

**Comments of the Boston Bar Association's Business and Commercial Litigation and
Insurance and Tort Litigation Sections on Proposed Superior Court Initiatives
(3/16/2016)**

In response to an invitation for comments from the Superior Court, the Boston Bar Association's Business and Commercial Litigation and Insurance and Tort Litigation Sections reviewed the proposed Superior Court Initiatives and discussed them at their steering committee meetings.

Members of both Sections were generally supportive of these proposals, at least in the sense that the court is making a commitment to increase judicial oversight of cases and improve efficiency. Members generally agreed that increasing the ability of judges to address isolated legal issues and make preliminary issue decisions could be helpful for litigants and may have the intended effect of speeding up litigation. However, some members pointed out that many of the practices summarized in the proposed rule changes are already being done, at least on an ad hoc basis, or otherwise would appear to currently be within the discretion of a Superior Court judge. Thus some members questioned whether these proposed changes needed to be codified to have effect.

Members of both Sections also had a number of concerns about the various proposals. The concerns about Proposal #1 include:

- There is no discussion of how the Superior Court circuit system would work with these rules. Members of both Sections agreed that given the amount of judicial involvement contemplated in this proposal, especially at early stages of litigation, many parties would likely want to keep the same judge throughout the litigation regardless of the timeline of the case. Alternatively, if things are not going one-party's way, they may try to stall to take advantage of the planned rotation. Both Section's members hoped the Court would clarify how rotations would work with this proposal and with the ability to seek and secure special assignment of a judge to a matter. Some members also noted that in some parts of the proposed rules it was unclear whether the proposed procedures could be implemented only by agreement of all parties or could be mandated by the Court in the event the parties do not reach agreement.
- Members of both Sections were concerned that the options in paragraph two of the Proposed New Superior Court Rule may lead to more disputes and actually slow cases. Some members suggesting subdividing paragraph 2 to make clear that, while some of the options could be ordered by a judge over a dissent, others could only be accomplished with agreement of the parties. The committee was concerned that the Rule not be read to broaden the Superior Court's discretion.
- Members of the Business and Commercial Litigation Section had concerns about the use of early non-binding judicial case assessments to the extent those assessments were performed by a judge that could be the trial judge. Some of the issues include: a concern that the judge could wed him or herself to a position early in a case before discovery without the ability to re-educate the judge and a concern about asking a judge to recuse him or herself from the trial of the matter and the lack of standards. From the proposal, it is hard to tell whether the judge would just be giving their "off-the-cuff" thoughts about the case, whether there would be any uniform formal process, or whether procedural decisions would all be in the hands of the individual judge and attorneys.

- Some members of the Business and Commercial Litigation Section noted that they would have preferred instituting policies that mirrored the Business Litigation Session methods, which are much narrower, but have proven effective. These include an initial Rule 16 case management conference and a firm trial date.

Both Sections were supportive of proposal #2. Members of the Business and Commercial Litigation Section voiced general consent that it was the best option of the three. Members of both Sections thought that the pilot program had potential to improve Superior Court practice, however, they wondered why the program would be limited to real estate, construction, products liability, and employment discrimination, and hoped that list would be expanded to any case upon request of the parties and without the need for the assent of all parties.

Members of both Sections also voiced concerns about the proposed amendment to Rule 4(j) of the Rules of Civil Procedure, reducing the time to effect service of process from 90 days to 30 days. Members felt that this change was drastic and could have a major and potentially negative impact on practice, where complaints are often filed, but not served for an extended period of time which permits the parties to engage in pre-service settlement discussions. Some members felt that reducing this time period may cut down on case resolutions that occur after filing but before service and others noted that leaving this rule in place would likely not have a significant impact on the efficient disposition of cases.

Members of both Sections felt that proposal #3 would not make significant changes in practice. Members of the Insurance and Tort Litigation Section noted that expert testimony often plays a large role in their practice, and thus, requiring the timely and complete disclosure of proposed expert testimony should be a high priority, not only for the purpose of general trial planning but also to permit timely challenges to the substance of any proposed expert's testimony to be presented to the Court.

Members of the Business and Commercial Litigation Section were concerned about the last two sentences which they felt could encourage parties to not answer interrogatories and or to delay securing experts until the last minute. Members of this Section were also concerned that the language prohibiting any subsequent expert disclosure was punitive and would lead to motion practice to permit additional disclosures when additional facts warranted or to re-open discovery to permit additional expert disclosures. One possible solution for these concerns would be for the court to provide clear deadlines for the disclosure of experts separate from the close of fact discovery or the filing of a pre-trial memorandum.