

# ADR Within ADR

## Business Courts as Laboratories for Litigation Process Improvement

By Hon. John C. Foster and Richard L. Hurford



Reflecting on the recent second anniversary of the birth of the business court statute in Michigan<sup>1</sup> and its significant impact on litigation practices, it is becoming increasingly clear that business courts are a de facto form of alternative dispute resolution that embrace a vast array of ADR processes and “evidence-based practices”<sup>2</sup> to achieve their statutory purposes. While the full realization of the objectives of the business courts is still a work in progress, the early journey has been promising.

### The classic litigation model vs. the new business court model

In the not-too-distant past, the classic litigation model consisted of the issuance of a standard case schedule early in the litigation

process setting forth various milestones, including the trial date. Motion practice to obtain or restrict discovery on all issues in dispute followed. After the completion of discovery, a party might opt to file an often-unsuccessful motion for summary disposition. Next, the parties engaged in the first foray into ADR: case evaluation pursuant to MCR 2.403. If the parties did not accept the case evaluation award,<sup>3</sup> the court often ordered mediation under MCR 2.411.<sup>4</sup> If the case was still unresolved, the trial court would then preside over one or more settlement conferences. More often than not—and at a significant additional cost to the litigants—the trial date was adjourned at least once.

This model was perceived by some as relatively successful in resolving disputes; historically, less than 2 percent of all civil cases ended in trial.<sup>5</sup> However, many litigants, particularly business

clients, questioned whether the time and resources invested in the typical litigation process achieved the desired benefits.<sup>6</sup>

Frustration with the status quo even led some to question the relationship between business investment in the United States and the country's litigation system. Perhaps the best known study in this regard, commissioned by the U.S. Department of Commerce, observed: "There is an international perception that the pervasive nature of litigation in the United States" has come to "serve as an unnecessary drag on the economy and as an implicit international competitive disadvantage."<sup>7</sup>

With this background, the Michigan legislature in 2012 mandated the creation of specialized business courts to:

- (a) Establish judicial structures that will help all court users by improving the efficiency of the courts.
- (b) Allow business or commercial disputes to be resolved with the expertise, technology, and efficiency required by the information age economy.
- (c) Enhance the accuracy, consistency, and predictability of decisions in business and commercial cases.<sup>8</sup>

In essence, the Michigan legislature challenged these courts with reengineering the litigation process to resolve business disputes in an *alternative* manner that better meets the needs of the litigants and to develop evidence-based practices that can serve as a potential model for all state courts.

These developments have caused many of the business court judges in the 17 affected circuits to view their role as not simply that of a traditional trial court. Rather, a number of these courts now also see themselves as "public dispute resolution advisors" as the new model of dispute resolution evolves in the business courts. The distinction is significant.<sup>9</sup>

While numerous courts throughout the state have become "laboratories" for cost-effective and efficient dispute resolution,<sup>10</sup> certainly the business courts are prime examples as demonstrated by the results achieved in the Macomb County Business Court. From November 1, 2011,<sup>11</sup> through November 26, 2014, 420 business cases were filed and 231 have been closed. The average age of closed cases was 172 days. Survey results demonstrated high consumer satisfaction (73 percent of respondents preferred the business court process and 68 percent stated the process shortened the time to resolution). In July 2013, the National Association of Counties presented Macomb County an achievement award for exceptional results and unique innovation in the establishment of the business court.

## The Macomb County experience

### Collaboration between the bench and the bar

Judge John Foster enlisted the support and cooperation of the bar in Macomb County's business court initiative. For example, the Macomb County Bar Association's Civil Practices and ADR committees, among others, assisted in the development of early case discovery protocols (discussed later), the local administrative

## FAST FACTS

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order, a dedicated business court website, amendments to the court's ADR plan, and educating the bench and bar on the panoply of available ADR tools. The ADR Committee also published *ADR Taxonomy for the Courts*,<sup>12</sup> outlining more than 20 ADR processes along the "dispute resolution continuum," the settings in which those processes might be most beneficial, and a wealth of practice pointers, forms, and checklists.

The early exploration of any number of right-sized ADR processes staged throughout the life of the case is becoming the norm in the Macomb County Business Court. The effectiveness of this evidence-based practice is underscored in the State Court Administrative Office's *Caseflow Management Guide*:

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 and screens cases to ensure that the referral is appropriate.... Timely and appropriate referrals can best be achieved through early court intervention and case screening.<sup>13</sup>

In addition, the court has developed a listing of neutrals it has deemed qualified to provide services in any number of ADR techniques involving business disputes.<sup>14</sup> The court always recommends the parties select a mutually trusted and respected neutral regardless of whether that neutral appears on the business court's listing.

### Business court discovery protocols

To enhance efficiency and minimize discovery disputes, the Macomb County Business Court has established protocols in four classes of business disputes: breach of business contracts, non-competes, shareholder oppression, and employment.<sup>15</sup> All parties

are expected to follow the protocols and produce the designated information at the outset of the litigation.<sup>16</sup> The protocols have significantly reduced often wasteful and time-consuming discovery motions. In addition, the court engages in another documented evidence-based practice by encouraging parties to bring discovery disputes to the court's attention as soon as possible and in an informal manner through conference calls and other methods.<sup>17</sup>

### Early case conference

The early case conference is conducted within 30 days of filing a response to the complaint. It is personally presided over by the business court judge with counsel in attendance and is a critical practice that leads to the development of a differentiated case management and ADR plan.<sup>18</sup> The court's local administrative order details a number of the topics addressed by the court during the early case conference and sets forth the information the parties must submit to the court seven days before the conference.<sup>19</sup>

The conference is a well-documented, evidence-based practice. As stated in SCAO's *Caseflow Management Guide*:

To adequately control cases, the court must monitor case initiation, screen cases, achieve event date certainty through the control of schedules and adjournments, and manage trials.

... [B]y intervening early in the process, nontrial dispositions can be achieved earlier. This can result in significant time savings since 90 to 98 percent of all cases are disposed of by nontrial means.<sup>20</sup>

### Differentiated case management

When establishing the case management schedule at the early case conference, the Macomb County Business Court engages in

another evidence-based practice: differentiated case management (DCM). One of the first articulations of DCM provided:

Inherent in the concept of DCM is the recognition that some cases can—and should—proceed through the court system at a faster pace than others. In a DCM system, the traditional “first-in-first-out” rule for case scheduling and disposition is replaced by a case management system that accommodates the diversity of case processing events and timeframes appropriate to the individual cases filed.<sup>21</sup>

An additional evidence-based practice in achieving “event date certainty” within a DCM plan is not setting a specific trial date at the early case conference.<sup>22</sup> In the Macomb County Business Court, trials are set only when it becomes apparent the case will likely proceed to trial.

### Proportionate discovery

In November 2013, the Supreme Court Administrative Office convened an Early ADR Summit that solicited the recommendations of highly respected judges, practitioners, and neutrals throughout the state concerning best practices that might be pursued by trial court judges in the cost-effective, efficient management of cases.<sup>23</sup> Among the high-priority recommendations was the proportionate staging of discovery.<sup>24</sup>

The rationale for this recommendation and a methodology for the implementation of proportionate discovery are addressed in the *Caseflow Management Guide*. It recognized that “[d]iscovery is a significant portion of litigation time and expense; therefore, management of discovery is essential if a case management system is to be effective and efficient” and suggested one resolution was to develop “a process where initial discovery focuses on the information needed for settlement with discovery for trial provided only in cases that are not likely to be tried.”<sup>25</sup>

The Macomb County Business Court engages in proportionate and staged-discovery practices that are explored and discussed during the early case conference and throughout the life of the case.

### Conclusion

Although the business court initiative is only two years old, the statutory objectives of business courts are being achieved as demonstrated by the results in the Macomb County Business Court and the state's 16 other business courts. Using early ADR and other evidence-based practices, dispute resolution in the business courts is being achieved with greater efficiency and less cost. Evidence-based practices and early ADR allow trial courts to achieve not only the metrics established by the Supreme Court Administrative Office,<sup>26</sup> but also the goals and objectives of stakeholders. The journey toward improvement will proceed apace as business courts continue to be laboratories for evaluating other evidence-based practices.<sup>27</sup> As business courts collaborate further on their experiences with these practices, the anticipation is that the goal



identified by Judge Christopher P. Yates, the designated Kent County Business Court judge, will be realized:

[T]he SBD [Specialized Business Court Docket] pilot projects should benefit all litigants in Michigan by spawning innovations such as electronic case filing and proactive judicial intervention that can be incorporated into all litigation, regardless of its complexity. In other words, the SBD pilot projects will not only assist the business community, but also enhance the State of Michigan as a whole by creating a more efficient, responsive court system. For this, we should all be grateful.<sup>28</sup> ■



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## ENDNOTES

1. On October 16, 2012, Governor Rick Snyder signed Michigan Public Act 333, requiring business courts in every circuit with at least three circuit judges.
2. Evidence-based practices have been defined as: "The conscientious, explicit and judicious use of current best evidence in making decisions about the management of a dispute. It means integrating individual judicial and legal expertise with the best available external evidence from systematic research." Steelman, *Caseflow Management: The Heart of Court Management in the New Millennium* (2004) <<http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/ctadmin/id/1498/rec/2>>. All websites cited in this article were accessed December 12, 2014.
3. A recent study by the Supreme Court Administrative Office (SCAO) established that case evaluation resulted in a late-stage resolution only 20 percent of the time. See Courtland Consulting, *The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts: Report to the State Court Administrative Office, Michigan Supreme Court* (October 31, 2011) <<http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/The%20Effectiveness%20of%20Case%20Evaluation%20and%20Mediation%20in%20MI%20Circuit%20Courts.pdf>>. Many business courts are not ordering case evaluation as part of the ADR plan for business cases.
4. *Id.* The same SCAO study established that case evaluation followed by a court-ordered mediation (as opposed to early mediation alone) had a longer case length by almost 200 days on average and resulted in a higher percentage of trials.
5. See generally, Michigan Courts: One Court of Justice <<http://courts.mi.gov/search/pages/results.aspx?k=case%20disposition%20by%20trial>>; see also Refo, *The Vanishing Trial*, 30 ABA J of Litigation 2 (2004).

6. See, e.g., National Arbitration Forum, *Business-to-Business Mediation/Arbitration vs. Litigation* (2005) <<http://www.adrforum.com/users/naf/resources/GeneralCommercialWP.pdf>>.
7. The U.S. Litigation Environment and Foreign Direct Investment, *Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty* (2009) <[http://learn.commerce.gov/s/groups/public/@doc/@os/@opa/documents/content/prod01\\_007457.pdf](http://learn.commerce.gov/s/groups/public/@doc/@os/@opa/documents/content/prod01_007457.pdf)>.
8. MCL 600.8033(3)(a), (b), and (c).
9. See SBM ADR Section, *ADR and the Business Courts: What They Mean to Litigators, Neutrals and Their Clients* (2014), p 46 <<http://www.michbar.org/adr/pdfs/businesscourtPP.pdf>>.
10. See Chief Justice Young, FY 2015 Budget Presentation <<http://courts.mi.gov/News-Events/Newsummary/Documents/ChiefJusticeYoungFY2015BudgetRemarks.pdf>>.
11. Macomb and Kent counties established pilot projects for the business court initiative before the passage of Michigan Public Act 333.
12. Hurford & Allen, *A Taxonomy of ADR* <<https://static.squarespace.com/static/50dc72c3e4b0395512960a1c/t/5277d27de4b0af356e29d432/1383584381860/ADR%20Taxonomy%20for%20the%20Courts%20-%20RHDRS.pdf>>. The *Taxonomy* has garnered national attention and is used frequently in judicial programming and as a resource by counsel and consumers of ADR.
13. SCAO, *Caseflow Management Guide*, p 41 <<http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/cfmng.pdf>>.
14. Neutrals who wish to be listed may submit an application for the court's consideration. The application is available on the business court's website at <<http://circuitcourt.macombgov.org/CircuitCourt-BusinessDocket>>.
15. The protocols can be accessed on the court's website at <<http://circuitcourt.macombgov.org/CircuitCourt-BusinessDocket>>.
16. The court is considering formulating additional protocols. To achieve the statutory goal of "enhanced accuracy, consistency, and predictability," MCL 600.8033(3)(c), all 17 jurisdictions with business courts might consider collaborating on the development of uniform discovery protocols.
17. As discussed in Steelman, *Caseflow Management*, this process is also an evidence-based practice. See also SCAO, *Caseflow Management Guide*.
18. Such early case conferences, as well as the establishment of differentiated case management plans, have been recognized and documented as evidence-based practices in effective and efficient docket management. See Steelman, *Caseflow Management*; SCAO, *Caseflow Management Guide*.
19. See LAO 2013-2 <<http://circuitcourt.macombgov.org/CircuitCourt-BusinessDocket>>.
20. SCAO, *Caseflow Management Guide*, pp 9–10.
21. Bureau of Justice Assistance, *Differentiated Case Management* (1993), p 1 <<https://www.ncjrs.gov/pdffiles/difb.pdf>>. See also Steelman, *Caseflow Management*; SCAO, *Caseflow Management Guide*.
22. SCAO, *Caseflow Management Guide*, p 14.
23. See SCAO, *Early ADR Summit Meeting Summary* (September 4, 2013) <<http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/ADR%20Summit%20Report%20September%202013.pdf>>. All the recommendations are worthy of review, and many mirror those evidence-based practices engaged in by the Macomb County Business Court.
24. *Id.* at 3.
25. SCAO, *Caseflow Management Guide*, p 22.
26. SCAO has mandated the creation of dashboards for all trial courts in the state that measure, inter alia, case age, clearance rates, and performance measurements. See Michigan Supreme Court Judiciary Dashboard <<http://courts.mi.gov/education/stats/dashboards/Pages/default.aspx>>.
27. For example, it is anticipated that the circuit courts in Kent and Macomb counties will pilot another ADR initiative—summary jury trials. A summary jury trial process and supporting administrative order are under consideration by the Michigan Supreme Court. See Hurford, *Summary Jury Trials*, ADR Quarterly (June 2014).
28. Yates, *Specialized Business Docket: An Experiment in Efficiency* <[https://www.accesskent.com/Courts/17hcc/pdfs/Experiment\\_Efficiency.pdf](https://www.accesskent.com/Courts/17hcc/pdfs/Experiment_Efficiency.pdf)>.