



# NJSBA Report On Business Courts

**NEW JERSEY STATE BAR ASSOCIATION**

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## **REPORT OF THE AD HOC COMMITTEE ON BUSINESS COURT**

By letter dated August 5, 1998, President Joseph Bottitta of the New Jersey State Bar Association appointed the undersigned as an Ad Hoc Committee to study the concept of a business court for the State of New Jersey. President Bottitta's action was a response to, and result of, the introduction of legislation by Assemblyman David C. Russo suggesting the creation of a Business Court (A-1927). The legislation was initially studied by five different sections and committees of the NJSBA<sup>1</sup>, and was generally supported. Nonetheless, President Bottitta and the Board felt further study was warranted. Hence, President Bottitta appointed the Committee and asked it to study a number of issues. Those issues included the need for a business court, the nature of its jurisdiction, how it should be created, how it should operate and how it could be funded. As a result of the creation of this Committee, not only was A-1927 reviewed with care, but the entire concept of a business court was studied by the Committee. The within report summarizes the Committee's findings.

### **I. NEED FOR BUSINESS COURT**

#### **A. New Jersey Supreme Court Complex Commercial Subtrack Advisory Committee Report ("Subtrack Committee")**

On June 10, 1996, the late Chief Justice Wilentz instituted an experimental program to handle complex commercial litigation. A pilot plan for the creation of a complex commercial subtrack in the Bergen and Essex vicinages was developed. Subsequently, a committee was appointed chaired by the Hon. Stephen M. Orlofsky and comprised of present and former judges as well as experienced practitioners. That committee submitted a report dated April 16, 1997 which strongly endorsed the "creation of a dedicated judicial mechanism within the Law Division for dealing with complex commercial litigation."<sup>2</sup>

The Subtrack Committee stated that "the most important determinant of the success of this project, by far, will be the specific judges who are selected to run it." The Subtrack Committee called for judges with commercial litigation experience and good management skills. The Subtrack Report went on to make other suggestions, some of which are referenced herein, pertaining to the operation of a business court, but concluded, without reservation, that a specialized court designed to efficiently and expertly handle commercial litigation was definitely and promptly warranted.

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<sup>1</sup> The five sections and committees that studied A-1927 were the Dispute Resolution Section, Insurance Law Section, Corporate and Business Law Section, Judicial Administration Committee and Banking Law Section. Each of these bodies is represented on the Ad Hoc Committee.

<sup>2</sup> The report, as well as other materials referred to herein, are either listed in the Bibliography.

B. Review of Other Jurisdictions and Extant Literature

The Ad Hoc Committee undertook the task of reviewing the status of business and commercial courts in other jurisdictions, as well as a survey of the literature on the subject that presently exists.

Other Jurisdictions - Business or commercial courts exist in several other states.<sup>3</sup> The Ad Hoc Committee focused primarily on existing or proposed business or commercial courts in our neighboring states of New York, Pennsylvania and Delaware, although the Committee did also review other materials, including the thorough Final Report of the California Judicial Council Business Court Study Task Force dated May 16, 1997 (“California Report”).

- a. New York - The Commercial and Federal Litigation Section of the New York State Bar Association studied the concept of a commercial court and submitted a report dated January 19, 1995 urging the creation of such a court. The report concluded that there were a number of justifications for a commercial court:
  - i. fostering a more favorable environment for maintaining business activities in New York (vis à vis Delaware).
  - ii. responding to dissatisfaction with the handling of business disputes in New York State courts.
  - iii. a need to deal with the unique attributes of a commercial case.
  - iv. need for development of a clear body of law to guide both lawyers and businesses.

In late 1995, a division of the New York State Supreme Court dedicated to commercial litigation was established. According to the Co-Chair of the Commercial Courts Task Force appointed by New York’s chief judge, the Commercial Division is a success.<sup>4</sup> He stated:

“The Commercial Division offers hope of innovation and positive change to those who are skeptical about the

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<sup>3</sup> There are existing Business Courts in Delaware, New York, Illinois, North Carolina and Wisconsin. Pennsylvania, Florida and California have studied the concept of a business court, but have not approved the concept. Other states are actively evaluating business courts.

<sup>4</sup> “New York Creates Business Courts,” Business Law Today (ABA), Sept/Oct. 1996, pp. 32-38.

judicial system. It shows that the bar, the bench and the business community can work together to benefit all citizens. It offers hope that public courts can resolve business disputes promptly and efficiently. The division is good for New York state and its citizens and good for businesses, lawyers and judges.”

- b. Delaware - While Delaware has no business court as such, its Court of Chancery has developed a nationwide reputation for business expertise. In this court of limited jurisdiction, specific judges are assigned to specific kinds of cases, and assignments are largely based on experience. A “summary procedure” track exists for expeditious treatment of business disputes (by consent). Normally, the Court of Chancery does not award money damages, but it may do so, and rarely is a case transferred from the Court of Chancery to the Superior Court (equivalent to our Law Division) for such purpose.
- c. Pennsylvania - The Pennsylvania Bar Association appointed an Ad Hoc Commerce Court Committee to provide a broad perspective on a pending Commerce Court proposal. Its report, dated August 19, 1997, found that “commercial litigation requires special accommodation within the court system” but the Committee declined to support a separate statutory statewide Commerce Court, stating that a “comprehensive overhaul of the court system for a single class of litigants” was not needed. The Committee then proposed legislation which called for the election of ten new judges and inadequate funding was provided. Because of these frailties (particularly the funding) and other concerns, the Committee felt that remedying problems in the existing court system was preferable, including “the creation of separate business divisions within the trial courts . . .” While it is believed that the Philadelphia Bar Association supports the creation of a business court, none exists yet in Pennsylvania.
- d. California - The California Report was a 142 page analysis that resulted from a 14 month study by a diverse committee. While the business community and business litigators supported the concept of a business court, it was opposed by the State Bar and the Consumer Attorneys of California, primarily due to the fear that it would be an “elitist court” favoring business interests. Instead, the California Report recommended greater implementation of early judicial intervention, alternative dispute resolution, an individual calendar system for complex cases, judicial education, research,

attorney support for judges and adoption of complex litigation rules and statutes.

- 2 Literature and Studies - In addition to the Subtrack Committee Report, and the state reports listed above, the Ad Hoc Committee reviewed a considerable number of background materials discussing the concept of a business court. These materials were:
- a. "Business Courts: Towards a More Efficient Judiciary," Ad Hoc Committee on Business Courts (ABA), 52 The Business Lawyer 947 (May 1997).
  - b. Business Court Hearing proceedings, Pennsylvania Senate Judiciary Committee, March 26, 1997.
  - c. The Status of Business Courts in the United States, Survey prepared by the Ad Hoc Committee on Business Courts of the Business Law Section of the American Bar Association (June 5, 1998).
  - d. "Business Courts Can Improve State Judicial and Legal Systems," Haig, Robert, Legal Opinion Letter, Washington Legal Foundation, January 9, 1998.
  - e. "New York Creates Business Courts; If They Can Make It There, Can They Make It Anywhere?" (see fn. 4).
  - f. San Francisco Superior Court, Early Settlement Program Format.
  - g. Correspondence from individuals involved in business court studies and legislation in New York, Illinois, Ohio and North Carolina.

As a result of this review of reports, critiques and experiences in other jurisdictions, as well as in the abstract, the Ad Hoc Committee was able to evaluate both the positive and negative factors associated with the creation of a business court.

C. Factors in Favor of the Creation of a Business Court

Expertise of Judges - Most of the reports and commentators strongly emphasize the need for utilization of experienced, knowledgeable individuals to conduct a specialized business court. Once such individuals have been selected, their special skills should enable them to efficiently

and effectively manage business litigation. Moreover, a continued concentration in business cases heightens that expertise.

2. Building a Precedential Foundation - As experience with specialization in the handling of business cases develops, a body of precedent will emerge for guidance to the business and legal community, much as has already occurred in Delaware in the Chancery Court.
3. Full Utilization of The Courts - The Ad Hoc Committee believes that the utilization of highly qualified judicial officers and the establishment of a precedential foundation will lead companies to incorporate in New Jersey, which would result in commercial disputes remaining in the courts in the State of New Jersey rather than being litigated in other forums. Moreover, while some commercial disputants shun the courts because of delay or seek ADR as an alternative, this trend could be reversed as the respect for a specialized business court grows.
4. Experience Elsewhere - The reports from other jurisdictions that have experimented with the business court are positive. Through the reallocation of judges and resources, rather than the creation of a new court, expenditures have been modest. The track record established in New York has been praised and the pilot program in Essex County appears to be working. There is no reason to believe that an expansion of the programs beyond Essex and Bergen would lead to any different result.
5. Attentive Case Management - The individual assignment of judges to cases has often been applauded as a strong device to implement effective case management. The federal courts are an excellent example of this concept. The New Jersey court system has experimented with individualized case assignment and management, often with excellent results. The pilot program in Bergen and Essex Counties also succeeded in moving cases efficiently and effectively.
6. Strong Settlement Potential - Commercial cases lend themselves, perhaps more than many other types of cases, to prompt disposition and settlement if attention is focused upon them. An experienced judge with good case management skills can enhance this process.
7. Public Respect and Confidence - It is felt that the establishment of a specialized business court that effectively manages cases and promulgates reliable precedent will gain respect and build confidence in a more efficient and responsive court system.
8. Protection for the Individual or Small Company - Rather than letting disparity in resources govern the conduct of litigation, such as by lengthy

discovery proceedings and motion practice instigated by the “deeper pocket”, effective, specialized case management can level the playing field and assist the small company or individual in obtaining satisfaction of its business dispute.

D. Negative Factors Associated with the Creation of a Business Court

Elitism - A concern has been expressed that a business court would be an elitist institution, catering to businesses and businessmen as well as to the more complex and sophisticated cases. Rather than be a “specialized” court, the fear is that it will be thought to be a “special” court. There is no evidence that this has occurred in the jurisdictions where such courts exist.

- 2 Jury v. Non-Jury Issues - Another concern grew out of the traditional siting of jury cases within the Law Division and non-jury cases in the Chancery Division. This concern was heightened by the fact that the Delaware Chancery Courts rarely, if ever, conduct jury trials, although they retain that ability. However, the recommendation in this report would avoid this issue since the siting of a business court, in the Committee’s view, should be within the Law Division.
- 3 Administrative Burden - At the outset of a case, differentiation will be required to see to it that the case ends up before a business part of the Law Division (if that is the recommendation that is accepted). Counsel will be the initial designator of the Law Division, Business Part. However, some review by a judicial officer may ultimately be required in order to ensure that the case is properly located. This may require some additional administrative activity.
- 4 Expense - The Committee does not foresee any immediate additional expense in connection with the recommendation that it makes herein. Rather, the Committee merely recommends a reallocation of cases and judges. However, if the concept is successful, it may lead to an expansion of a portion of the judiciary to handle business cases with the requisite funding requirements that would pertain thereto. Such a future step is outside the scope of this report.
- 5 Jurisdiction - As discussed more fully below, there may be some overlap or even duplication between a Business Part of the Law Division and the Chancery Division. Care must be exercised to ensure that no friction occurs and that coordination between Divisions and Parts operates smoothly.

Committee Recommendation: The Committee believes that the need for more specialized forums is manifest. To some extent, this need has been recognized not

only in other jurisdictions but also in New Jersey, where special assignments have been made for certain types of cases in certain practice areas, including environmental, mass tort and others. Insofar as business disputes are concerned, the Committee believes the time for such a specialized forum, i.e., a business court, has come.

## II. JURISDICTION OF A BUSINESS COURT

- A. Subtrack Committee - The Subtrack Committee left open the issue of what types of cases should be handled by a business court in whatever form it may ultimately take. The Subtrack Committee felt that trial counsel should initially designate a case as “complex commercial” or such other designation as would put it before a business court. Moreover, the Subtrack Committee did not take a position as to whether or not “garden variety book account cases” should be handled by a business court. Finally, the Subtrack Committee decided not to impose any monetary threshold on the complex commercial court’s jurisdiction.
- B. A-1927 - Assemblyman Russo specifically outlined the types of cases over which a business court would have jurisdiction. They include the following:
1. Contract cases.
  2. UCC.
  3. Banking.
  4. Insurance.
  5. Commodities.
  6. Securities.
  7. Corporations.
  8. Non-profit corporations.
  9. Partnerships.
  10. Limited liability entities and associations.
  11. Business trusts.
  12. Competition among businesses.
  13. Business reorganizations.
  14. Dispositions of businesses.
  15. Business combinations.
  16. Shareholder, partner and member disputes.
  17. Intellectual property matters.
  18. The termination of services to a business or an agreement not to compete.
  19. Employment agreements with an executive officer or manager.
  20. Other commercial disputes as provided by the Rules of the Supreme Court.
  21. Private actions under federal law relating to federal regulatory matters that nonetheless may be heard in state court.
  22. Disputes where a contract designates the business court in a forum selection clause.

- 23 Other matters where judicial expertise and matters involving business and commerce is desirable.
- 24 Other matters as provided by statute.

This is a very broad grant of jurisdiction and may need some refinement. Not all insurance disputes necessarily belong in a business court and care should be taken in the employment area to limit the jurisdiction to the business side of such disputes rather than infringe upon the traditional jurisdiction of the Law Division in cases such as employment discrimination, wrongful termination, etc.

- C. Pennsylvania - The Pennsylvania Commerce Court Committee analyzed the jurisdiction issue and paralleled much of the listing in Assemblyman Russo's bill That report added antitrust and other unfair trade practices in certain matters specific to Pennsylvania laws. It excluded consumer claims, insurance claims, environmental claims and products liability claims, among other things.
- D. California - The proposal in California was to define jurisdiction broadly to include "association" matters, such as corporate and partnership litigation, as well as "mercantile" matters, defined as commercial, real property and business litigation generally.
- E. New York - New York struggled with the concept of defining jurisdiction and in the last analysis recommended flexibility in determining a commercial court's jurisdiction. Nonetheless, the report did include all business and commercial disputes in which the amount in issue exceeds \$25,000<sup>5</sup> (exclusive of punitive damages and costs), including the following:

Breach of contract, fraud or misrepresentation actions involving

- (a) Purchase or sale of securities.
- (b) The Uniform Commercial Code.
- (c) Purchase or sale of the assets of a business, or merger, consolidation or recapitalization of a business.
- (d) Provision of goods or services by or to a business entity.
- (e) Purchase or sale or lease of, or security interest in, commercial real property or personal property.
- (f) Partnership, shareholder or joint venture agreements.

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<sup>5</sup>This threshold monetary requirement was not adopted.

- (g) Franchise, distribution or licensing agreements.
- 2. Shareholder derivative actions and commercial class actions.
- 3. Dissolution or liquidation of corporations.
- 4. Actions involving liability and indemnity of corporate directors and officers, general and limited partners and shareholders (e.g., actions alleging breach of fiduciary duty).
- 5. Actions involving the internal affairs of corporations, such as voting and inspection rights of shareholders or directors, authorization of corporate acts or interpretations of articles or bylaws.
- 6. Commercial loans (including failures to make commercial loans), negotiable instruments, letters of credit and bank transactions.
- 7. Actions involving allegations of business torts, including unfair competition, interference with business advantage or contractual relations.
- 8. Actions involving employment agreements or employee incentive or retirement plans in which the business or commercial issues predominate.
- 9. Breach of contract or declaratory relief actions involving insurance.
- 10. Liquidation or receivership of banks, credit unions, insurance companies or savings and loan associations.
- 11. Such other kinds of cases as may be designated by the Chief Administrative Judge.

F. Committee Recommendation - The Committee recommends a flexible approach to subject matter jurisdiction. The Committee believes that consumer fraud cases should be excluded from the jurisdiction of a business court, as should employment discrimination, wrongful termination, sexual harassment and similar employment cases. The Committee also believes that the present \$10,000 Superior Court, Law Division, minimum threshold is appropriate. There were discussions regarding a \$100,000 threshold as opposed to a \$10,000 threshold, as was suggested in New York at one point. The Committee felt that such a threshold was too high and that there might be too few cases for a state business court if the amount in dispute had to be \$100,000 or higher. Moreover, setting a threshold at this level could substantiate the "elitist" criticism that has been suggested in other jurisdictions.

New York debated whether or not to have a minimum (as is set forth above in the summary of the report), but ultimately decided against any threshold. Our Committee, however, feels that a \$10,000 threshold now is appropriate. If it proves to be too low, it can be raised at a latter date. Moreover, simple book accounts below this threshold amount can be handled by the Special Civil Part in an expeditious manner.

The Committee is very sensitive to the traditional jurisdiction of the Law Division and Chancery Division, and does not believe that any business court should infringe upon those jurisdictions. Nonetheless, there are situations that warrant the assignment of a case to a business court as opposed to allowing it to take a normal course in the Law Division. For example, residential and commercial foreclosures have been handled by the courts in a traditional way for many years, but recent developments in the law, including expansion of lender liability counterclaims, fraud in the inducement counterclaims and other defenses have slowed down the foreclosure process. Juries have been demanded where none would normally be convened. The determination of where a case will go will have to be a decision that is carefully evaluated not only by counsel, but also by judicial oversight. This is discussed in greater detail in Section III, below.

Another area in which the Committee felt a business court should have jurisdiction would be in class actions (other than tort cases).

As a result of the foregoing, the Committee believes that the categories of cases listed by Assemblyman Russo in A-1927 (as modified by the above suggestions) is representative of the types of cases that should be handled by a business court. However, as set forth in Section III below, the ability to transfer cases and determine what is and is not cognizable by a business court should, in the last analysis, be left up to a judicial determination.

### **III. THE FORM THAT A BUSINESS COURT WOULD TAKE**

#### **A. Statutory Court**

The Russo bill (A-1927) has suggested that a business court be created as a separate statutory court. However, because of the funding and administrative concerns and because adoption of our recommendations will achieve the same result, the Committee recommends a separate part within the Superior Court, Law Division, as opposed to a separate statutory court. If this recommendation, when implemented, fails to achieve the goals envisioned, then the Committee would recommend revisiting the statutory court concept.

Nonetheless, the Committee has certain concerns if the business court is set up within the Superior Court. One of these concerns is a continuing problem that plagues the entire judicial system: an insufficient number of judges. If certain

judges are assigned to business cases, this may have an impact upon the ability of the remaining judges to handle current case loads. The Committee believes this can be done, as described below, but felt it was important to reiterate the continuing need for the appointment of a sufficient number of judges to handle the litigation load facing our judiciary.

The second concern of the Committee is the rotation issue. Because the Committee believes that any judge assigned to the business court should have experience and expertise in the areas of its jurisdiction, the Committee would hope that the assignment of judges to handle business cases would not fall prey to the rotation system presently in effect any more than is necessary. A high degree of permanent assignment to the forum responsible for handling business cases is deemed to be absolutely critical. Only in that way can the positive objects of continuity, valuable precedent, expertise and respect be achieved.

Funding of our court system remains a problem from year to year. Each year the legislature agonizes over the funding requirements for the judiciary. While the Committee recommends a separate part within the Superior Court, it does not negate the possibility of advocating for a separate statutory court if it is unsuccessful at securing a Business Part within the Superior Court, Law Division. The Committee, however, believes it is being realistic in its recommendation and that the concept of a business court is too important to shelve because of funding issues.

**B. Separate Division Within the Superior Court**

The Committee considered whether or not it should recommend that the business court be a separate division within the Superior Court, such as the Law Division or Chancery Division. While this is a feasible recommendation, the Committee felt that it was not necessary to take this step, particularly in light of jury issues and other matters discussed elsewhere in this report. Accordingly, the Committee did not recommend the creation of a separate division within the Superior Court at this time.

**C. Business Part Within the Superior Court, Law Division**

The Committee recommends the creation of a separate part within the Law Division to be known as the Superior Court, Law Division, Business Part. This concept parallels the Family Part within the Chancery Division, as well as the Special Civil Part within the Law Division. Judicial expertise and system flexibility are the keys to this program's success.

1     Funding

This recommendation should not create any immediate funding problems since there will not be the need to create a new statutory court, nor will any other steps have to be taken requiring commitment of funds. Rather, the Committee recommends that there be a reallocation of cases to the Business Part as well as a reassignment of judges to handle those cases. The Committee recommends that judges be assigned to the Business Part on a vicinage basis and that the number of judges assigned correlate to the types of cases that are filed currently that would come within the jurisdiction of the Business Part. These statistics are generally available from the Administrative Office of the Courts. In most vicinages, one judge, at present, should be sufficient to be the Business Part Judge. Of course, use of a judge on even a part-time assignment to the Business Part might be appropriate. Flexibility should be the watchword.

2.     Accessing the Business Part

Based upon a study of methods in use in other jurisdictions, it is the Committee's view that the most appropriate means for the assignment of a case to the Business Part would be for attorneys filing cases to designate the Business Part in the caption of their pleading and on the Case Information Statement. Of course, the judge handling the matter would have the authority and discretion to screen this designation and reassign as appropriate. The Subtrack Committee Report suggests early intervention by the court in any case initially filed within the jurisdiction of the court (the Business Part, for our purposes). That Committee recommended an initial scheduling conference approximately thirty days after issue had been joined and set forth a detailed description of a proposed memorandum so that the court could obtain guidance from counsel and proceed to manage the case appropriately, or transfer it if it was not appropriate for the jurisdiction of the Business Part. The Committee endorses the application of this recommendation within the proposed Business Part.

3.     Assignment

It is hoped that the judges with the most experience in corporate, commercial and business disputes would be assigned to sit in the Business Part. This is true in all of the vicinages even if one judge covers more than one county. Further, the Committee believes that

there should be a limited rotation of judges assigned to the Business Part for the reasons outlined above. Additionally, the Committee hopes that the Governor gives consideration, in making appointments to the bench, to seeking and selecting individuals with experience and expertise in the Business Part's jurisdiction. The Committee also believes that annual training should be considered at existing judicial training facilities (such as the New Jersey Judicial College) in order to enhance and supplement the skills of judges assigned to the Business Part. The Committee believes that, through the cooperation of the Bench and the Bar, this could be an effective tool in enhancing the operation of the Business Part. However, the Supreme Court of New Jersey should evaluate whether additional training and education in facilities outside New Jersey is appropriate and worthwhile, as well. As the Subtrack Committee Report stated, "the most important determinant of the success of this project, by far, will be the specific judges who are selected to run it." The Committee agrees that this is a critical factor to the success of a Business Part.

4. Case Management

As stated, there should be no question that cases can be transferred from Division to Division and Part to Part. Such transfers should be available on application by any party, or by the court sua sponte. Additionally, the Business Part judges should have individual calendar control of their cases. This has been a successful technique in the Federal Court, in certain special assignments within the Superior Court and in other situations. Because of the complexity of many of the cases that will be within the jurisdiction of the Business Part, hands-on case management should be the norm. In this way, settlements will be facilitated and prompt disposition of cases that need to be tried can occur.

5. Creation Of Supreme Court Committee On The Business Part

The Supreme Court should establish a practice committee for the Business Part. This Committee should include as members all judges assigned to the Business Part in New Jersey, court staff, and attorneys with commercial litigation experience. The NJSBA would appreciate membership on such committee, as well.

#### IV. USE OF THE BUSINESS PART

- A. By Litigants - The Committee believes that the expertise that will develop within a Business Part will encourage its use by businesses and individuals who have commercial disputes. If cases are handled effectively and expeditiously, the nature of the litigant, whether a corporation or an individual, should not have any impact upon the dispensation of justice. A body of qualified judges should be able to make the financial resources of a litigant less of a factor in determining the prompt and effective disposition and outcome of litigation. Moreover, the development of a strong body of commercial law, particularly in areas where there is a paucity of precedent at present in New Jersey, should afford guidance to litigants in the conduct of their disputes.
- B. Value to New Jersey Business - A Business Part should be viewed as “good for business”. It should encourage businesses to remain in New Jersey on the basis that they will obtain fair expedient treatment in the courts when actionable disputes arise. Moreover, it may encourage businesses to incorporate in New Jersey (as opposed to Delaware) if there is assurance that such businesses will receive the benefit of dispute resolution in a court system designed to handle business disputes.
- C. ADR and CDR in the Business Part - In recent years, a significant number of business litigants have concluded that the state courts in New Jersey and elsewhere, and even the federal courts, have become increasingly less hospitable to business disputes. Many businesses routinely take their disputes to alternative forums. While Alternative Disputes Resolution (ADR) has a long history and is an accepted tool in a number of industries for resolution of particular types of disputes, there has been a virtual explosion in recent years in the popularity and utilization of a variety of ADR techniques.

States that have established specialized business courts have cited this phenomenon and have acted to reverse the trend. They not only have developed business courts to improve access and services to business, but have also embraced ADR in their business court operations in recognition of the significant contribution that ADR can make to the resolution of business disputes.

The New Jersey Court system, through its Complementary Dispute Resolution (CDR) programs, provides a variety of options to litigants to resolve their disputes without trial. Many of the CDR programs in New Jersey have gained national recognition for innovation and success. These programs have much to offer to the business litigant.

While ADR and CDR are excellent means of dealing with commercial disputes, it is not the purpose of this Committee to make detailed recommendations as to the specific mechanism by which the Business Part and litigants avail themselves of

ADR and CDR opportunities. The Committee does believe that it is vitally important, for the success of the Business Part and for the satisfaction of litigants with the services it provides, for judges to be thoroughly familiar with ADR and CDR, and to provide opportunities for parties to utilize ADR and CDR techniques that may be appropriate for a particular dispute.

Of all of the available ADR and CDR techniques, mediation has gained widespread prominence and acceptance for use in business disputes. The New Jersey Court Rules, R.1:40-1 et seq. govern CDR. R.1:40-4 governs referral to mediation, and R.1:40-9 deals with referral of parties to private ADR providers. The Committee is confident that these rules can be applied effectively in the Business Part.

The Civil Mediation Program, recently made permanent by the Supreme Court, is an excellent resource for mediation services for parties. The Roster of Mediators in the Civil Mediation Program is generally available to the bench and counsel. The Roster contains information on a mediator's substantive and geographical areas of practice. It is this Committee's recommendation that the Supreme Court [CDR] Complementary Dispute Resolution Committee consider, upon implementation of the Business Part, the development of effective dispute resolution mechanisms designating mediators with substantial commercial and business experience for assignment to cases in the Business Part. Finally, any and all alternative dispute resolution efforts should be perfected in consultation with the Business Part's judges and court staff.

With respect to the management of cases, it is important for the court and the parties to address, as early as practicable, the appropriate role for CDR and ADR. The Business Part should provide opportunities, throughout the life of a case, for utilizing CDR and ADR to help the parties focus on expeditious management of the progress of a case and on opportunities for settlement.

Sophisticated business clients, and their counsel, may have substantial experience with mediation and other forms of ADR/CDR. The Committee recommends that the judges assigned to the Business Part be provided with the opportunity to become fully familiar with the state court CDR programs, private ADR services and innovative ADR techniques including summary jury trials and mini-trials. In this way, parties will have the benefit of an informed bench and informed counsel so that matters will be guided appropriately to meaningful ADR and CDR events.

## **V FUNDING**

The Committee does not recommend any immediate need for additional funding to establish the Business Part. Rather, the Committee recommends a reallocation of cases and reassignment of members of the Judiciary together with staff and related resources to handle those cases in the Business Part. The Committee notes again that there is a crying

need for more judges to handle the caseloads throughout the State and, while we recommend reallocation, this in no way should undercut the importance of appointing a sufficient complement of judicial officers to handle existing disputes.

The Committee has not studied sufficient empirical data to determine whether or not the creation of a Business Part will have any significant costs attendant to it. The Committee believes that the creation of a statutory court might increase expenses and that is one reason why the Committee recommends the Business Part within the Law Division of the Superior Court as opposed to a separate statutory court. However, a number of suggestions do appear in the materials studied by the Committee as to alternative means of providing for funding of a separate statutory court. One of the suggestions was that a special filing fee be required for access to a business court. The Committee does not believe that such a procedure is practical at this time; the Committee does not believe that an additional "entrance fee" should be required of litigants to gain access for a commercial dispute that otherwise would be handled on a regular basis within the court system.

Other suggestions were an additional tax on businesses, through the corporation business tax, incorporation fees, license fees, UCC and other filing fees or other business charges, which would be dedicated to defray the cost of a business forum. The Committee does not recommend that such a tax or financial contribution by corporations is appropriate at this time since the Business Part should be open to all litigants, including individuals, proprietorships, partnerships and corporations, and the burden of maintaining a business court should not fall on only one constituent. The Committee does not, however, rule out any appropriate funding source that would enable implementation of either the letter or spirit of its recommendations.

Even if the Committee's recommendation that a Business Part be created within the Law Division is approved, rather than a statutory court, there may, at some future date, be a need for defraying expenses peculiar to the Business Part. Alternate funding suggestions could be considered at that time. However, in the interim, the Committee believes that the costs of a Business Part will be minimal. Perhaps some administrative costs will attend its creation, but it should otherwise function normally within the existing Superior Court system.

## CONCLUSION

The Committee applauds Assemblyman David Russo for his efforts to initiate a constructive debate on this issue. For the foregoing reasons, the Committee recommends the creation of a Business Part within the Law Division of the Superior Court to handle the types of cases outlined above.

Respectfully submitted,

AD HOC COMMITTEE ON BUSINESS COURT

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The NJSBA Ad Hoc Committee on Business Courts surveyed the following materials in developing and making the preceding report and recommendations:

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