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From the April 29, 2002 Massachusetts Lawyers Weekly.

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Feature Story

Are Massachusetts Courts 'Business - Friendly'?

Despite The New Business Session, A Nationwide Study Places The State Near The Bottom

By Amy Johnson Conner

A recent survey that ranked the Massachusetts civil liability system 36th among the 50 states in its friendliness toward business matters has raised questions about how businesses perceive the courts here.

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The survey of corporate and in-house counsel, sponsored by the U.S. Chamber of Commerce, showed the Massachusetts system is perceived as fairer than just 14 states and ranks just steps above tort reform targets like Alabama, Mississippi and Louisiana.

Some lawyers say this perception is the reality in some courts where they find it difficult to get timely decisions

and speedy trials from Superior Court judges who have few resources to help them manage the hundreds of cases assigned to their courts.

"We don't support our judiciary the way that we need to," says Boston's Mitchel S. Ross, who handles both plaintiffs' and defense cases. "The overall single biggest cause of the dismay corporate clients have in getting a business dispute resolved is you can't get a decision. The level of sophistication is always a concern, but second is the [ability to get] a carefully reasoned decision, even if it's a decision from a judge that doesn't have a great depth of experience in the area."

Other lawyers point out that the survey does not take into account the strides made to improve this situation through the Suffolk Superior Court business litigation session. That session, although not open to the entire state, has helped solve many of the problems businesses experienced prior to its opening in October 2000.

That's the whole point of the survey, says Michael Schick, director of communications at the U.S. Chamber Institute for Legal Reform.

"There's a disconnect between reality and perception, and it's really up to the state to get their message out and let corporations know," he says.

One thing all could agree on is that the low scores for judges' impartiality and competence were way off base. Even outside Suffolk's business session, judges treat lawyers with the utmost

fairness, whether they are representing a plaintiff or a defendant, lawyers say.

"I'd like to know who did this survey," says Worcester plaintiffs' attorney James D. O'Brien Jr. "I have a very high regard for the Massachusetts judiciary. When I have tried business cases of some complexity, I have never felt that the judge was anti-business. I thought, if anything, the judges were fairly even-handed."

The Pre-BusinessSession Perception

The U.S. Chamber of Commerce sponsored the survey to "explore how reasonable and fair the tort liability system is perceived to be by corporate America."

The survey was conducted in November 2001 — about a year after the business session was established — and was based on the comments of 824 corporate counsel and insurance company attorneys in companies with at least \$100 million in annual revenues.

Respondents were asked to evaluate only states with which they were very or somewhat familiar in the areas of overall treatment of tort and contract litigation; treatment of class actions; timeliness of summary judgment and dismissals; discovery; scientific and technical evidence; judges' impartiality and competence; and juries' predictability and fairness.

Nationwide, the survey says 57 percent of respondents gave an overall ranking of fair or poor to the state court liability system. Some 78 percent said the litigation environment in a state could impact important business decisions, such as where to locate or do business.

The top five states were Delaware, Virginia, Washington, Kansas and Iowa; at the bottom were Mississippi, West Virginia, Alabama, Louisiana and Texas. Massachusetts ranked well below the halfway point.

Lawyers' poor perception of Massachusetts courts likely originated in their inefficient administration and unpredictability prior to the launch of the business session a year-and-a-half ago, lawyers say.

Before the session opened, there was a widely held feeling among businesses that the courts were not servicing them adequately, according to Boston attorney J. Owen Todd, a former Superior Court judge.

"They couldn't get a certain date for trials, a speedy trial or consistent decisions, and they felt that it was not a good business climate in Massachusetts," he says.

Time is an issue of particular importance in business disputes and one [that] courts are often unable to accommodate.

"It's difficult for businessmen to understand why they can't get a more speedy resolution to a problem," says Springfield attorney John J. Egan, who has handled major tort and real-estate cases in Superior Court and is member of a committee in the process of evaluating the business session. "The system isn't really made for quick results; it's made for just results."

Corporations may also be frustrated with judges riding circuit, which makes chances small the same judge will hear a case from start to finish, adds Martin W. Healy, general counsel for the Massachusetts Bar Association.

"If you're talking from a pure court administration [point-of-view], in general, the Massachusetts court system hasn't been viewed as the most efficient," Healy says.

Lawyers' poor perceptions may also be based on their unfair dislike of a court because they lost a case there, or they heard about an aberrational decision coming from a particular court, says Steven P. Reynolds, president of the northeast chapter of the American Corporate Counsel Association and general counsel at Texas Instruments in Massachusetts.

Inaccurate Perception

It was in response to the business community's experiences in court that Superior Court Chief Justice Suzanne V. DeVecchio set up the business session.

Now that it's operating, some of those concerns have abated, lawyers say. But based on the results of the survey, the perception of the courts hasn't changed very quickly.

"I would love to know if any of those people have tried cases in Massachusetts," she says of those who responded to the survey. "I really find it hard to believe that [the survey is] accurate, frankly."

DeVecchio does not accept the assertion by some observers that there is a gap between the perception and reality when it comes to the way businesses are treated in Massachusetts courts

Based on his experiences on the bench in the business session and also as a practicing corporate attorney for 35 years, Superior Court Judge Allan van Gestel does not think the courts are hostile to business.

"From my vantage point — not just as the presiding judge in this session, but I spent 35 years trying business cases at Goodwin, Procter & Hoar before I came on the bench — there is nothing that I can see that the Superior Court is antagonistic toward business, [or] unfair toward business," he says.

Lawyers who regularly appear in court on behalf of businesses also say the survey results about judges and juries don't paint an accurate picture of how matters are handled.

"I don't have any idea why corporate lawyers might feel [that judges are unfair or incompetent]," says O'Brien, another member of the committee evaluating the business session's performance. "I have no sense of that being the case. I certainly haven't felt that way in dealing with judges and juries."

Specifically, the survey ranks the state low in several areas:

* judges' impartiality: 30th

* judges' competence: 29th

* juries' fairness: 34th

* juries' predictability: 44th

"I would have thought that as to impartiality and competence we would rank higher than average, not lower," Ross says. "My experience has been that the great majority of judges bring enough life experience and enough hard work and reasonable good judgment to bear on their cases without any prejudice or incompetence that I've discerned."

Todd agrees.

"I'd say our judges under the system — who are appointed — puts them at a more impartial footing than judges in states where they're elected," he says.

"My experience has been whether I'm representing a corporation or a plaintiff that at least out here, I'm unable to discern any bias on the part of jurors or the judges," Egan adds.

Kudos For The Business Session

According to statistics van Gestel compiles himself, since the business session opened in October 2000, 420 cases have been brought, each of which is complex by definition. Already 207 of those cases have been resolved through trial or settlement. "I think those are marvelous statistics," van Gestel says.

The session is open only in Suffolk County, but it is available to businesses with complex litigation that, either by geography or statute, can claim venue there. The number of businesses that could be served by the court is impossible to calculate, van Gestel says.

"It seems to me," he remarks, "whoever is making those statements [in the survey] has no concept whatsoever of what we're doing in this particular session."

The session has been so successful, in fact, many talk about expanding it into other jurisdictions. Chances are, though, that won't happen anytime soon.

"We are in such a state of crisis with funding in the courts, we're just keeping our heads down and hoping we can keep the doors open," van Gestel says. "I'm not sure I can see much [hope] for expansion, as much as it would be a very good idea."

Ross praises the "orderly" way in which cases he's been involved with have been handled in the business session.

"It's very difficult to do that in the Superior Court. The combination of not enough time for judges to deal with it, judges riding the circuit, not having the research assistance, clerical assistance, makes it very difficult for a hard-working judge to analyze a complex business dispute that might take two to three weeks of trial and have hundreds of pages of documents," he says.

Thanks to the business session, Todd says, "all of the complaints of consistency and ... the value of a decision have been met and bettered. I believe that a survey today would disclose a favorable feeling among businesses and corporate counsel on the way the court system works."

Problems With Survey

Lawyers note that some aspects of the survey's execution might have contributed to the state's poor rating.

Harris Interactive, which conducted the survey, interviewed 824 corporate counsel and insurance company lawyers nationwide. Massachusetts' ranking was based on responses from 66 of those attorneys who reported being "very" or "somewhat" knowledgeable about the state's court system. They did not necessarily practice law in or work in the state.

In-house counsel, many point out, do not have the most contact with the courts, and perhaps are not the best gauge for how well they work.

"With all due respect to corporate and in-house counsel, you might as well be talking to some general who sits at the Pentagon as compared to a troop that's on the ground doing the actual fighting," O'Brien says.

Andrew Grainger, president of the New England Legal Foundation, points out that the court had been in existence only a year before the survey was conducted.

"We don't know how many respondents have had cases in the special session, but the average ranking which Massachusetts achieved in every category suggests that no more than half the respondents, and possibly many fewer, have experienced the new system," he says.

On that point, though, Reynolds says there are corporate counsel whose sole responsibility is to oversee litigation. While he himself does not have enough personal experience with the courts to comment on why his in-house colleagues may view the state's court system so poorly, Reynolds says there are corporate counsel who do, and perhaps they were interviewed for the survey.

It's also important to keep in mind the message the U.S. Chamber of Commerce is trying to convey, van Gestel notes.

"The Chamber of Commerce is so intent on tort reform. They're not dealing with what goes on in Massachusetts. They are focusing on the states that have punitive damages and come out with that they think are inappropriately large verdicts," he says.

Healy noted there have been efforts in the past led by the local Chamber of Commerce and sponsored by the national chamber to institute tort reform in Massachusetts.

"That effort failed. They couldn't show any evidence that tort cases were decided in favor of plaintiffs. We were able to quickly debunk those earlier tort reform balloons," he says.

In its own defense, the survey warns that "caution should be used in drawing any conclusion from results based on these small samples."

But Schick, of the national chamber, says the numbers speak for themselves.

"The sampling is indicative of a prevailing attitude in terms of perceptions," he says. "That's really what you have to look at. It's a sample of the entire country and what they think or perceive about the various states.

"What we want to see happen is the gap between perception and reality close so everyone's on the same page, so what individual states believe to be true is what the companies also agree" is true, Schick says.

The chamber wants companies to know "you can go to courts that dispense justice fairly, reasonably quickly, predictable, so that the companies can go into a state and whatever the outcome, know they got a fair day in court," he says.

Schick also says he believes there is a lag time between when perception catches up with reality, but adds that states should take action to shorten that lag time and use the results as motivation to "do whatever necessary to make the real changes so the corporate attorneys see that and appreciate that and respond appropriately."

Amy Johnson Conner is a freelance writer. The complete Chamber of Commerce report is available at www.litigationfairness.org.

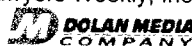
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