

**REPORT TO THE 71ST SESSION OF THE NEVADA LEGISLATURE
BY THE LEGISLATIVE COMMISSION'S SUBCOMMITTEE TO
ENCOURAGE CORPORATIONS AND OTHER BUSINESS ENTITIES
TO ORGANIZE AND CONDUCT BUSINESS IN THIS STATE**

I. INTRODUCTION

Nevada is nationally recognized for establishing and cultivating an attractive climate for corporations and other business entities to organize and operate within its borders. Companies and their employees thrive under the State's minimal tax structure. With some of the least burdensome taxes in the nation and progressive incorporation laws, Nevada is often referred to as the "Delaware of the West."

A. CREATION OF AN INTERIM STUDY

The 1999 Nevada Legislature adopted Senate Concurrent Resolution No. 19 (File No. 144, *Statutes of Nevada 1999*, page 4057), which directs the Legislative Commission to conduct an interim study of methods to encourage business entities to organize and conduct business in Nevada (Appendix A contains Senate Concurrent Resolution No. 19). The resolution requires the Subcommittee to perform a comprehensive assessment of the need for changes in Nevada's business laws, the advisability of creating a court of limited jurisdiction to resolve business and corporate issues, and the accessibility of the Office of the Secretary of State.

In August 1999, the Legislative Commission appointed a subcommittee consisting of the following ten legislators to conduct the study and report its findings to the 2001 Legislature:

Senator Mark A. James, Chair
Assemblyman David R. Parks, Vice Chair
Senator Ann O'Connell
Senator Dean A. Rhoads
Senator Michael (Mike) A. Schneider
Senator Dina Titus
Assemblyman Greg Brower
Assemblywoman Barbara K. Cegavske
Assemblyman Mark A. Manendo
Assemblywoman Bonnie L. Parnell

As required by S.C.R. 19, the Legislative Commission also appointed an advisory committee consisting of the following four individuals:

Mr. Scott Anderson, Deputy Secretary of State for Commercial Recordings

EXHIBIT B-CHANCERY COURTS
Meeting Date: 01-29-08
Document consists of 11 pages.
Entire Exhibit Provided.

Mr. Stephen Brock, Nevada Business Journal
Mr. John Fowler, Business Law Section, State Bar of Nevada
Mr. Bob Shriver, Executive Director, Commission on Economic Development

Legislative Counsel Bureau (LCB) staff services for the study were provided by: Allison Combs, Principal Research Analyst; Bradley A. Wilkinson, Principal Deputy Legislative Counsel; and Roxanne Duer, Senior Research Secretary.

B. OVERVIEW OF COMMITTEE PROCEEDINGS

The full subcommittee held three meetings in Las Vegas that were teleconferenced to Carson City. Additional meetings of sub-subcommittees were held at the direction of the chairman to conduct more in-depth reviews of the three major issues within the scope of the interim study: the creation of a business court, economic incentives for businesses to organize in Nevada, and the operation of the Office of the Secretary of State.

During the course of its work, the Subcommittee considered testimony from national, state, and local entities, including Justices of Nevada's Supreme Court, Lieutenant Governor Lorraine T. Hunt, Secretary of State Dean Heller, Nevada's Commission on Economic Development, representatives of the University and Community College System of Nevada, officials from rural Nevada, local attorneys who practice in the areas of business incorporation and intellectual property, and local and national business and venture capital organizations.

The Subcommittee adopted a total of 18 recommendations addressing the following issues:

- • **Business Court in Nevada** - Endorse the creation of business court procedures by court rule and amend the *Nevada Constitution* to create a business court.
- • **Nevada's Laws** - Revise Nevada's business and intellectual property laws to include changes that will encourage corporations and other business entities to organize and conduct business in this State.
- • **Economic Development and Diversification** - Strengthen the coordination of efforts to encourage economic development and diversification throughout the State, including rural Nevada.
- • **Office of the Secretary of State** - Support the efforts and goals of the Office of the Secretary of State to improve its technology and to provide state-of-the-art mechanisms for its clients to conduct their business with that

office. These efforts also include expanded office hours and other expedited services.

The information in this report is designed to provide a general overview of the complex issues and information considered by the Subcommittee in adopting each of its final recommendations. For more detailed information, please consult the minutes and exhibits from the meetings, which are available from the Legislative Counsel Bureau's Research Library. A brief summary of the primary topics discussed at each meeting follows:

- ❖ ❖ November 19, 1999 – Background in business courts, business laws, and the Secretary of State's Office;
- ❖ ❖ January 7, 2000 – Business courts, business laws, and intellectual property laws;
- ❖ ❖ January 10, 2000 – Venture capital programs, Workforce Investment Act, Nevada's Commission on Economic Development, ballot question regarding investment of state money;
- ❖ ❖ January 24, 2000 – Secretary of State's Office;
- ❖ ❖ February 3, 2000 – Entrepreneurship classes and the Ruby Gas Pipeline and Power Plant proposal, Elko, Nevada;
- ❖ ❖ February 28, 2000 – Secretary of State's Office;
- ❖ ❖ March 24, 2000 – Business court and laws, Ruby Gas Pipeline and Power Plant proposal, Georgia Research Alliance, Secretary of State's Office, and preliminary discussion of recommendations received at prior meetings;
- ❖ ❖ May 30, 2000 – Business court and laws; and
- ❖ ❖ June 30, 2000 – Business court, Uniform Electronic Transactions Act, overview of mission and goals of state agencies involved in economic development, and the work session.

General information regarding the meetings of the Subcommittee, including the minutes (without exhibits), and a copy of this report are electronically available on the Legislature's web site at www.leg.state.nv.us.

II. DISCUSSION OF ISSUES AND RECOMMENDATIONS

The Subcommittee adopted a total of 18 recommendations designed to promote business incorporation and retention and economic development and diversification in Nevada. Following is a summary of each of these recommendations with relevant background information considered by the Subcommittee.

A. CREATION OF SPECIALIZED BUSINESS PROCEDURES IN NEVADA'S COURT SYSTEM

1. Background Information

During the 1999 Legislative Session, the Secretary of State, the Executive Director of the Commission on Economic Development, and representatives of the private sector, including John H. O. LaGatta, a private citizen, testified that the creation of a specialized business court would entice companies, particularly financial institutions, to conduct business in Nevada and generate revenue for the state.

Mr. LaGatta, an early advocate of the creation of a specialized business court or procedures in Nevada, noted in his testimony before the S.C.R. 19 Subcommittee that the implications of Nevada enhancing its ability to attract businesses and becoming a "financial business center" include:

- ➤ Additional revenue generated for the state;
- ➤ More businesses that are involved in "entity creation" and finance, which are "clean" industries with the intangible benefit of a minimal impact to a state's environment, infrastructure, and social welfare;
- ➤ An increased gross state product from legal, accounting, banking, financing, trust, investment management, and administration activities; and
- ➤ A highly paid work force.

Due to its corporate and personal income taxes, Mr. La Gatta opined, Delaware cannot compete with Nevada's favorable tax structure and minimal incorporation requirements. The Secretary of State's Office and the Commission on Economic Development both have web sites listing Nevada's incentives for incorporation, which include no corporate, inheritance, gift, franchise, or personal income taxes. Nevada also offers no taxes on corporate shares, nominal annual fees, and minimal reporting and disclosure requirements. Additional state economic development incentive programs include a Sales and Use Tax Deferral Program; Sales and Use, Business, and Property Tax Abatements; Train Employees Now (TEN); and a Property Tax Abatement for Recycling/Retail Wheeling. Information prepared by

Nevada's Commission on Economic Development regarding the State's incentives and programs favorable to businesses is included in Appendix B.

One of the primary attractions for businesses incorporating in Delaware is the predictability of its legal system. The State's well-established statutory and case law has been developed by both its Legislature and its Court of Chancery, which was constitutionally created in 1792. As an equity court, the Court of Chancery has the authority to provide appropriate relief based on circumstances when no adequate remedy is available under the law. The court has jurisdiction to hear all matters relating to equity. The litigation largely deals with corporate issues, trusts, estates, other fiduciary matters, disputes involving the purchase of land, and questions of titles to real estate as well as commercial and contractual matters. With a consistent body of law, Delaware and its Court of Chancery attract corporations by providing swift and reasonably predictable civil justice.

As noted in a 1998 law review article entitled *Business Courts: Efficient Justice or Two-Tiered Elitism?*, proponents of business courts note numerous advantages to corporations and states in which such courts are established:

- ➤ Cases would be resolved more quickly in the business court. Resources would be freed up for other cases, and costs for litigants would be decreased.
- ➤ Complex cases take up a disproportionate amount of time and resources * * *.
- ➤ A specialized business court would attract top-notch judges, with expertise and sensitivity to business issues.
- ➤ Judicial expertise and specialization will lead to more predictable, consistent and prudent case results.
- ➤ Judges may be available to resolve discovery and other disputes informally, by telephone conferences rather than formal motions.
- ➤ Specialized courts promote the development of technological resources and support personnel.
- ➤ The business court will offer speedier justice to small and mid-size businesses which do not have resources to hire private judges and arbitrators. These businesses suffer most from the high costs and long delays of civil litigation.
- ➤ Better resolution of business matters is often a key factor in "business climate" discussions and in attracting and retaining businesses.

(Junge, *Business Courts: Efficient Justice or Two-Tiered Elitism?*, 24 William Mitchell Law Review, 1998)

In the past decade, other jurisdictions have created business courts or specialized litigation procedures including judicial districts in California, Illinois, Massachusetts, New York, North Carolina, Pennsylvania, Virginia, and Wisconsin. Some states, like Wisconsin and California, adopted pilot programs to streamline business litigation. In other states, like New York, a specialized business court was created by court rule.

2. Legal Considerations Regarding the Creation of a Specialized Court

The *Nevada Constitution* and *Nevada Revised Statutes* do not provide for a court that specializes in business litigation. Prior to the first meeting of the Subcommittee, Chairman James requested a legal opinion from Mr. Wilkinson, Principal Deputy Legislative Counsel, Legal Division, LCB, regarding whether the Nevada Legislature may establish a business court by statute or whether a constitutional amendment would be required. According to this opinion, such a court may be created by two mechanisms: constitutional amendment or court rule. Mr. Wilkinson's written opinion explains:

Because the Legislature is not authorized under the *Nevada Constitution* to create a separate business court and because the establishment by statute of a business court as a division of the district court would violate the separation of powers provision of the *Nevada Constitution*, it is the opinion of this office that if the Legislature wishes to establish a business court by statute, it would be necessary to amend the *Nevada Constitution*.

Our conclusion is further supported by the history concerning the establishment of the family courts in this state. When the Legislature wished to establish family courts as divisions of certain district courts, the *Nevada Constitution* was amended specifically to authorize the Legislature to enact legislation creating the family courts as divisions of the district courts. * * *

Although it is the opinion of this office that the Legislature cannot establish a business court by statute, it is also our opinion that the judicial branch could create a specialized business division of a district court through the exercise of its inherent judicial power and rulemaking authority.

3. Testimony Received by the Subcommittee

During the course of the study, many individuals testified in support of creating a business court in Nevada as a method of attracting businesses to the State, including representatives of the Office of the Secretary of State, the Commission on Economic Development, and Nevada's Supreme Court.

Scott Anderson, Deputy Secretary of State for Commercial Recordings, testified that stability and continuity in a business court system is a major business concern, and the lack of such a system is a primary reason businesses decide not to organize in Nevada. Such specialized procedures within a court applying Nevada=s business-friendly statutes would entice companies to organize in this state.

As noted by Mr. Anderson, increased incorporation in Nevada is a measurable financial benefit. In Fiscal Year (FY) 1999, the Secretary of State generated \$33.8 million in revenues, \$25.9 million of which was generated through the Commercial Recordings Division and other business related filings as compared to \$22.2 million for FY 1998. Revenues have increased 14 percent over the prior year; however, the operating budget increased only 1 percent. The Secretary of State=s Office contributes significantly to the State General Fund, and any efforts that increase filings will enhance contributions to the State.

Representing Nevada=s Commission on Economic Development, Karen Baggett, Deputy Director, noted that Nevada has in place some very significant laws that reflect the state=s business attitude: an attractive tax climate; limited-liability protection for officers and directors of Nevada corporations; reasonable fee structures for attracting incorporations; and modest, yet effective tax incentives. Nevada has been able to attract and retain major multi-national financial service companies such as Citicorp, Ford Motor Credit, First Card, and Bank of America. In addition, corporations that reflect the “new economy” such as Microsoft, Cisco Systems, and Amazon.com have made investments in this state with corporate treasuries, licensing divisions, and fulfillment centers.

To truly become the “Delaware of the West,” Ms. Baggett felt Nevada must revise existing statutes to reflect the needs of the “new economy” and to encourage more significant intangible investment in this state; modernize and equip the Secretary of State’s Office with the necessary resources to meet the new technologies competitors have in place; and develop a court structure that reflects the entire breadth of corporate, finance, contract, and business law.

4. Supreme Court Task Force

Robert E. Rose, former Chief Justice of the Nevada Supreme Court, testified in support of the creation of specialized business procedures and stated that, in his opinion, the “establishment of a business court in Nevada would ensure competent and prompt adjudication of disputes involving corporate governance, business transactions, and technical commercial issues. It would also promote a positive business climate needed to attract businesses to Nevada and to diversify our economy.”

With the support of Chairman James on behalf of the Subcommittee, Chief Justice Rose created a business court task force within the judicial branch to evaluate the appeal for such a court within the judiciary and to provide suggestions for the structure of a business court for the Subcommittee's consideration. Information from Chief Justice Rose provided during the course of the study and a copy of the correspondence from Chairman James regarding the creation of the task force is included under Appendix C.

In his testimony, Chief Justice Rose described in more detail the two methods by which a business court could be established: a constitutional amendment to create a special court (like the Family Court) and using court rules to create a specialized business court. In May, Chief Justice Rose presented an overview of the work of the Task Force and the recommendations for the jurisdiction of the business court. For example, the jurisdiction would include cases involving shareholder derivative suites, trademark laws, and corporate governance. Jurisdiction would not include personal injury and products liability cases. The business court judge would determine whether or not a case should be accepted by the business court (within certain jurisdictional parameters), and the decision of whether to accept a case would not be appealable.

The recommendations also addressed the possible operation of a business court if one were created by court rule. Chief Justice Rose noted that initially, it is anticipated that the business court may not have a full calendar, and, therefore, judges should not be precluded from hearing non-business cases if time is available to dedicate to other cases. In addition, the chief judge of the judicial district should select the business court judge. As suggested, two full-time district court judges in the Eighth Judicial District Court (Clark County) and one-full time or two part-time district court judges in the Second Judicial District Court (Washoe County) would comprise the business court. Based on an examination of business court-type filings in 1999 in Clark and Washoe Counties, it is estimated that a business court in Clark County would oversee approximately 1,000 to 2,000 cases annually, and a court in Washoe County would oversee an estimated 500 to 750 cases annually.

Testimony during the work session indicated that the creation of a specialized business court docket would not immediately generate additional state or county expenditures because the judges are handling these types of cases currently. If civil filings within the jurisdiction of the business court were to increase substantially, additional resources would be needed. Regardless of the creation of the business court, testimony indicated that the existing need for expanded court facilities and for additional judges (based upon the number of current case filings) is a concern in the Eighth Judicial District Court in Clark County. Based upon these existing needs, it is anticipated that the judicial branch will request additional judges during the 2001 Legislative Session whether or not the business court is approved.

At the time of the work session in June 2000, the Eighth and the Second Judicial Districts were in the process of submitting changes in their rules to include business court procedures. However, at that time, no final decision regarding the creation of the business court by rule had been made. Therefore, the Subcommittee adopted two recommendations: (a) Endorse the creation of business court procedures by court rule; and (b) Draft legislation to amend the *Nevada Constitution* to create a specialized court if the proposed court rules are not approved or if approved rules were not in harmony with the Subcommittee's determination regarding the appropriate jurisdiction and methods of operating a business court.

Recommendation No. 1

The details of first recommendation to create business procedures by court rule are based largely on the studied recommendations of Chief Justice Rose and the judicial task force:

Draft a resolution endorsing the creation of business court procedures by court rule in the Second and Eighth Judicial District Courts. (BDR R--253)

The Subcommittee voted to support the following concepts for the proposed business court procedures:

A. Structure of the Court

- • ***The chief judge of the judicial district shall select the business court judges.***
- • ***The business court shall consist of two full-time district court judges in the Eighth Judicial District Court (Clark County), and one full-time or two part-time district court judges in the Second Judicial District Court (Washoe County).***
- • ***The district judge serving in business court may hear and decide all other non-business cases assigned to that judge as any other general jurisdiction district court judge.***
- • ***The position of district judge shall rotate periodically as provided in the district court rules of the Second and Eighth Judicial District Court Rules.***
- • ***The business court shall decide whether a case is or is not one the business court should hear and that decision shall***

not be appealable by any appeal or reviewable upon any writ. (See proposed jurisdiction, as outlined below.)

- • *Either party in a case filed in the Second or Eighth Judicial District may request in the pleadings that a case be transferred to a business court. When such a request has been made and all the pleadings filed, the case shall be transferred to the business court and a determination made by a business court judge whether jurisdiction over the case will be assumed.*
- • *A case filed in any judicial district other than the Second and Eighth Judicial Districts may be transferred to a business court if both parties and the district judge assigned to the case consent. The business court still reserves the right to decline to accept any case believed to be a business court case.*

B. Proposed Jurisdiction of the Business Court

The following types of cases would be under the jurisdiction of the business court:

- • *Disputes concerning the validity, control, operation, or governance of entities created under Nevada Revised Statutes, Chapters 78–88, including shareholder derivative suits;*
- • *Disputes concerning trademarks asserted under Nevada law (NRS Chapter 600, generally) and causes of action asserted pursuant to the Nevada Trade Secrets Act (NRS Chapter 600A); the Nevada Securities Act, involving Investment Securities described in Article 8 of the Nevada Uniform Commercial Code (NRS Chapters 104 and 104A); or Commodities (NRS Chapter 90).*
- • *Disputes between two business entities where the business court determines that the case would benefit from enhanced case management.*

Cases Excluded from Business Court

The business court would not hear cases where the primary claim is an action:

- • *For personal injury;*

- • *Based on products liability;*
- • *Brought by a consumer against a business;*
- • *For wrongful termination of employment; and*
- • *Involving landlord-tenant disputes.*

Recommendation No. 2

In addition to endorsing the creation of specialized business procedures by court rule, draft legislation to create a business court by amending the Nevada Constitution to authorize the Legislature to provide by law for a business court as a division of a district court and prescribe the business court's jurisdiction. (BDR C--254)

5. **Adoption of Business Court Rules by the Judicial Branch Following the Final Work Session**

In October 2000, the Supreme Court approved changes in the rules of the Second and Eighth Judicial Districts allowing for special business procedures. It appears the rules are generally consistent with the recommendations of the S.C.R. 19 Subcommittee and the judicial task force. A copy of these rules, which are effective on January 1, 2001, is available under Appendix D.

