



Report of the Business Impact Committee
Meeting Minutes

Business Impact Meeting Minutes

Friday, November 13, 2009

10:00 AM Hudson Room, Michael Franck Building

Present: Co-Chairs Diane Akers and Andy Doctoroff, Chuck Barbieri, Hon. Robert Bondy, Rockwood Bullard, Mark Burzych, Lynn Chard, Ron Keefe, Hon. Dennis Kolenda, Elvin Lashbrooke, Andrew Portinga, Nick Stasevich (via conference call at 1:58 PM), Alan Valade, and Doug Van Epps

Absent: Peter Alter, Steve Baeda, Mary Elizabeth Bunn, Hon. Diane Druzinski, Kiffi Ford, Janet Kelley, Kathleen Lang, Bob LaBrant, Robert Katz, Hon. Richard Pajtas, and Carl Ver Beek

Staff Liaisons: Cliff Flood and Jim Horsch

Co-Chairs Diane Akers and Andy Doctoroff convened meeting at 10:05 AM

Overview from Diane Akers and Andy Doctoroff

Andy Doctoroff discussed the Judicial Crossroads Task Force – judicial reform needed due to budget crisis. This “Blue Ribbon” task force will be proactive and provide recommendations on Court reform. The engine of the Task Force will be the ideas from its four committees. Purpose of this Committee – focus on structure, not substantive law reform.

Diane Akers discussed the role of co-chair - “If you are not at this table then you’ll be on the menu”. Schedule - Task force report due in a year, Committee work to be completed in March. There is a huge amount of work to do on a tight schedule. Co-chairs will work with other task force committees. Survey – reviewed results.

Judge Davis, Barry Howard, Elizabeth Lyon, and Anne Vrooman addressed the Committee

Barry Howard - discussed the task force’s history and dates by which work is to be done. Primary question – what steps can be taken to make Michigan competitive?

Anne V and Elizabeth L – discussed their roles.

Alton Davis (Chair of Structural Changes Committee) – committee is comprised of 24 judges, has met three times to date, and is working from a blank slate. Reviewed notes – in the context of the court system, what would help the business community?

Final results – High quality of dispute resolutions in Michigan.

Andy Doctoroff – new report out spelling out crisis in Michigan – people will be more receptive to meaningful reform. When Elizabeth was in Seattle what states were down? Georgia (25% funding cut). Every state there is looking at reform.

Committee Meeting Schedule and Logistics

Committee meeting schedule and logistics – The Committee will meet at the State Bar building, on the 2nd Friday of each month at 10:00 AM.

State Bar Resources

Staff Liaisons - Jim and Cliff

SharePoint presentation

Brian gave an overview

Substantive considerations - Input from committee members on Michigan business impacts.

Lynn Chard – Delay in getting into court. Costs connected with delay. Lack of subject matter expertise. Having a system where there is a testing process (means of knowledge) to be met before a judge is assigned to commercial matters. Use of a “tiered system”, where preliminary matters handled by magistrates and then trial is before a seasoned judge.

Chuck Barbieri - Worry about expertise- not an even distribution of knowledge across circuit to circuit. This could be an education opportunity for judges. Pace in Court system is too slow, especially on TRO and PI matters.

Ron Keefe - Big problem in Michigan is small business. If you could spin off the large corporations and focus on small business, there would be less discrepancy and you would go through ADR for quick results. Small business can't afford to litigate. Have tracts for litigation – small businesses have a shorter discovery and quicker results and lower costs, like the Federal Court. Magistrate – limit depositions and interrogatories and use early ADR. Most judges are ex-prosecutors; lack commercial experience. A specialty business court would do nothing but business disputes.

Rockwood Bullard - State District Courts use magistrates (they do everything the judge doesn't want to do) for arraignments, first bite at small claims, etc., which frees up judge's time for trials and heavy motions. Money for judges comes from state but courts pay for magistrates Oakland County Courts use the magistrate system. Use of “Special Master” to help decide complex cases. However, problems with constituents and with Supreme Court, which views use of master as an unconstitutional delegation of authority. A Court that is dedicated to business – have judges that

understand the issues and make good decisions. Delay for small business is “tax” – “dues” to do business in Michigan.

Mark Burzych - Many Michigan businesses are regulated by State Government. Need to address how business interacts with State Government through the administrative law process. There is a hodgepodge of statutes governing review of administrative matters, depending on the enabling statute. There is no meaningful judicial review of administrative matters. States need a specialized review panel at COA for regulated businesses. Courts need to specialize in different areas, like Family Courts and Probate Court. Insurance, banking and utilities are all regulated businesses that would benefit from enhanced, expert administrative review. Suggests a specialized Committee for review in administrative matters. Would require changes to enabling statutes.

Andy Portinga - Cost of litigation (a function of the amount of discovery) is prohibitive. Could minimize through use of Rule 26 disclosures, as in federal system. Would also like to see Michigan courts adopt the federal courts’ approach to experts.

Judge Bondy - Good lawyers generally solve their cases and a good judge with knowledge in the subject matter at issue will help resolve a case. Jurisdictional limits can be increased in contractual disputes in district court. Contract cases can generally be tried in a day with limited discovery and a limited number of witnesses. Other cases, such as an auto neg. cases, are not suited for district court resolution. Relaxed standards of attorneys Reluctance for Courts in district not to combine because they will lose seats because of funding. Idea of a “green” Court – environmental law.

Alan Valade - Predictability of decision depends upon which judge you draw. Is not good for business. Need a Court that specializes in claims of businesses (like Court of Claims). Perhaps a Chief Judge could be given authority to create a special panel and assign matters to it. Need better-reasoned decisions out of the Court of Appeals. Disputes between entrepreneurial families’ concurrent in Probate and Circuit Court. Requires litigants to run between two courts, depending on the issue – is needlessly time consuming and expensive. Want fast and predictable outcomes. Need COA Judges with specialized knowledge. Get jurisdiction in front of (one) judge who can decide. “One stop shopping”. New Jersey has a tax court that is a good model for specialty court. Court of claims in Michigan is a good model for specialty Court.

Dean Lashbrooke - One of the ramifications of cost is the insurance suit. Doesn’t set too well with business. Small claims court with higher limits where businesses could get dispute resolved efficiently. Jury trials. Jury has no expertise. Do away with jury trials in complex business cases. Litigation is not the biggest issue for business. Biggest issue is Regulatory Compliance. Is not sure that changing the system of litigation in Michigan would make a big difference to

businesses looking to locate here. Biggest issues: tax structure, pro business, educated work force, business climate, etc.

Judge Kolenda - The term "courts" needs to include administrative matters although administrative determinations can be just as cumbersome as courts. Don't need a lot of Federal rules – but do need to have judges who will apply the Michigan rules already in existence. Specialized courts – don't like, however, business courts would be different. Notes that Kent County permits single judge to handle matters that involve both probate and family court. How do you deal with giving jury trials and judge assignment outside of counties with a specialized court? Create a pool of judges to be assigned to cases needing their expertise. Leary about creating too many special panels and COA. Statute on books: Retired judges can be on list of Supreme Court to be assigned to case to review for trial (both sides have to agree). The selected judge can only be paid about \$150 a day, which is a problem.

Doug Van Epps - Large Corporations do not use State Court systems; instead go to private vendors (ADR, mediators, arbitration, etc). Collaborative law – retain counsel with the notion of settling the case, not litigating. Case evaluation is not always effective because it promotes cases going too far in litigation process before being resolved – need early intervention, conferencing, settlement. One issue with specialized courts - every group wants its own specialized judges and wonders why you get one and they don't. Address legal culture – incentives are wrong for early dispute resolution for businesses – need early collaboration.

Overview of efforts in other states

Diane Akers – what other states have done to start "Business Committees" (not necessarily a separate court): 1) Delaware, 2) New York - Company's saying they are putting clause in contract to have dispute settled in New York.,)3 Georgia, and 4) North Carolina. None of the states that have done some form of business courts have not cut back. If we would like a speaker from another state we can get one. Some states include technology and some torts.

History in Michigan - Cyber court – were going to fund in 2002, Business law section – business court committee. Came up with proposals to assign cases to business committee judge (locked in Oakland) – effort failed. Cyber court funding went away. Business courts are accused of being elitist and everybody wants their own specialty court. 2006 statute was introduced in legislature to create a pilot business court. Rep Palmer never out of committee so it failed. Opposition from Judges Association: Opposition to specialization, some judges didn't like, take away interesting work, elitist.

Member comments

We should look at this in the context of a new economic environment. Discussion – judges are defensive right now. Pay has been frozen and looking to cut judgeships. Whatever comes out of

here needs to be palatable to legislators and not cost a lot of money. Judges see value in generalization, not specialization.

What would we need to do to help get this passed?

Get judges involved in the process. Need to form advocacy on. There is empirical evidence to show benefit of this system. Empirical enhanced quality of justice. Expose white paper to Judge Davis to float concept. Reframe question and advocacy. How would we operate with 20% cut in funding? Should this group include those who might be in opposition? Depends on if Supreme Court decides or legislator decides. Judge Bondy agrees and suggests using Supreme Court avenue versus the risks and uncertainties of the legislative process. Andy asked group if we should broaden group – yes with no objections. A tsunami is coming and courts will have to suffer layoffs and legislature won't have time to consider this, so stay with getting Supreme Court involved. Group feels that prescription should be those items can be administratively handled by the Supreme Court and not requested by the legislature. Follow up with plaintiffs at the State Bar (get members from Plaintiff's Bar on Committee). These are not in favor of business court because the lack of specializations serves their interest.

Next steps

- Crystallize ideas.
- Get more people on Committee (plaintiff's bar).
- Get minutes out.
- Get schedule out.
- Identify which issue can be researched.
- Reach out to general counsel across state.
- A speaker from another state.
- Committee members - contact information changes.
- Minority representatives.
- Implement SharePoint for the Committee.

The meeting was adjourned at approximately 3:00 PM.

Respectfully submitted,

James C. Horsch, Director of Finance & Administration
Staff Liaison to the Business Impact Committee

Business Impact Committee Minutes

Friday, December 11, 2009

10:00 AM

Hudson Room - Michael Franck Building

Attendance

Present: Andy Doctoroff (co-chair), Diane Akers (co-chair), Chuck Barbieri, Steve Bieda, Hon. Robert Bondy, Mark Burzych, Rockwood Bullard, Bob LaBrant, Elvin Lashbrooke, Kathleen Lang, Norm Tucker, Alan Valade, and Carl Ver Beek

Attended by conference call: Peter Alter, Lynn Chard, Robert Katz, Ron Keefe, Dennis Kolenda, Nick Stasevich, and Doug Van Epps

Staff liaisons: Cliff Flood and Jim Horsch

Guests: Alton Davis (chair – Structure and Resources Committee), Janet Welch (SBM executive director), Judge Ben Tennille (North Carolina), Cory Manning (South Carolina), and Michael Lee (liaison – Justice Initiatives Committee)

Absent: Georgi-Ann Bargamian, Kathleen Bogas, Hon. Diane Druzinski, David Graham Leitch, Hon. Richard Pajtas, and Andrew Portinga

Introductions, Purpose and Mission

Co-chair Diane Akers convened meeting at 10:06 AM. Diane welcomed the group, the members of the committee introduced themselves, and Diane discussed the purpose and mission of the committee.

Special Presentation

Judge Ben Tennille from North Carolina and Cory Manning from South Carolina made a presentation to the committee on their experience with business courts.

Judge Tennille, North Carolina

The North Carolina Business Court was started by court rule. Judge Tennille is a Superior Court Judge (specialized Judge), but does not operate a separate court. He suggested starting with a pilot project first – Ohio is doing that. North Carolina started with a very low budget. He suggests focusing on what you are trying to accomplish. Identify your goals. One objective was to improve the business environment – a business court is one (of many factors) to retain and start business. The benefits of a business court are 1) cost savings to clients, 2) expedited decisions (if it takes 2 to 3 years to get a

decision, then it doesn't help business) and 3) judges with specialized expertise leading to better decisions.

He noted that with the changing technology, litigation in technology disputes is addressed. There is also better arrangement of complex cases. If these cases are in the regular system, then it takes longer. They still have jury trials but judges are required to write opinions - creating a body of case law.

He stated that Michigan needs to meet the needs of its own system in its business court design. You need a broad participation and input of plaintiffs and defendant's lawyers, large and small firms, judges, court officials, and lay people.

Business courts provide a great way to use technology. Since 1996, e-filing has been used in North Carolina business courts. Make sure you use technology. Decide what cases you want in business court. Look at what you want to have in a business court jurisdiction. Keep the legislature away from process of business courts. In North Carolina, the legislature mandated that the business court handle appeals on tax cases and also utility cases. Also, because of economic development in North Carolina, the business court has jurisdiction over biotechnology and internet.

Cory Manning, South Carolina

Cory is a partner in a law firm in Columbia, South Carolina. He was chair of a task force on business courts in South Carolina for over a year and also has experience with the West Virginia program. He was involved in sending the study to the Chief Justice in South Carolina for approval which started the pilot program in 2007 in 3 counties. The pilot ended in 2009. The pilot was reviewed and 70% said that the business court met expectations and over half said it met client expectations.

The classic criticism of business courts is that it appears to create two classes of justice – one for business and one for everyone else. However, there is no data to support this bias. Most cases are business- to-business litigation. In South Carolina, we could not get the Chamber of Commerce involved initially, but now they are involved. Reviewed business court for two more years and in the meantime will develop rules. He noted that every state is different – one size does not fit all.

In implementing the business court in South Carolina, they did not include South Carolina assembly – the business court was created by Supreme Court administrative order. In West Virginia, the business court has support from the legislature, Governor, and Chief Justices. In South Carolina, you can move for assignment to business court

even if doesn't meet the initial criteria. In South Carolina, there is no waiver to right to a jury trial.

People didn't know much about business court – so we needed to publicize it more. Also needed to make rules clearer on how cases are assigned. The 2009 report from South Carolina was provided to Diane.

Questions of Judge Tennille and Cory Manning by the Committee

How are the business courts funded?

North Carolina has no separate budget for the business court. It is funded through the courts, and is low cost and consists primarily of rent. Two judges are assigned, and the cases are not conducted in regular court houses. Each judge has a law clerk as the judges are required to write opinions. South Carolina has no additional budget. The judges selected also have other cases on their dockets and use same facilities. All judges have law clerks, so there are no special costs. If the courts do need additional funding legislative approval is required.

How was it determined which judges are in business courts?

It is based on the judge's ability to handle complex cases. In North Carolina, the process was one of self selection – find the judges who want to do it. They have to be interested and willing. The judges are appointed by the Governor and the Chief Justice. There are 3 business court judges. The success of the business court is dependent on the selection of the judges. In South Carolina, the business court judges are elected by general assembly and Chief Justice, taking into account geography, diversity, some business expertise (not absolutely necessary), and how efficient the judges are. There are 3 judges handling business cases in South Carolina.

What caused failures in other states?

Causes for failure include: 1) not educating the bar on how it will work, 2) not communicating with the bar, 3) not having the right set of rules, 4) not having support of Chief Judge and rest of judiciary, and 5) setting the minimum dollar amount correctly to get into court - if the amount is too high, then the number of cases will be reduced.

What are the main impediments to getting a business court implemented?

In North Carolina, there was an initial objection from plaintiffs' Bar. In South Carolina, they got more favorable comments from plaintiffs' bar and they wanted it expanded. Because of limited funding, you need to find a way to do it on a shoestring.

What are the mechanics of how the cases work – from initial filing to final disposition?

Look at the North Carolina Bar court rule – 10 years of experience. A lot more case management – 60 days of filing (both lawyers and clients come to the conferences). Electronic discovery, limits on depositions, document production, and interrogation. Case management conference – can be done by video conference.

What are some other suggestions in implementing a business court?

Start with a pilot project in a major metro area. The number of judges are dependent upon the jurisdiction and types of cases. Training is important - there is a 2 day program annually with the College of Business Court Judges. Every state that has started a business court has expanded (other than in Florida due to funding). Encourage clients to get involved in taking ownership of these cases. Have technology to get into system and observe cases in progress. Choosing the jurisdiction and type of cases is very important. Implement case management.

What are the filing fees?

In North Carolina, there are no additional filing fees. However, the Legislature added \$250 to remove the case to business court. Last year the legislature increased that fee to \$1,000 to remove the case to business court. This still did not impact the case load, but Judge Tennille would not encourage a large fee. In South Carolina there is no additional fee for the business court.

How does ADR (Alternative Dispute Resolution) fit into business court?

During case management conference, the judge advises on ADR options. There are mandatory mediations in North Carolina and the case will not be tried until after mediation. In Delaware, for a fee, the Chancellor Judge will also act as arbitrator. In North Carolina, 95% of all cases settle before trial. In business cases, there are very few fact disputes – mostly law disputes. Only 46 cases were assigned to business court in 2 years in South Carolina. Two are outstanding, the rest are settled. There are very few trials in business court in North Carolina or South Carolina.

How does it help to have the case decisions written?

Everything the judges decide is posted on its web. Within the business court, the written opinions have precedent. There are no panel decisions, only individual judge decisions.

Do you have any data that shows business courts saves the parties' time, money, and improvement in reversal rates upon appeal?

In North Carolina there are no statistics on reversals from decisions made in business courts. There is a probably a greater probability of appeal due to its size of the dollar amount. In theory, you could have a higher appeal rate due to the magnitude of the dollar amount in these cases. The cases move faster in business courts. We have had a couple of consumer class actions – no employment litigation generally unless an employee left the firm and cleaned out a hard drive. Usually there are no labor employment or consumer law cases. There are a lot of “mom and pop” business break up cases (however the \$1,000 fee for may be too high).

What is the mix of large vs. small business in cases filed in business court?

In North Carolina, the mix is about 50% large and 50% small business involved in business court. In South Carolina, it is about 90% small business cases filed.

The presentation and discussion with Judge Tennille and Cory Manning ended at 11:41 AM and the Co-Chairs thanked them for their presentation and the time spent with us.

Resources

Andy touched upon some of the resources sent out in the advance material. He briefly discussed the National Chamber of Commerce study and pointed out that the perceived business environment is improved with a business court, and that Michigan is ranked 33rd in terms of “friendliness” to business. He reminded the group that our committee should not be “pro-business.”

Review of the List of Ideas Pertaining to Business Courts

Andy reviewed the list of ideas generated from last meeting and distributed in the advance material. He asked for each member to comment on this list. Each committee member who did not provide comments from the last meeting was able to provide comments:

Carl Ver Beek – A lot of the ideas for ADR have the same advantages as what the advantages of Business Court are. Is there an assumption to make changes to court rules or legislation to court rules? He is concerned if we are trying to make changes in court rules, given the nature of the current Supreme Court. It was noted that Chief Justice Kelly is a member of the Judicial Crossroads Task Force.

Bob LaBrant – When I look around the nation and if states in the South are going to Business Court as an economic development tool, then Michigan wants to be competitive also.

Janet Welch – Very excited of what can come from this committee.

Steve Bieda – Looks at a business court as an economic development tool. Last effort failed because it was too new and novel.

Michael Lee (ATJ committee liaison) - there is not a lot of overlap between the Business Impact Committee and the ATJ Committee - only on the fringes.

Judge Bondy – The advantages are predictability and economic development. How we fund our courts is an issue. When we look at how the South Carolina and North Carolina Business Courts handle funding, both courts appear to be funded by the states. This is different in Michigan where Michigan is funded by both state and local dollars. Local units may not be cooperative. Consider “pay to play” as an alternative. There is a concern with a blind draw of judges with a business court as there are a limited number of judges. You may find that after a couple of years some judges may decide one way or another. These are issue to consider.

Carl Ver Beek – Could be an issue if you take a judge’s backlog away - they could potentially lose judgeships.

Norm Tucker – Legislation does not help attract business in Michigan (the structure is not the big issue to attract and retain business). Sounds good, but as a practical matter – there are many factors in attracting and maintaining business - the business court will not do it. You have got to save time (courts and clients), save money, and render reliable opinions. I did not get that information from the judge in North Carolina. Is there an incentive to attorneys to resolve cases early (because attorneys make money by the hour)? This system would be highly dependent on the judges selected. There has to be some rational reason to do this (cost and time). Where are the statistics? Great job with what North Carolina has

done – use it as a base and tweak. Some corporations are now demanding a fixed fee (not hourly rate). It would be interesting to have a fixed fee that is charged. Court rules could require that an attorney offer options and alternatives and business court could be an option to consider for the court. The rule would have to require this. I like the aspect of the business court in North Carolina using technology to video conference or Skype. Also to get the clients involved earlier in the process, to get them educated on the risks, options, and alternatives. Then the client can make informed decisions.

Michael Lee (ATJ Committee liaison) – Agrees that getting everyone together early to cut down on time.

Kathy Lang – From a purely business perspective, I think the system is broken. Cases with no fact disputes - only legal issues - need to wait 12 months. Goal of this committee should be to resolve cases sooner. ADR is good, but be careful – if the parties are not interested in ADR, then it could fail.

Peter Alter – (He is both a defendant and plaintiff lawyer). Everyone does not have the same interests and objectives. The issue does not have uniform agreement among judges. There is an advantage of certainty and predictability - but why would that be limited to business issues and not other cases. I am concerned about having a judge to decide all business cases. High success rate for having early case intervention, but not sure business court solves that question. However, I would support it if the parties agree and they both want a business court, and then ok to have one. Issue with business court – if you are moving around cases and moving them to a business court judge and re-shuffling cases – it should be a wash – with no additional cost. What other states have tried business courts and it was rejected? I have a concern with anecdotal information rather than hard data.

Andy Doctoroff – How do you eliminate the potential for bias with one or a few judges only handling business cases?

Norm Tucker – Would the system work if both parties opt in? Yes. On the North Carolina website most cases are all business to business. Important to identify what cases are selected for this.

Andy Doctoroff – We need to decide what will be optional and what will be mandatory.

Carl Ver Beek – When should you require parties to go to arbitration?

Andy Doctoroff – Needs predictability to determine that if a certain case, then it will go a certain way.

Diane Akers – Looked at New York commercial court.

Andy Doctoroff – Venue Statutes – prevents “judge shopping”.

Alan Valade – Are there any judge panels that handle business courts? He asked what the reaction would be to have a panel of business judges. Norm indicated they are not needed.

How should we move forward?

Andy Doctoroff asked the group: What should we do going forward?

Chuck Barbieri – We should not limit ourselves to just a pilot project or business court.

Carl Ver Beek – Why not look at improving ADR? Interested in what percentage of cases are decided on without going to trial. Some use ADR because the system doesn't work. How can we make our system work better for all disputes?

Mark Burzych – In Administrative law, the rules expedite the case to be decided. The time line to respond is 5 days for discovery; we use pre-filed written direct testimony, 9 months for a decision on the case. The hearing is basically cross-examination. Could you do this in a business court? Could this be applied in general civil litigation?

Andy Doctoroff – Regarding our scope – do we want to look at business court and also other things that would look at general improvements in the courts?

Carl Ver Beek – Explore pilot program like the PSC Administrative law.

Peter Alter – There will be a finite number of things to agree on and add if a business court is part of a package of other things that will address problems.

Elvin Lashbrooke – Develop a pilot business court program that would incorporate these ideas that could also be used for general civil litigation.

Norm Tucker – Stick to the purpose of the Business Impact Committee.

Rockwood Bullard – Cover the waterfront before we come to a conclusion. All these issues impact business.

Kathy Lang – I don't think it really matters if we create a model for business and then roll it out to other civil litigation. We should focus on improving business to business disputes.

Peter Alter – Disagrees with this. Sees more everyday disputes including employee-to-employee. Thinks we should expand scope and not limit it to just business court.

Robert LaBrant – All he expected from the committee was for business-to-business improvements in the court system. He had a more narrow perspective on our mission.

Michael Lee – the ATJ Committee started with 3 overarching questions that could impact both the court system and outside its court system.

Andy Doctoroff – summarized the different points of view as a global view versus a specific view.

Rockwood Bullard – We do have a business court – it's the one we have. It's broken. We need to provide some concepts to repair it. Do we address the repairs to get to business court or do we address the business court to get to the repairs?

Carl VerBeek – We agree - we can copy what some of the other States have done in their systems.

Hon. Alton Davis – There are 581 judges in Michigan based on a 10 million population. We are looking at a downsizing of the bench. There are 270 retired judges, another 71 judges up to 209 who will be forced to retire. We will have to look at all aspects of cases – some can be done by magistrates, etc. Last time this came around, judges were not in favor of business courts because there are too many specialized courts. Judges will be more agreeable to a business court concept if business parties both agreed to go outside the court system – if both paid for a retired judge and paid for a jury, then this would be ok. The number of judges will be reduced.

Diane Akers – The problem with hiring judges for parties to settle business disputes is that “mom and pop” business would find it too expensive to hire judges.

Hon. Alton Davis – Indicated that he is interested in these ideas (like in the Administrative law) to improve the general system.

Chuck Barbieri – Concerned that the business court only will not be broad enough because environmental litigation won't be included.

Rockwood Bullard – Our mission should be broader and include fixes that need to be made to address business litigation and also to our general court system.

Next steps

Andy and Diane summarized the next steps for the committee:

- 1) Form a business court proposal subcommittee to identify and outline what a business court would look like and present a proposal back to the committee at the January meeting. The following members agreed to serve on the subcommittee: Alan Valade, Carl Ver Beek, Chuck Barbieri, Rockwood Bullard, Diane Akers, Andy Doctoroff, and Dennis Kolenda.
- 2) Diane Akers and Andy Doctoroff will discuss with the Task Force chairs, Janet Welch, and the other committee chairs to clarify how broad or narrow the scope of this committee's work should be, how the Business Impact Committee's recommendations will feed into the task force.
- 3) Survey of General Counsels. A survey will be sent to general counsels requesting input. The SBM staff will finalize an electronic survey to gather input from general counsels on the need for change to the court structure in order to make it easier to conduct business in Michigan and to attract and retain business in Michigan. We will be working on this survey for presentation at the January meeting.

There being no further business of the Committee, the meeting was adjourned.

Respectfully submitted,

James C. Horsch, Director of Finance & Administration
Staff Liaison to the Business Impact Committee 12/23/09

Business Impact Committee Minutes

Friday, January 8, 2010

10:00 AM

Hudson Room - Michael Franck Building

Attendance

Present: Andy Doctoroff (co-chair), Diane Akers (co-chair), Chuck Barbieri, Kathleen Bogas, Hon. Robert Bondy, Mark Burzych, Rockwood Bullard, Dennis Kolenda, Norm Tucker, and Doug Van Epps

Attended by conference call: Peter Alter, Steve Bieda, Georgi-Ann Bargamian, Lynn Chard, Carl VerBeek, David Graham Leitch, Ron Keefe, Kathleen Lang, Robert Katz, Nick Stasevich, and Alan Valade.

Staff liaisons: Cliff Flood and Jim Horsch

Guests: Ed Pappas (Task Force co-chair - via conference call), Janet Welch, Anne Vrooman, Hon. Cynthia Stephens (JI liaison), Hon. Alton Davis (Structure & Resources Chair), Michael Lee (JI liaison – via conference call), Mike Hodge (Task Force member), Amy McDowell (National Center for State Courts), Deborah Hensler (Stanford Law School), and Elizabeth Lyon.

Absent: Bob LaBrant, Elvin Lashbrooke, Hon. Richard Pajtas, and Andrew Portinga.

Introductions, Purpose and Mission

Co-chair Diane Akers - Convened the third meeting of the committee at 10:11 AM. Diane welcomed the group and made introductions.

Ed Pappas - Thanked the group for their work on this committee and explained the structure and purpose of the Task Force. There is urgency in this effort to provide input on the judicial budget for next year. Think outside of the box and about all things that might support the business community. Don't limit yourself. Everything is open for discussion.

Andy Doctoroff - Discussed and got Ed's input on the scope of this committee regarding a business court versus all ideas.

Minutes Approved

Diane Akers moved to approve the minutes from the December 11 meeting. Mark Burzych asked that his comments in the minutes be modified to delete "radical". The

changes will be made and the minutes reposted. The committee voted to approve the minutes with that change.

Business Court Outline Discussion Memo

Diane Akers credited Rocky Bullard with the drafting of the memo. An overview of the memo included counties to use in the pilot, evaluation period length, integrating ADR, voluntary versus mandatory assignment, identification of what cases go into the business courts, written opinions, law clerks, budget and costs, how many and who would be the judges (need criteria and caseload), how cases assigned, how administered, how operated, and how the court would be funded. The committee was invited to provide comments for input:

Andy Doctoroff - Pointed out that the proposal in Section 6 would apply equally to the general court as well as a business court.

Judge Stephens – Memo does not address the goals of the business court.

Andy Doctoroff – Responded that the goals of the business court are to increase the speed of case disposition, improve the reliability of case decisions, and reduce the cost of litigation to the litigants. These goals will be included in the memo.

Lynn Chard – Suggested the goals be stated up front. Thought the big factor in this effort was cost savings in the courts.

Ed Pappas – Responded that the economic factor is a big factor, but not the only issue in this effort.

Lynn Chard – If we have a goal to save costs within the court systems, then we should state that in our goals.

Judge Stephens – If the goal is to save costs for the courts and the litigants, then the goals should be clarified.

Janet Welch – Our goal is to make Michigan more attractive to business assuming a limited budget and fiscal constraints.

Peter Alter – It is unrealistic to believe there will not be additional costs. Need to do a cost benefit analysis. Don't think it will be good to have a goal to save money for both the court and the litigants. Could not support 1 judge in 1 county

– would not be fair to the litigants. Can only be solved in one of 2 ways: 1) opt in approach, or 2) several judges appointed to be business judges.

Dennis Kolenda – Before we begin we should have goals. Disagrees that we need to save money on the business court - the business court should meet our goals while minimizing costs.

Judge Bondy – We have a funding problem because of the court system being funded by the counties (funding units). You are going to have problems because of the funding system. Start in one of the bigger courts so you can do it within our funding unit (one county), and then evaluate.

Judge Kolenda – Keep the case within the county and the business court comes to the county. Some see this effort as a “track” only, and if that is the case, then it is such a baby step that it’s not worth doing.

Judge Bondy – Perhaps one business court in three areas of Michigan.

Judge Kolenda – There are benefits from a pilot project.

Kathy Lang – Is not clear on funding.

Dennis Kolenda and Judge Bondy – (In response to funding question): If a case is transferred from one county to another (venue change) then the funds transfer. If a case is transferred for convenience, then only the filing fee transfers. A substantial portion of the judges salaries are paid for by the state. The county pays for everything else.

ADR Presentation by Amy McDowell, National Center for State Courts

Resources are available for ADR and many other issues from the National Center for State Courts. She discussed the history and services of the NCSC. She also discussed the divisions of the NCSC and what each division does, and the resources available.

Current ADR Issues:

- Funding – ADR had been funded, but with budget cuts, ADR funding is being slashed.

- How do you certify “neutrals”? - Local versus national certification, availability of “neutrals”.
- Program evaluation – tools available to evaluate if ADR is having an effect on reducing workload. Lack of empirical evidence to determine if ADR is impacting the court caseload.
- Standardization and standards of “neutrals”
- Confidentiality.

Looked at ADR in several states – may contact states for further information used by courts.

- Binding arbitration (Arizona, Delaware, and formerly New Jersey) 3rd part mutual.
 - Issue – do parties agree to binding arbitration? Arbitration costs less.
- Mediation.
 - Used in multiple parties and mass torts
 - Non binding.
 - Resolve differences on one side of a party.
 - A mix of arbitration and mediation used.
- Nevada – Mini bench trial on a limited issue in the settlement agreement.
- Use of expert to help parties identify issue to get to a settlement.
 - Ombudsman (Ombuds Office) goes back and forth between both parties (not officially accepted as a mutually agreed rep by each party).
- Settlement conference (Oregon, Virginia).
 - Courts send out letters in complex cases to ask if parties want the settlement conference.
 - Retired judge conducts conference and helps parties find best solution on settlement.
- Summary jury trial (New York, Kansas, others).
 - Limited issues and then urging of parties to settle with the limited issue settled.

ADR – More popular at trial courts versus appellate courts. Courts are seeing diminished caseloads. Budget cuts in ADR.

Court ADR versus mandatory ADR. Court connected - required to go through a good faith effort before going to trial. Court is providing the service – not binding.

Andy Doctoroff – How could ADR be evaluated for use?

- Look in ADR data base to look at possible options and contact several states.

Business courts - database of specialty courts.

Funding mechanism for business courts – we could get that from Miss Saunders at NCSC.

Nothing in database of ADR used in a business court.

Early ADR intervention impacts?

Wish we did have data on how early ADR impacts caseload resolution quicker.

Only anecdotal information that early ADR has positive impact.

American Arbitrators Association may have data.

Are there unbiased sources of information? University research?

Doug Van Epps – Website of dispute resolution has resources on ADR.

The Chair of the ADR Section, Chuck Judson, was introduced and he offered his support to the committee

Doug Van Epps – Which is the right process and when do you do it? Oakland County – early intervention for use in commercial cases. Case evaluations. Question he has is if case evaluation is useful for business court cases. Statistics from courts. Contract cases – statistics from the largest counties.

Break for lunch – 12:30 PM

Business Court Outline Discussion Memo (Continued)

Norm Tucker – Suggested breaking up this effort into sub groups. Use North Carolina and Georgia as models. Identify what is and what is not included in the business court. Most don't like arbitration because it's three times more expensive than litigation. Feels like we are moving to specialized courts. May enhance specialization all around with the introduction of a business court.

Kathleen Bogas – Questions whether a business court will retain or attract business in Michigan. Don't believe it will have any impact. Hope that employment cases do not go to business court. Concerned more competent and intelligent judges will go into business court and will lose good judges for other cases. Need to set a jurisdictional limit on business court cases.

Diane Akers – (In response to the issue of potentially losing good judges to business court): This is an issue, but there are many factors of what the judge does to consider. She cited other states – reduced resolution time for business cases and other cases. Reported an increase in litigant satisfaction. Diane will get information from other states. Kathleen Bogas indicated she can get the plaintiffs' bar issues.

Carl Ver Beek – Take the discussion memo and use it as a discussion piece to move us along. Believes there is merit to a business court because we have been involved in activities to recruit business in Michigan – a business court will have symbolic impact. Don't see this as a way to save money. Offer a good process to business to settle their dispute.

Rocky Bullard – Not sure if the loss of good judges is real or perception with a business court. In the memo, one of the most important things is how ADR fits into the business courts.

Presentation by Deborah Hensler, Stanford University

Our objectives with business and commercial cases are very similar to the objectives in general litigation cases (expediting cases, predictability). Encourage “business solutions” rather than “legal solutions”.

Approaches – Case management and ADR and specialized judges for business cases and private alternative of ADR.

Do ADR techniques work? While there has been a fair amount of research, the empirical research doesn't give us good information. Depends on point of view of research and may be biased by the position of the researcher.

A summary of what the empirical research data does show:

1. Case Management

- a. When judges keep tight control - time to disposition decreases, but if too tight then may cost more. "Fixed fees" could shorten time to disposition.
- b. Attorney. Limit the amount of discovery (document requests, interrogations, etc) – have been unwilling to see this on all cases as they waive the rules.
- c. Caveat. Requires judges to implement the rules and takes a lot of the judges' time to ride herd over the case. So one approach to get around this is to establish panels of judges for complex cases and leave more routine cases to one judge.
- d. Politically better to talk about "complex cases" rather than just "business cases".

2. ADR techniques to assist in settling cases

a. Mediation.

- i. Most striking research shows that ADR does not reduce the number of cases going to trial. If the mediation is held too early, then it will fail.
- ii. Some private mediators have a reputation for having a high rate of settlement, but these great "super mediators" are getting clients who are already prepared to settle, so perhaps they are not that good.
- iii. Mediators who tell you how much its case is worth – why do attorneys need this?
- iv. Little evidence that mandatory mediation techniques produce better outcomes and it costs money for mediation. Since settlement would have occurred anyway, does the additional cost justify the savings in legal fees and discharge? Research shows no net costs but shows no net savings. But surveys of lawyers show that yes, there is much savings, but making the wrong conclusion because they are comparing it to cases that would have gone to trial, but it never would have gone to trial in the first place.

3. Reliability or predictability

a. Non binding but mandatory arbitration.

- i. High satisfaction rates.
- ii. Advisory adjudication process. Bottom line in saving time and money.
- iii. Private arbitration is extremely popular in some segments. Arbitrators are too willing to "split the baby". Has a pessimistic view of ADR in general. Reading of the research does not support its claim that ADR saves court time or money.

Mark Burzych – Is there any research that shows when is the best time to implement early ADR? Answer - No. Where is the right middle? Answer - No research that shows – could depend on the type of case.

Doug Van Epps – Trying to understand. Michigan adopted ABA guidelines to dispose of cases in a limited period of time, yet adjournments of cases are allowed. Rand study – lawyers and clients had more of an impact than the courts. Typical case is resolved well within the ABA guidelines. These are the cases that take the most time and money. Courts have not come up with a good process to identify these cases that will take the most time and money. None of the empirical evidence has been able to predict this.

Norm Tucker – “Fixed fees” – any research on the impact of this? Moving cases more rapidly or settling cases more rapidly? Answer: Most potential in savings of cost and time. Litigation counsel and outside counsel as they discuss cases – that is where the potential for greater savings lie. The incentives are complicated. Not everyone is interested in saving case time and expense.

Andy Doctoroff – Question on ADR. Answer – Jurisdictions that require lawyers to consider ADR and some require meetings with clients.

Professor Hensler - One problem -the new techniques implemented – short term effect – what appears to happen is that they become cookie cutters and has limited impact on cases. In Federal court the more complex cases make a difference.

Kathleen Bogas – Pam Harwood is an excellent resource in our state to talk to. Someone needs to speak with her on ADR.

Liaisons to other committees

The co-chairs indicated that we needed volunteers to serve as liaisons to the other committees. Dennis Kolenda agreed to serve as a liaison to the Structure and Resources Committee, and we are still looking for volunteers for the Access to Justice Committee and Technology Committee.

Business Court Outline Discussion Memo (Continued)

Rocky Bullard – Discussed ADR in the business court.

Andy Doctoroff – Thought that the Professor felt that a scalpel approach can work.

Doug Van Epps – Local results in Oakland County show that ADR techniques work. Depends on how it is being done.

Carl Ver Beek – Let's not be too much of a perfectionist in our approach.

Rocky Bullard – ADR and integration in business court is very important. Seems like a good idea to break up the tasks in the memo among us.

Dennis Kolenda – He initially told Ed Pappas that he was the wrong person to be on this committee because he's a skeptic of specialty courts. But a business court - that specialization is good. Family and Business courts are worth pursuing. Real value of a business court is image. Put concrete proposal to debate at each meeting. Doesn't think that creating a business court will take all the good judges. Doesn't think that a business court will have that many cases. Consider using former judges. Have competing and specific proposals to debate to get to a final proposal. Will put together a proposal on the operational aspect of how the business court would work in a centralized court. Dennis believes we should have competing proposals. Dennis discussed the pros and cons of a centralized business court in Michigan versus having a division in each county or circuit.

Diane Akers – Discussed that in the previous business court study that the judges in each county in the pilot would have enough business court cases to keep busy.

Dennis Kolenda – Does not like a limit and does like a centralized court for business. You need a court with a sign on the door.

Cliff Flood – Suggested not focusing only on a business court. Put the goals in the document. Have two or three more subcommittees. Indicate why we need changes in business court and in the general courts? What would a business court look like? Need funding detail. Identify changes that would go beyond business courts.

Janet Welch – We heard the details of a central model from North Carolina and let's look at a model for a non-centralized model.

Norm Tucker – Need to decide on division or districts; assignment – what is included and not included; case management; funding, etc.

Andy Doctoroff – In South Carolina they had a high limit.

Chuck Barbieri – volunteered to work on case management.

Andy Doctoroff – Will work “off line” to determine the sub groups and make assignments for drafting prior to the next meeting.

Diane Akers – Discussed goals of the business court - a 5th goal – can we sell it?

Survey of In-House Counsel

An update on the survey was provided by Cliff Flood and the organizations he is working with to distribute the survey. We would like to have the committee review the proposed survey and send it out in time for the results to be gathered by the February meeting. David Graham Leitch volunteered to help encourage other general counsels to respond to survey and help refine the survey.

Summary and Next Steps

The co-chairs agreed to form several subcommittees to draft specific proposals in key areas initially addressed in the Business Court memorandum. These drafts will be useful in focusing our discussion at the February meeting, assist us in finding points of agreement and disagreement, and ultimately be the basis for consensus to form a recommendation to the Task Force.

There being no further business of the Committee, the meeting was adjourned.

Respectfully submitted,

James C. Horsch, Director of Finance & Administration
Staff Liaison to the Business Impact Committee
February 10, 2010

Addendum

After the committee meeting, the co-chairs and staff liaisons identified four subcommittees to continue the effort identifying the details of a business court as follows:

Subcommittee 1) The goals and objectives of the Business Court, what problems and improvement opportunities the Business Court will address, and how it will benefit the business community. Chair - Andy Doctoroff

Subcommittee 2) What cases will be heard in the Business Court, including the threshold dollar amount (if any), and whether or not the Business Court will be voluntary or mandatory (will address questions #4 and #5 in the memo). Chair – Rocky Bullard

Subcommittee 3) The operation of the Business Court, including how many jurisdictions will be included in the pilot and where, and how the judges will be selected, and the funding of the Business Court (will address questions #1, #2, #8, #9 and #10 in the memo). Co-chairs - Diane Akers and Dennis Kolenda. They will outline competing proposals for discussion.

Subcommittee 4) Procedural mechanisms that should be used in the Business Court, including the use of ADR, expedited procedures and rules, and the use of written opinions (will address questions #3, #6, and #7 in the memo). Chair – Alan Valade

Each subcommittee will be meeting by conference call and will be preparing written proposals that will address the questions assigned. The proposals will be presented by the subcommittees at the February 12, 2010 meeting for reaction and discussion.

Business Impact Committee Minutes

Friday, February 12, 2010

10:00 AM

Hudson Room - Michael Franck Building

Attendance

Present: Andy Doctoroff (co-chair), Diane Akers (co-chair), Chuck Barbieri, Steve Bieda, Mark Burzych, Rockwood Bullard, Lynn Chard, Dennis Kolenda, Bob LaBrant, Elvin Lashbrooke, and Doug Van Epps

Attended by conference call: Peter Alter, Carl Ver Beek, David Graham Leitch, Ron Keefe, Kathleen Lang, Michael Lee, Ed Pappas, Nick Stasevich, and Alan Valade

Staff liaisons: Cliff Flood and Jim Horsch

Guests: Janet Welch (SBM executive director), Anne Vrooman (SBM Director of Research and Development), Judge Atkins (ATJ Committee)

Absent: Georgi-Ann Bargamian, Kathleen Bogas, Hon. Robert Bondy, Hon. Richard Pajtas, Andrew Portinga, Robert Katz, and Norm Tucker

Introductions, Purpose and Mission

Co-chairs Andy Doctoroff and Diane Akers convened the meeting, welcomed the group and made introductions.

January 8, 2010 Meeting Minutes Approved

The minutes from the January 8 meeting were approved by the Committee.

Discussion of the results of the in-house counsel survey – Anne Vrooman

Anne reviewed the survey results provided to the Committee in the advance materials. Over 6,000 surveys were e-mailed to in-house counsel and business lawyers, 27% were opened by the recipients, and 435 surveys were completed. Andy and Diane discussed the points that were rated most important and least important for a business court in the survey. The most significant finding or area of consensus was assigning cases involving business issues to designated judges with training and experience in business matters. The survey established broad support for many aspects of a business court.

Presentation by Robert L. Haig, Partner, Kelley Drye & Warren, LLP, New York

Mr. Haig joined the group by conference call and was introduced by Diane Akers. He shared his vast knowledge of business courts throughout the US as he has been involved

in every effort to establish a business court. He indicated that 16 states have business courts and 4 states have complex litigation courts.

He suggested the design of a business court should not be “elitist”, and not allocate more resources to the business court in a way that other cases get fewer resources. He advocated starting in a “minimalist” way – don’t need to spend additional dollars, and simply reassign existing judges the business cases to the judges who have interest in those cases. The most important factor in the success of a business court is the interest, aptitude and experience of the judges handling the business cases. In summary, to be successful: be non-elitist, start in a minimalist way, and get a judge who is interested in these cases.

The constituents who at first objected were the personal injury lawyers and the judges (because they viewed the business court as potentially elitist). In New York, after 15 years, the plaintiffs’ bar and judges are satisfied with the business court, and they see that after the more complex cases are removed from the general system, there is room for the other general cases. He also explained that the business community in New York has been very satisfied and use the court structure as a selling point when attracting new business to the state.

If you do it right, and do not damage the rest of the court system, the rest of the court system actually runs better with these business cases removed from the general civil docket. He explained that cycle time of business cases is reduced by a third, and that there is an increase in settling cases earlier.

A lot of other states have started with 1 or 2 counties, implemented the business court in a minimalist way (reduces the problems with other judges), started small (to work out the kinks), used a trial or experimental approach to getting it started, and didn’t do too much too soon.

ADR is used in conjunction with the business court but the problem is that people get bogged down, and ADR takes on a life of its own.

Mr. Haig suggested that we appear to be planning a more elaborate approach and that the problem with this approach is the more highly developed the business court is at the beginning – the more people can be opposed. We should be using a minimalist approach – just reassign business cases to judges who are interested and qualified to handle these cases, and assign the other cases to the other judges. This can be done in a way that costs nothing.

When Mr. Haig was asked if he sees a concern with having only 1 or 2 judges handling business cases (viewed as either pro-defendant or pro-plaintiff), he responded by indicating that this is solved by the types of cases in our jurisdictional model. Also, law suits brought by individuals in an employment or discrimination case should not be in a business court. If the parties are equal, then it should not be a problem.

When asked if two or more counties should be merged into one business court – or separate the business court by county – he responded by saying that travel costs would be a problem if more than one county is included in a business court. He suggested starting small and keeping the court within one county, and then over time, consider expanding. When New York began a business court, they used two counties, and all activity was within each county. So in order to keep people from getting mad and raising political issues and opposition, keep it within one county so you can more easily sell it.

When asked if he is advocating a dedicated docket like the drug cases in Detroit, Mr. Haig indicated that yes – that is 100% what he is suggesting at the onset. Many refinements can be implemented in the future, but start with a dedicated docket now. Start in a small way and then grow over time.

Diane thanked Mr. Haig for his presentation.

Discussion of the results of the in-house counsel survey (continued)

The group continued discussion on the results of the study, and Anne Vrooman and Janet Welch indicated it would not be a good idea to survey the entire bar on this matter. Anne explained this was not a scientific survey, but a good indicator of the responses.

Diane discussed the press release and policy statement of the Board of Directors and the National Association of Corporation Counsel in support of business courts. The Committee then adjourned for lunch.

Discussion of business court proposals from the 4 subcommittees

Each subcommittee discussed provisions of their proposal to the group and answered questions.

Andy discussed that the next meeting of the Task Force is March 11, and that the Governor has requested proposals from the Task Force by the end of May, so it is important to have the committee's recommendations soon to accommodate this accelerated date.

Goals Subcommittee - Andy Doctoroff discussed the goals subcommittee document, and indicated that it is important not to oversell the issue of the business impact of a business court in attracting and retaining business. He noted that a business court cannot be allowed to deprive any other class of litigants of the resources they deserve. Diane made some suggestions regarding hourly billing and “scorched earth tactics”, and comments were made by others. As a result, Andy agreed to take out # 1 and #2, and leave #3 and #4. Some other suggestions were made to the document on the word “business court” and the number of business courts. The group had no further concerns or comments.

Operations Subcommittee –Dennis Kolenda and Diane Akers both presented separate recommendations for the operation of a business court. Dennis Kolenda advocated a separate business court (a division of the circuit court) where cases from several circuits would be handled by a separate business court, and Diane advocated a model where a circuit would have its business cases assigned to a business court judge within the circuit. Each discussed the pros and cons of their proposals. Diane advocated an incremental “minimal” approach to start with and Dennis advocated a bolder approach to begin with. Issues of concern with a separate business court were primarily travel and related costs that would be required, and logistical issues in implementing the court in multiple circuits and counties. Issues of concern with a business “track” approach within a county included: it may not be a significant enough of a step, and the number of judges participating in business cases could be too limited. In summary, Diane’s approach was essentially what Bob Haig was recommending, and Dennis’ approach was a more robust design that would implement a separate court rather than a separate docket. Andy asked for the thoughts of the committee members on what they would recommend and there was support for each approach, with a slight preference toward Diane’s recommendation.

One issue that needs more analysis is to better understand the number of cases that would be eligible for a business court or business track. Janet Welch indicated that the ATJ Committee is looking at specialized courts, and that the Structure and Resources Committee is looking at the potential regionalization of courts.

Andy suggested that the opinions of each approach be reviewed and reconciled offline, and that a final proposal will be brought back to the committee at the next meeting.

Cases Eligible for a Business Court Subcommittee – Rocky Bullard discussed this subcommittee’s proposal to the group. The dollar threshold issue was discussed and some suggested it should be higher (\$50k).

Business Court Procedural Mechanism Subcommittee – Alan Valade. This proposal will be discussed at the next meeting due to the fact there was no time left for discussion.

The meeting was adjourned at 3:05 PM.

The next meeting will be held on Friday, March 12, 2010.

Respectfully submitted,

James C. Horsch, Director of Finance & Administration
Staff Liaison to the Business Impact Committee

February 28, 2010

Business Impact Committee Minutes

Friday, March 12, 2010

10:00 AM

Hudson Room - Michael Franck Building

Attendance

Present: Andy Doctoroff (co-chair), Diane Akers (co-chair), Steve Bieda, Rockwood Bullard, Mark Burzych, Dennis Kolenda, Bob LaBrant, Kathleen Lang, Elvin Lashbrooke, Andrew Portinga, Hon. Cynthia Stephens (ATJ Committee), and Doug Van Epps

Attended by conference call: Georgi-Ann Bargamian, Francine Cullari, Ron Keefe, Michael Lee (ATJ Committee), and Nick Stasevich

Committee liaisons: Jim Horsch

Task Force liaisons: Elizabeth Lyon

Absent: Peter Alter, Chuck Barbieri, Kathleen Bogas, Hon. Robert Bondy, Lynn Chard, David Graham Leitch, Hon. Richard Pajtas, Robert Katz, Norm Tucker, Alan Valade, and Carl Ver Beek

Welcome

The co-chairs convened the meeting at 10:00 AM, welcomed the group, and made introductions.

Minutes Approved

A motion was made and seconded to approve the minutes from the February 12 meeting. Motion passed.

Report from the Judicial Crossroads Task Force meeting – Andy Doctoroff and Diane Akers

Andy and Diane reviewed the discussion from the Task Force Meeting held on the previous day. The co-chairs discussed presentations from the House and Senate fiscal agencies outlining the State of Michigan's dire economic outlook, falling projected revenues, and projected budget shortfalls, which is putting pressure on the resources allocated to the Judiciary and requiring changes in how the Judiciary operates. The co-chairs also discussed the updates from each committee of the Task Force at the meeting. They noted that the Business Impact Committee update provided a good description of the business court proposed concept, and that there were no significant objections raised from the Task Force at the meeting.

Discussion of business court proposals from the 4 subcommittees

Business Court Procedural Mechanisms

Kathy Lang discussed the memo on procedural mechanisms.

The group discussed the concept of whether or not the opinion should be precedential. Neither Dennis nor Judge Stephens were in favor of trial court opinions having precedential value. Judge Stephens suggested emphasizing predictability and to have written opinions that could be available for review and use in subsequent cases, rather than saying they should be precedential. The group agreed.

A question was asked regarding the issuing of written opinions on significant issues - need language to clarify this to include summary disposition, final judgment, and other significant matters.

Dennis questioned whether written opinions are needed. He discussed the concept of issuing bench opinions and then dictating them to a written document and posting them on the web.

Dennis suggested changing #4 to say that all cases are eligible for jury trial. Strike the provision in #4.

Dennis and Diane discussed clarifying jury instructions – non standard jury instructions. Is it specific enough? Federal discovery rules? Limited discovery?

The group agreed this was not an issue.

Andy asked if the subcommittee considered Special Masters. Yes, it did, within the current court rules. Dennis noted that under the circuit court rules Special Masters are not allowed as this would constitute an unlawful delegation of judicial process.

Judge Stephens was kind enough to draft the following changes that the group agreed needed to be made to the Procedural Mechanisms memo:

Modify 11 and 12 - Given the value of predictability and efficiency, the trial judges are required to issue detailed written or oral opinions on summary dispositions, final judgments or other significant issues in the case. The oral opinions shall be transcribed immediately at court expense. These opinions are to be publicly available so that those opinions can be utilized as persuasive tools in future cases.

Add to 11 - Jury instructions may be electronically posted and made available.

Modify 9 - to allow for detailed oral or written opinions.

Re: Jury - Delete mandatory waiver.

Business Court Goals and Objectives

Andy discussed the changes in the Goals document and the change to present the Business Court as a “Specialized Business Docket”.

Operation of a Business Court

Diane explained the revised proposal and how a “specialized business docket” would work. If the initial proposal was successful after a 3 year pilot, the “specialized business docket” could be expanded to a centralized “stand alone” business court at some point in the future. Dennis explained changes to his proposal. He suggests calling it a “stand alone” court and suggests “former” judges instead of “retired” but the preference would be for “active” judges. The business court could have judges from district, probate or circuit – not just circuit. Other changes would be to permit the use of electronic appearances and video conferences. After further discussion, Andy indicated that we need to provide a recommendation to the Task Force, and we can have a minority opinion in the recommendation. After further discussion, the group was polled and four members support the “specialized business docket approach” (“minimalist approach”). One member supports sending both positions. One member supports the “specialized business docket” as the majority view and the “stand alone” approach as the minority view. After further discussion, the group was comfortable with recommending implementation of the “specialized business docket” proposal immediately and then considering the “stand alone” business court proposal sometime in the future as part of the recommendation.

Cases Eligible for a Business Court

Rocky reviewed his proposal and the committee discussed the jurisdictional amount required. A straw vote was taken and the majority of the committee was satisfied with a minimum \$25k jurisdictional amount required, with the thought that the amount can be reviewed and adjusted if needed after implementation.

During the morning session on the Procedural Mechanisms memo, Diane raised an issue concerning case eligibility definitions, including joinder of claims that needed clarification in the Cases Eligible memo. She noted the possibility of business court and non-business Court claims presented in a single pleading, and noted a similar issue with counterclaims and third party pleadings. She suggested that this be clarified in Rocky’s

memo as to which court has venue when this occurs, and where the case should be filed. Dennis suggested we consider leaving it up to the judge. In the afternoon session, there was a preference that in a pleading with several claims, if one claim is eligible for a business court then all claims will go into business court and if a question exists to a claim, the question is for the judge to decide. Diane asked Rocky to clarify all of these issues in his revised memo, and review how other states have addressed similar issues.

Rocky will adjust the Category II (white collar crime) changes to petition by either party, and will also adjust the language on shareholder derivative suits.

Estimated number of Cases Eligible for a Business Court (Wayne and Oakland Counties)

Jim Horsch discussed a rough estimate of the number of cases that could be expected under the proposal under consideration by the committee, but will have further discussions with SCAO, and the Wayne and Oakland County administrators to refine the estimates for business court activity.

International Special Certificate

The co-chairs discussed an issue from Janet Welch regarding international attorneys and the potential to consider special certificates for practice in the US with their company. Jim will discuss this issue further with Janet and bring this back to the group.

Summary and Next Steps

There was a consensus to finalize the business court proposals and incorporate them into one document, and send the proposal to the committee prior to the next meeting for review. The next committee meeting will be held on Friday, April 9, 2010.

Adjournment

There being no further business before the committee, the meeting was adjourned.

Respectfully submitted,

James C. Horsch, Director of Finance & Administration
Staff Liaison to the Business Impact Committee

Business Impact Committee Minutes

Friday, April 9, 2010

10:00 AM

Hudson Room - Michael Franck Building

Attendance

Present: Diane Akers (co-chair), Andy Doctoroff (co-chair), Chuck Barbieri, Rockwood Bullard, Lynn Chard, Dennis Kolenda, Bob LaBrant, Elvin Lashbrooke, Nick Stasevich, Norm Tucker, and Carl Ver Beek

Attended by conference call: Francine Cullari, Robert Katz, Ron Keefe, Alan Valade and Doug Van Epps

Staff liaisons: Cliff Flood and Jim Horsch

Guests: Judge Alton Davis (Structure & Resource Committee liaison), Ashish Joshi (IT Committee liaison), Frank Greco via conference call (Chair of Civil Procedures and Courts Committee), Pamela Harwood via conference call (speaker), Elizabeth Lyon (SBM Director of Governmental relations), and Anne Vrooman (SBM Director of Research and Development).

Absent: Peter Alter, Georgi-Ann Bargamian, Steve Bieda, Hon. Robert Bondy, Mark Burzych, Kathleen Lang, David Graham Leitch, Hon. Richard Pajtas, and Andrew Portinga.

Welcome

The co-chairs convened the meeting at 10:07 AM, welcomed the group and made introductions.

Minutes Approved

A motion was made and seconded to approve the minutes from the March 12 meeting. Motion passed.

Comments on the Draft Business Court Proposal

Andy Doctoroff framed the discussion about the draft proposal and wants to ensure all concerns are presented.

Andy Doctoroff discussed some themes of the committees and Task Force from Janet Welch

- Open mindedness about the need to reform court system
- Recognition of the need to change
- Lack of availability of hard data
- Concern with doing too much too soon

- Use a pilot program to begin and down the road expand

Chuck Barbieri - question on page three – business court in every circuit – needs to be clarified to say the proposal is a pilot in two or three participating circuits.

Norm Tucker – Page four – needs to have an evaluation protocol to review the pilot program and evaluate it. Have a committee of six to eight people to establish a written protocol for evaluation of its process. Evaluate the pilot every 12 months. Have the data to weigh against the goals. Establish a baseline. Track metrics and have potential targets for the metrics.

Carl Ver Beek- the Supreme Court should approve the people on this evaluation committee but the recommendation should be made by the State Bar.

Dennis Kolenda – Need Supreme Court’s approval because of numerous court rule changes. By definition a pilot project is run by the Supreme Court and SCAO would determine data to use and evaluate.

Chuck Barbieri – We need to have SCAO involved

Carl Ver Beek – State Bar of Michigan needs to be involved in nominating members of this committee

Francine Cullari – suggests a soft approach to the Supreme Court in “suggesting” the process – suggest committee only present it as a suggestion

Dennis Kolenda – agrees with having a proposal for evaluation, but leave silent who is going to do it

Norm Tucker– Suggested the following language to provide for the review process:

Project Protocol and Evaluations

A committee shall be appointed of members of the bench and bar to prepare written protocols to evaluate the success of the pilot business courts. After the project begins, every 12 months this committee shall present a written report of the pilot’s progress.

Diane Akers – Page four, section one needs to be changed to apply to a pilot, not the entire state (Diane to change)

Carl Ver Beek – Page 11 should be two – three counties to align with page four

Robert Katz – Why not have a business court that could be accessible by all the counties? Also, he thinks the \$25K is too low.

Diane Akers – To first point, we would need legislative approval to change venue

Andy Doctoroff – To second point the committee has debated this: (1) Concern with elitism, (2) there is not a connection between the dollar amount of a claim and the complexity of a matter, and (3) the amount can be re-evaluated and changed in the future

Robert Katz – Does the statute allow for a voluntary assignment from another venue?

Dennis Kolenda – No, by previous Supreme Court orders

Ashish Joshi – Why can't we have the same process or venue as in arbitration?

Dennis Kolenda – Can't use in the court system

Norm Tucker – We should try it first. See if it works, then can sell it and propose to change more rules. Keep it simple, start slowly.

Chuck Barbieri – Page four, section three, should include “Counsel” and “Judges” (Diane Akers to clarify)

Carl Ver Beek – Page three pointed out typo to “could”

Robert Katz – There are two instances of typos in the goals (Andy Doctoroff to correct). Also, the footnotes on page six (Diane Akers to correct).

Robert Katz – Regarding jury trials. Why doesn't the proposal recommend “no jury trials”?

Diane Akers – Have been advised not to eliminate jury trials as would incur too much opposition

Francine Cullari – Need to ensure that the protocol on how numbers are used in the beginning of sentences and in the document are consistent. (Francine agreed to edit the document to make the revisions).

Norm Tucker – If you are going to have some specialized judges and courts, and save money, why not collect fees to help offset the cost of educational programs for judges?

Dennis Kolenda– The court could authorize fees by court rule. The group agreed not to charge fees at this time.

After further discussion, Carl Ver Beek moved, and Bob LaBrant seconded to approve the business court proposal subject to the changes and modifications discussed. The co-chairs have the authority to modify the report as needed and the final draft will be circulated to committee. The committee voted to approve this motion unanimously.

Dennis Kolenda – Raised issue of the minority report in the proposal. The group agreed it would remain in the report.

The committee also discussed adding a cover letter and table of contents.

Concerns on the Business Court Proposal to Raise to the Task Force

Andy Doctoroff asked the group if there were any concerns to the proposal that need to be raised to the task force?

Norm Tucker – The business court will have to overcome the perception that “business runs everything” and the perception that with their own court “business many not be perceived to care about the rest of the system.

Dennis Kolenda – Issue of how the other judges would feel if not part of the specialty court

Carl Ver Beek – These concerns are inescapable. What we need to do is recognize we are on a tight rope – use a minimalist start – but try to make it important.

Elvin Lashbrook – Need to make sure it doesn’t cost more than the current process.

Rocky Bullard – Review the 10 point memo that Andy wrote in one of our first meetings.

No other concerns were discussed.

Presentation by Pamela R. Harwood (bio previously distributed)

Key Concepts

- Set up docket using principles and methods going back to the 1980's
- Case flow management guide (on SCAO's website)
- Proactive – Early and continuous judicial control on cases
 - Early case conference
 - Customize scheduling order
 - Witness list and discovery cut off
 - Necessity and timing of ADR
 - Screens cases for timely and appropriate ADR
 - Case by case basis for ADR
 - Special masters - Mitten vs New World Television - If lawyers agree to do it, can have a special master if initiated by counsel and not by judge
 - Time standards – goals (current goal or guideline is “two years”)
 - Date credibility – importance of trial dates that have meaning
 - Don't give out trial dates before settlement conferences because will have more adjournments. Need policy for scheduling trials and trial dates
- Our state has not done as much training on case flow management as it should. SCAO had a SWAT team and they would come out and make suggestions and improve operations – not sure if they are still doing that.
- Number of judges needed
 - First make sure you have an effective case flow management plan before you decide how many judges are needed
- Problems with specialty courts
 - Creates an uneven distribution of work
 - Feeds peer pressure. When you set up dockets that are apples and oranges, it's hard to compare.
 - Hostile to the blind draw system.
- Family court
 - Arbitrarily dismissing cases and causing parties to re-file. Time standards are not the problem. Problem is asking good judges to work in a bad system
 - Criminal cases – not a problem with 90 day time standard – a problem with the process. Need to change legal culture to make change. Need a VP in charge of production.

Chuck Barbieri – Did you stay within the time standard?

Judge Harwood – Yes, but complex cases that may cause it to go over the time standards.

Norm Tucker – What are changes to make in a bad system? Will specialty courts solve the problem?

Judge Harwood – Recommendation to have SCAO assist courts, but now the Supreme Court appoints the Chief Judge and they may not be able to do a good job with docket management.

- Can take off 40% of the backlog in docket with a good system - no trial date given when case filed
- Not enough focus on case flow since the 1980's

Andy Doctoroff – What are the five reforms you would suggest to improve on case flow management?

Judge Harwood – Chief Judge – educated and trained on case flow management (leadership and training). If you don't have leadership, don't do it. We are wasting millions of dollars in this state by not running effective dockets

Andy Doctoroff – What else would you have on the list for individual judges?

Judge Harwood – (1) Adjournment policy (2) Have continuous control of case and docket (3) One step process (4) take a look at docket and audit it. If you get rid of cases that are over time standards, would take care of the 40% problem. Used to have four trial dates before the real one occurred – many resources are wasted.

Carl Ver Beek – How many cases as a percentage are settled by ADR?

Judge Harwood - don't know.

Carl Ver Beek - What should be recommended in terms of ADR?

Judge Harwood - If she was business court judge, she would ask if you had arbitration or facilitation

Norm Tucker – Did you see the proposed rule for time standards - 100 % in two years and took out discretionary language, plus 75% in 12 months?

Judge Harwood – These are guidelines. It is OK to have a case over guidelines. In 2003 the courts had to report to SCAO the cases over time standards.

Andy Doctoroff – How often should judges talk to parties about ADR?

Judge Harwood – depends on the case. Don't set up a system to have the parties check in every X months.

Andy Doctoroff thanked Judge Harwood for her presentation.

Andy Doctoroff then asked the group for any comments or concerns on Judge Harwood's presentation:

- Andy Doctoroff – How does early and continuous judicial control get implemented?
- Dennis Kolenda – Thinks the judges who would serve on a business court would already do this
- Carl Ver Beek – In the letter introducing the business court proposal, suggest noting the above
- Andy Doctoroff – Is there something the Committee can do to advocate this?
- Dennis Kolenda – Need to have Supreme Court instruct their judges better

Andy Doctoroff – What do you think Judge Davis?

Judge Davis – Agree with Judge Harwood. The principles are there – we need to reemphasize them. Without the strong leadership and management of Chief Judge, we will not make progress. However, the more efficient you are, the more your budget is cut.

Carl Ver Beek – Suggest not loading up on committee recommendations over our business court proposal

Dennis Kolenda – Why not have one Chief Judge? Advocates having training for Chief Judges.

Norm Tucker – Advocates monthly meetings to discuss dockets in each circuit

Dennis Kolenda – Perhaps the SBM should do the training

Andy Doctoroff – Suggested that he write up some ideas for the group to consider at the next meeting.

Richard McLellan regarding Licensing of International Attorneys

Richard McLellan reviewed his proposal with the committee (handout provided). The committee agreed to support this concept. It was agreed that Richard McLellan, Carl Ver Beek, and Robert Katz, will work together to draft a proposal. Nick Stasevich will provide comments from the International Law Section.

The next meeting is Friday, May 14, 2010.

The meeting was adjourned at 2:25 PM

Respectfully submitted,

James C. Horsch, Director of Finance & Administration
Staff Liaison to the Business Impact Committee
April 26, 2010

Business Impact Committee Minutes

Friday, May 14, 2010

10:00 AM

Room 1 & 2 - Michael Franck Building

Attendance

Present: Diane Akers (co-chair), Andy Doctoroff (co-chair), Chuck Barbieri, Rockwood Bullard, Mark Burzych, Elvin Lashbrooke, Norm Tucker, and Carl Ver Beek

Attended by conference call: Robert Katz and Kathleen Lang

Staff liaisons: Jim Horsch

Guests: Michael Lee (Access to Justice Committee Liaison), Pamela Harwood (speaker) via conference call, Elizabeth Lyon (Director of Governmental Relations), and Janet Welch (SBM Executive Director)

Absent: Peter Alter, Georgi-Ann Bargamian, Steve Bieda, Hon. Robert Bondy, Lynn Chard, Francine Cullari, Bob LaBrant, Ron Keefe, David Graham Leitch, Hon. Richard Pajtas, Andrew Portinga, Dennis Kolenda, Nick Stasevich, Alan Valade, and Doug Van Epps

Welcome

The co-chairs convened the meeting at approximately 10:05 AM, welcomed the group and made introductions.

Minutes Approved

A motion was made and seconded to approve the minutes from the April 9, 2010 meeting. Motion passed.

Discussion of the Task Force Co-Chairs meeting on May 13

Diane reported that there were no objections to the Business Docket proposal at the Co-Chair meeting. Andy reported that there was not acceptance of the case flow management proposal at either the Structure & Resources Committee meeting or at the Task Force Co-Chair meeting. It was felt by some that their case flow management was already implemented in the courts and such a recommendation would be redundant. As a result, it was moved by Carl Ver Beek and seconded by Norm Tucker that the committee take no further action on this proposal, but to instead refer the issue to the SBM Civil Procedure and Courts Committee. Motion passed.

Discussion on the Case Flow Management recommendation

Judge Harwood discussed the case flow management issue with the committee and she believed the proposal was not redundant in her view, as someone needs to look at the systems in place to improve the system. She reported that SCAO dropped their "SWAT Team" a while ago due to budget issues, so there is an opportunity for improvement. She illustrated the need for review of the case flow management systems currently in place with a quote: "it is terrible to be a great judge in a bad system".

Diane Akers and Andy Doctoroff thanked Judge Harwood for her efforts in helping the committee identify improvement opportunities for the Task Force.

Final review of the Draft Business Docket Proposal

Diane Akers asked the committee for any additional comments on the draft. Jim Horsch suggested that we need comments in order to meet the June 10 report deadline. It was moved and seconded to authorize the Co-Chairs and Staff Liaisons to finalize the report subject to edits suggested by the committee members. Motion passed. The draft of the Business Docket Proposal will be circulated for final comment to the committee.

Janet Welch commented that this is a significant recommendation and that it is important to know there were no significant concerns from the judges. Janet thanked the group for their work on this proposal.

Discussion of the recommendations for licensing international attorneys in Michigan (Multijurisdictional Practice and GATS Compliance)

Carl Ver Beek discussed the proposal with the group. After discussion, there was consensus that a more specific, concrete and actionable proposal needs to be in the proposal, and there was concern that the GATS issue would dilute the committee's efforts.

The Committee agreed that the proposal should be refined and more focused on the in-house counsel licensing of foreign attorneys, and to refer the GATS issue to the International Law Section. It was agreed that the revised proposal will be circulated to the committee for review and comment. Carl agreed to draft another proposal and circulate it to the group.

(Note: the proposal was subsequently redrafted and transmitted to the committee via e-mail on June 3. The revised proposal passed by e-mail vote (with no objections) and will be included in the final recommendations to the Task Force).

Next Steps

The case flow management issue will be referred to the State Bar of Michigan Civil Procedure and Courts Committee.

Carl Ver Beek will draft another proposal on the multijurisdictional practice and GATS issue and circulate it to the group. The issue will also be referred to the International Law Section.

The draft of the Business Docket Proposal will be circulated for final comment to the committee.

The committee recommendations will be presented to the Judicial Crossroads Task Force on June 24 in Lansing. The presentation will be no more than 20 minutes with Q&A to follow. Committee members are welcome to attend.

Diane Akers and Andy Doctoroff thanked the group for their work on the Committee.

Adjournment

The meeting was adjourned at 2:25 PM

Respectfully submitted,

James C. Horsch, Director of Finance & Administration
Staff Liaison to the Business Impact Committee
June 14, 2010