court sessions it would be very helpful to have real-time reporting by stenographers, and the facilities for electronic filing.

A plea.

Massachusetts should not let its Business Litigation Session wither away. Those who have been so supportive, I am sure will continue to be so. But the future is far from predictable. A stronger foundation needs to be established.