

# Is it Time for Litigators to Reconsider the Benefits of Legal Process Improvement?

## Take a Lead from Michigan Courts

By Richard L. Hurford

In the not-too-distant past, lawyers and law firms were inundated with promises of greater profitability, efficiency, and client satisfaction if only they embraced process improvement principles.<sup>1</sup> In my experiences, Six Sigma, Lean, Lean Sigma, the Theory of Constraints, the Five S's, Kaizen, and other process improvement methodologies became the panacea for what ailed the legal profession. Once lawyers and legal organizations realized the amount of time, resources, and commitment these techniques required, the lure waned. It has been replaced by comfortable deniability, such as “the practice of law is an art, not a science, and really not susceptible to process improvement techniques.” As a result, in lieu of process improvement, some firms focused on flat fees, alternate billing techniques, unbundling, and other cost-reduction strategies that failed to address eliminating waste and only further eroded profitability, reinforcing the perception that various legal services were no more than a commodity.<sup>2</sup>

Those legal organizations that persevered in process improvement initiatives were amply rewarded and recouped significant benefits for their members and clients. Better-known examples include:

- Seyfarth Shaw and the Seyfarth Lean™ initiative<sup>3</sup>
- Association of Corporate Counsel and the ACC Value Challenge™<sup>4</sup>
- Baker Donelson's Baker Lean™<sup>5</sup>

Organizations successfully implementing legal process improvement abound and, in Michigan, we need look no further than the courts to comprehend the power of legal process improvement and its current and future impact on the profession, particularly litigators. The time for litigators to reconsider the power of legal process improvement may be now.

Former state Supreme Court Chief Justice Robert P. Young Jr. championed legal process improvement for Michigan courts. In his 2011 annual report, Justice Young predicted:

[The Courts] can and will do more. Performance measurement, long a staple of the private sector, is coming to the Michigan judiciary. The quality of justice is not easy to measure, but other aspects of our work are. How long do we take to resolve cases? Do we utilize potential jurors' time well.... We can measure all this and much more.... Efficiency. Access. Transparency and above all Public Service. These will be our watchwords.<sup>6</sup>

Taking Justice Young's comments to heart, the Michigan Supreme Court and the Supreme Court Administrative Office (SCAO)<sup>7</sup> developed “dashboards” measuring whether Michigan courts were meeting efficiency, access, transparency, and public service goals.<sup>8</sup> Each court now has an online dashboard<sup>9</sup> evaluating key metrics like clearance rates, case age, efficiency, technology implemen-

tation, court metrics, and evidence-based practices.<sup>10</sup> In describing this last metric, SCAO used language adopting core principles of process improvement:

Virtually all disciplines and businesses use performance measurement: Imagine investors who do not provide return rates, surgeons who do not calculate survival rates, carmakers who do not measure fuel efficiency or philanthropic foundations that do not measure outcomes. Similarly, courts can assess their own performance by using metrics; online dashboards make that information available to the public.<sup>11</sup>

Another foray into process improvement in Michigan's courts involved SCAO's 2013 publication of a manual for judges, *The Caseflow Management Guide*.<sup>12</sup> This manual offered courts a number of evidence-based practices to consider, founded on years of empirical research that evaluated the efficacy of various judicial practices in state and federal courts throughout the nation. To appreciate the impact of this process improvement exercise on litigators, at the top of the next page is a chart comparing the number of the evidence-based practices recommended in the *Guide* with recommended modifications to the Michigan Court Rules recently proposed by the State Bar of Michigan.<sup>13</sup>

Evidence-based practices and legal process improvement inspired the establishment

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“If you can't describe what you are doing as a process, you don't know what you are doing.”

—W. Edwards Deming

<b>The Caseflow Management Guide Recommendations</b>	<b>State Bar of Michigan Special Committee Report Recommendations</b>
Designing a discovery plan for each case in consultation with counsel, generally as part of the case management plan. (page 22)	Proposed MCR 2.401
Limiting the nature and scope of discovery by category of cases.... (page 22)	Proposed MCR 2.301(A) Proposed MCR 2.301(C) Proposed MCR 2.302(B) Proposed MCR 2.306 Proposed MCR 2.309 Proposed MCR 2.401(J)
Providing informal methods for resolving discovery disputes...(page 22)	Proposed MCR 2.411
Developing a process where initial discovery focuses on the information needed for settlement with discovery for trial provided only in cases that are likely to be tried. (page 22)	Proposed MCR 2.302(B)
The two often-cited goals of alternative dispute resolution (ADR) are to reduce cost and to expedite disposition. These goals can only be achieved, however, in a case management system which promotes the timely referral of cases to ADR...(page 41)	Proposed MCR 2.401(B)(1)(n) Proposed MCR 2.411

of Michigan’s business courts.<sup>14</sup> The goals of the business courts were to resolve business and commercial disputes efficiently and “enhance the accuracy, consistency, and predictability” of decisions in business disputes.<sup>15</sup> Hon. Christopher Yates, the circuit court judge assigned to preside over the specialized business docket in Kent County, underscored the importance of the business courts to Michigan’s economy and their pivotal role in judicial process improvement:

[A] 21st century Michigan economy requires a 21st century court system that can dispense justice efficiently in even the most complex commercial cases. The SBD pilot projects in Michigan will move the state forward, clearing the way for commercial enterprises to devote more resources and time to business and less attention to litigation. But beyond that, the SBD pilot projects should benefit all litigants in Michigan by spawning innovations [i.e., evidence based practices]... that can be incorporated into all litigation, regardless of its complexity.<sup>16</sup>

All of the business courts are to be complimented for their laser focus on improving the litigation process by eliminating waste and seeking efficiencies and cost savings for the benefit of individuals who appear in those courts. Illustrative of the ongoing process improvement journey in Michigan’s business courts have been the steps taken in Oakland County.

The Oakland County experience is a classic example of an effective process improvement methodology.<sup>17</sup> Business Court Judges Wendy Potts and James Alexander assembled a high-functioning advisory team of stakeholders invested in improving the business litigation process for their clients. I am a member of this advisory team that includes diverse and highly accomplished litigators (both plaintiff and defendant), experienced neutrals, and court staff. We meet periodically with the business court judges to discuss how the litigation process might be improved. Team suggestions are robustly discussed and debated, solutions are explored, and objectives are prioritized.

From time to time, subcommittees are established to condense the suggestions to written proposals for consideration and discussion by the entire advisory team. Judges Potts and Alexander have championed the process by listening, establishing priorities, requiring accountability, and setting realistic goals and timelines.<sup>18</sup> The result: a number of evidence-based processes have been implemented (and continuously improved upon) in the Oakland County Business Court, including:

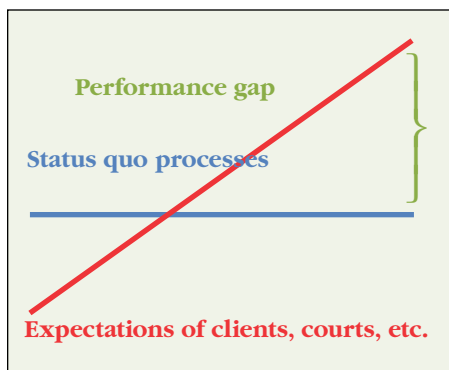
- A standardized notice and order to appear for a case management conference establishing clear expectations for what will be discussed, decided, and accomplished at the conference;<sup>19</sup>
- A case management protocol governing all business cases, including a suggested framework for electronic discovery;<sup>20</sup>
- The development of a model protective order;<sup>21</sup>
- The implementation of a facilitative mediation process (at no cost to the litigants) for discovery disputes that significantly narrows or resolves those disputes before a hearing;<sup>22</sup>
- The early disclosure and exchange of information and documents;<sup>23</sup>
- A standardized scheduling order completed at the case management conference;<sup>24</sup>
- The appointment of a neutral selected by counsel at the case management conference who will be available to assist in resolving periodic litigation disputes as they arise as well as the ultimate resolution of the case;<sup>25</sup> and
- The online publication on the court’s website of all decisions by the Oakland County Business Court.<sup>26</sup>

Significantly, the effect of these process improvements is monitored by the court and the advisory team and reevaluated for continuous improvement opportunities.

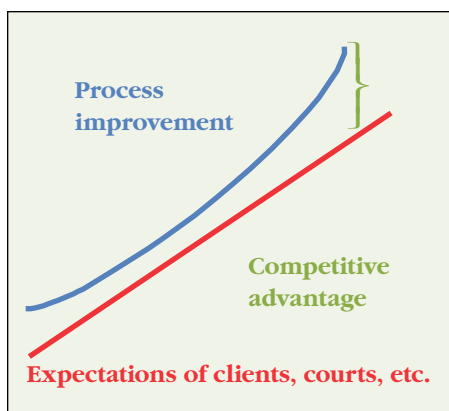
These changes should not be viewed as a short-lived trend; they are harbingers of future modifications that will significantly affect litigators and the litigation process well into the future. As the processes and

expectations of all Michigan courts continuously evolve to ensure greater client satisfaction, efficiency, and cost effectiveness, the question becomes: Are litigators concurrently reevaluating and continuously improving their processes to adapt and meet the ever-increasing expectations of their clients and the courts? If not, as illustrated below, an organization's performance gap will continue to grow, resulting in a decided competitive disadvantage:

#### Continue as we have:



#### Improve processes:



Although litigators may not have catalogued and evaluated each and every litigation process they perform, as noted by the father of modern process improvement theory, W. Edwards Deming, “If you can’t describe what you are doing as a process, you don’t know what you are doing.”<sup>27</sup> If your litigation processes can’t be described and improved upon to harness the significant current and future process changes in the courts (and expected by your clients), about the best that can be said to you is, “Good luck!”

Those law firms improving processes that eliminate waste and result in increased value to their clients will enjoy a significant competitive advantage. As clients pursue continuous improvement in their businesses and other activities, why would they expect anything less of their legal counsel? In the not-too-distant future, a potential client’s request for proposal for legal work may require submitting competing dashboards from prospective counsel with information on metrics that matter and are of value to the requesting organization. Wait—that’s already happening! ■



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*land County ADR committees; and current co-chair of the Federal Bar Association’s ADR Section. He co-authored the nationally recognized A Taxonomy of ADR (2015). In addition to a JD, he earned an MBA and is certified in Legal Lean Sigma process improvement.*

#### ENDNOTES

1. There are many definitions of “process improvement” depending on the methodology used. For purposes of this article, a satisfactory working definition of process improvement is this: reducing system performance gaps through the elimination of waste and enhancing the performance of those services and goods most valued by the client.
2. For example, see Davis, *Lawyers jump into process improvement*, PEX Process Intelligence Network (March 27, 2014) <<https://www.processexcellencenetwork.com/lean-six-sigma-business-transformation/articles/lawyers-jump-into-process-improvement/>>. With the exception of endnote 11, all websites cited in this article were accessed February 13, 2018.
3. Seyfarth Shaw LLP, *Seyfarth Lean* <<http://www.seyfarth.com/SeyfarthLean>>.
4. Association of Corporate Counsel, ACC Value Challenge <<https://www.acc.com/valuechallenge/>>.
5. Baker Donelson, *Legal Project Management, Baker Lean* <<https://www.bakerdonelsonlp.com/lpm-solutions/lean-process-improvement/>>.
6. Michigan Supreme Court, *Annual Report 2011* <<http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Statistics/2011/2011%20Michigan%20Supreme%20Court%20Annual%20Report.pdf>>.
7. SCAO has been particularly active in recommending best practices for consideration by the trial courts. For example, in 2015 SCAO published the *Michigan Judges Guide to ADR Practice and Procedure*, which catalogued more than 20 ADR techniques and the indications/contraindications for the use and timing of each. This guide is a valuable resource of evidence-based practices for the consideration of litigators and is available at <<http://courts.mi.gov/administration/scao/officesprograms/odr/documents/adr%20guide%2004092015.pdf>>.
8. Michigan Supreme Court, *Judiciary Dashboard*, Michigan Supreme Court Judiciary Dashboard <<http://courts.mi.gov/education/stats/dashboards/Pages/default.aspx>>.
9. Michigan Supreme Court, *Judiciary Dashboard*, Performance Measures: Courts with a Dashboard on the Web <<http://courts.mi.gov/education/stats/dashboards/Pages/Courts-With-Dashboards.aspx>>.
10. For purposes of this article, the author defines evidence-based practices as the conscientious, explicit, and judicious use of current best evidence in making decisions about the management of a dispute, while integrating individual expertise with the best available external evidence from systematic research.
11. Michigan Supreme Court, *Judiciary Dashboard*, Performance: Court Metrics and Evidence-Based Practices (accessed by author on June 12, 2016) <<http://courts.mi.gov/education/stats/dashboards/Pages/Dashboard-Service-Surveys-Why.aspx>>.
12. Michigan Supreme Court, SCAO, *Caseflow Management Guide* (October 2013) <<http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/cfmng.pdf>>.
13. State Bar of Michigan, *Civil Discovery Court Rule Review Special Committee Report and Draft Proposal* (September 25, 2017) <<http://spb.mplp.org:8080/download/attachments/11010074/SPB+Civil+Discovery+Draft+Proposal+10-17.pdf?version=1>>.
14. Toering, *The New Michigan Business Court Legislation: Twelve Years in the Making*, American Bar Association (January 2013) <[https://www.americanbar.org/publications/blt/2013/01/03\\_toering.html](https://www.americanbar.org/publications/blt/2013/01/03_toering.html)>.
15. MCL 600.8033(3).
16. Yates, *Specialized Business Dockets: An Experiment in Efficiency* <[https://www.accesskent.com/Courts/17thcc/pdfs/Experiment\\_Efficiency.pdf](https://www.accesskent.com/Courts/17thcc/pdfs/Experiment_Efficiency.pdf)>.
17. Oakland County, *Business Court* <<https://www.oakgov.com/courts/businesscourt>>.
18. Kirvan, *New ‘business court’ on horizon in Oakland County*, Macomb County Legal News (May 10, 2013) <<http://legalnews.com/macomb/1375877>>.
19. Oakland County, *Business Court, Case Management Protocol Oakland County Circuit Court Business Court Cases* <<https://www.oakgov.com/courts/businesscourt/Documents/ocbc-pro-case-management.pdf>>.
20. *Id.*
21. Oakland County, *Business Court, Forms: Model Business Court Protective Order* <[https://www.oakgov.com/courts/businesscourt/Documents/mod-bc-pro\\_ord.pdf](https://www.oakgov.com/courts/businesscourt/Documents/mod-bc-pro_ord.pdf)>.
22. Oakland County, *Business Court, Case Management Protocol Oakland County Circuit Court Business Court Cases*.
23. *Id.*
24. *Id.*
25. *Id.*
26. Oakland County, *Business Court, Business Courts Opinion Search* <<https://www.oakgov.com/courts/businesscourt/>>.
27. van Vliet, *William Edwards Deming*, Toolshero (2009) <<https://www.toolshero.com/toolsheroes/william-edwards-deming/>>.