

# Michigan's Business Courts

## Experimenting with Efficiency and Enjoying the Results

By Douglas L. Toering

 On November 1, 2011, Macomb County Circuit Court launched the state's first specialized business docket. Just four months later, Kent County Circuit Court established its specialized business docket. Then on October 16, 2012, Governor Rick Snyder signed Michigan Public Act 333 (2012), establishing business courts in Michigan counties with at least three circuit judges.<sup>1</sup> The legislation took effect January 1, 2013, although most of the affected counties implemented the changes during the first half of 2013. Thus, in the 17 circuits<sup>2</sup> with business courts, every "business or commercial dispute" (as broadly defined) goes to a special docket.<sup>3</sup>

The purpose of business courts is to resolve commercial disputes efficiently, accurately, and predictably.<sup>4</sup> The experience so far suggests business courts are accomplishing that objective.<sup>5</sup>

To implement the statutory mandate, business courts are encouraged to adopt "evidence-based practices"<sup>6</sup> that reduce litigation waste and inefficiencies. Those practices can also serve as a model for trial courts.<sup>7</sup>

Indeed, the Michigan Supreme Court has called on all courts to develop more efficient practices. In the 2015 budget for the judiciary, Chief Justice Robert P. Young Jr. stated, "Every trial court in this state can be a little laboratory of new ideas—a fertile ground for discovering new and better ways of doing things."<sup>8</sup>

What are the business courts doing in their own laboratories? What specifically are they doing to help resolve cases efficiently? Which practices have they adopted regarding discovery, alternate dispute resolution, motion practice, and the like? For answers, the business court judges were asked a series of questions. Responses from judges in Ingham, Kent, Macomb, Oakland,

Ottawa, Saginaw, Washtenaw, and Wayne counties help provide answers.<sup>9</sup> Among other things, their answers confirm that two keys to the success of the business courts are early and frequent judicial intervention and early ADR.

Overall, as Judge Jon A. Van Allsburg of Ottawa County stated, "Early judicial intervention has been the hallmark of business court litigation...." Judge H. Randall Jurens of Saginaw County noted, "[S]everal themes have emerged" in business court litigation: "the advantages of early and frequent judicial intervention (e.g., early case management conference and regular status conferences), the utility of early facilitative mediation, the benefits of easy judicial access (e.g., expedited conference calls to resolve minor issues), and the quality of legal representation."<sup>5</sup>

### Early case management and scheduling conferences

Of course, counsel wishing to know the practices of a particular business court should consult the local administrative order for that court as well as the judge's own protocol. Regarding the former, the Michigan State Court Administrative Office posts online the opinions for each business court.<sup>10</sup>

Generally, business courts employ early case management conferences. In Oakland County, for example, the court automatically sends a notice and order to appear for an early status conference. The notice is usually sent shortly after the answer is filed, and the conference with the judge typically occurs about three weeks after the answer date. Before the conference, counsel submit a proposed joint case management plan, which includes a proposed scheduling order, identification of discovery issues, and other matters counsel wish to bring to the court's attention.

Some business courts, such as Saginaw County's, periodically set informal status conferences to monitor case progress and provide attorneys the opportunity to apprise the court of pending or expected issues. Another approach for cases in which discovery may be a problem is setting a regular teleconference with the court. Under that protocol, counsel check in with the court regularly (perhaps every two weeks) to make sure discovery is proceeding apace.<sup>11</sup>

In Macomb County, the business judges are in the process of adopting a detailed notice and order to appear, which, in turn, will require a joint pretrial report. In addition to other issues, counsel must identify financial issues—insurance coverage, bankruptcy, receivership, and the like—that might affect settlement, and state whether a meeting with the judge attended by counsel and the parties would be appropriate. In Ingham County, the business judge and the parties typically agree to include an early mediation date in the scheduling order; mediation then occurs either before discovery or after some discovery has been taken. This leads us to our next two topics.

### Alternative dispute resolution

Under Administrative Order 2013-6, circuit courts

shall establish specific case management practices for business court matters. These practices should reflect the specialized pre-trial requirements for business court cases, and will typically include provisions relating to scheduling conferences, alternative dispute resolution (with an emphasis on mediation scheduled early in the proceeding), discovery cutoff dates, case evaluation, and final settlement conferences.<sup>12</sup>

As one would expect, business courts encourage early mediation.<sup>13</sup> Ottawa County,

for example, orders early mediation in nearly all cases. Ingham County directs counsel to *A Taxonomy of ADR: A Practical Guide to ADR Practices & Processes for Counsel*,<sup>14</sup> the court asks counsel to familiarize themselves with ADR techniques other than mediation. (*Taxonomy* details a variety of ADR practices beyond mediation for counsel to consider.<sup>15</sup>) Another resource for the bench—both business court judges and other state court judges—and the bar is the *Michigan Judges Guide to ADR Practice and Procedure* published by SCAO.<sup>16</sup>

If mediation does not produce a settlement, courts may order a second round of mediation after discovery is concluded. Even when early mediation does not settle a case, this does not mean the process failed. Rather, the parties can use mediation to narrow the issues in dispute, limit the scope of discovery, and construct an effective litigation plan. The litigation plan, in turn, can lead to further settlement discussions.

For its part, SCAO has suggested judges consider serving as both dispute resolution advisors and traditional trial court judges.<sup>17</sup> In many ways, business court judges are doing just that.

In fact, business disputes are well-suited to early mediation.<sup>18</sup> First, the parties have done business with each other for years—as vendor and customer (a Tier 3 automotive supplier selling to a Tier 2, for example) or perhaps as business partners. The quicker the parties can focus on settlement, the more money they can save on litigation expenses. Said differently, money is fungible: every dollar spent on litigation is a dollar not available to settle the case, invest in the business, or save for the college education of the owners' children.

Moreover, early mediation allows the parties to focus on a “business solution.” Here’s one: “You buy more steel from me, and I will sell it to you at a lower price.” And an early mediation—where parties can air their grievances to a neutral mediator (and perhaps directly to each other) and construct their own solution—can help save a relationship and maybe even a family. Indeed, the owners of small businesses have typically worked together for years and, in some cases, decades, especially in the case of family businesses.<sup>19</sup>

What about case evaluation? Some business judges do not order case evaluation unless the parties agree to it. (They seldom do.) Other business judges will order case evaluation, such as when early mediation has not resolved the case.

Overall, early mediation is successful. As Judge Archie C. Brown of Washtenaw County observed, it has led to a significant decrease in the average days a case is open before closing. Given that only about 1.5 percent of civil cases in Michigan go to verdict, early settlement discussions and early ADR should always be considered.

### Discovery and motion practice

The most expensive—and often the most contentious—aspect of many commercial cases is usually discovery. Business court judges have several tools in their toolbox to address this issue. For example, business courts such as Ottawa, Saginaw, and Wayne often stage discovery to allow limited discovery before early mediation. Other courts tailor discovery to meet the needs of the case and the amount in controversy; a simple \$75,000 breach-of-contract case will not need the same amount of discovery as an eight-figure automotive supplier lawsuit or complex shareholder dispute. Other courts, however, leave the timing and amount of discovery to the parties—subject, of course, to the general requirements of the Michigan Court Rules.

In any event, the amount and timing of discovery can be addressed at the early court conference. As part of this, counsel can discuss the often thorny issue of discovery of electronically stored information.

Another method for managing discovery is initial discovery protocols. Macomb County has established protocols for disputes involving breach of contract, business organizations (shareholder disputes), employment, and noncompete cases.<sup>20</sup> Elsewhere, Oakland County has approved a model protective order.<sup>21</sup>

Oakland County also is considering its own set of discovery protocols. A subcommittee of the advisory committee to its business court is working on protocols, and another subcommittee will provide recommendations for resolving discovery dis-

putes. In addition, courts such as Oakland, Ottawa, and Saginaw allow counsel to contact the court before filing a discovery motion. Other courts, like Ingham, prefer the traditional motion practice.

Several business courts, including Kent, Macomb, and Oakland, have set up advisory or “best practices” committees to assist the courts. For example, Macomb County’s best practices committee has recommended a standard notice and order to appear and will next consider whether its local administrative order should be revised.

### Advice to counsel

#### Local protocol

Check the court’s local administrative order and the assigned judge’s individual protocol.

#### Other business court opinions

Although nonbinding, business court judges may consider opinions of other business courts. Before filing or opposing a motion, check whether the assigned judge has already addressed that issue. If not, find out whether another business judge has decided a similar issue. All business court opinions are posted to SCAO’s website;<sup>22</sup> this helps with predictability.

#### Non-business court cases

Can the business court protocols—especially early judicial involvement, periodic and as-needed judicial involvement thereafter, and early mediation—be successful in non-business court cases? Perhaps. To some degree, certain courts (Ottawa and Saginaw, for example) apply the protocols to at least some non-business court cases. Thus, if counsel have a non-business court case but want business court protocols to apply, ask the judge. Depending on the judge’s caseload and other factors, the court may be open to this. In that regard, I encourage judges to consider experimenting with business court protocols in non-business cases.

#### Final advice for litigators

Much of the same advice that applies to any court applies to the business courts

as well. Be prepared. Be professional. Be prompt. Consult with opposing counsel before filing a motion. File the joint pretrial report or similar documents on time so the court has the opportunity to read them in advance. Discuss the possibility of an early resolution or early ADR with your client. Be careful with “forum shopping” (judges know this is happening). Know the business court statute. Is your case really a business court case?<sup>23</sup> Check whether the court has default discovery protocols or a notice of assignment to the business court.<sup>24</sup>

Overall, as Judge Joyce A. Draganchuk of Ingham County stated, “Don’t expect your case to proceed in the traditional way. There will be more judicial management than you may be accustomed to and it is not necessarily ‘business as usual.’”

## Conclusion

The business courts are a proverbial work in progress, but the work is progressing quite well. As the business courts continue to experiment with best practices, this progress is likely to continue.

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## ENDNOTES

1. MCL 600.8031 *et seq.*
2. The judges are, in alphabetical order by county, Hon. Kenneth W. Schmidt (Bay); Hon. John M. Donahue (Berrien); Hon. Brian K. Kirkham (Calhoun); Hon. Judith A. Fullerton (Genesee); Hon. Joyce A. Draganchuk (Ingham); Hon. Richard N. LaFlamme (Jackson); Hon. Pamela L. Lightvoet (Kalamazoo); Hon. Christopher P. Yates (Kent); Hon. Richard L. Caretti and Hon. Kathryn A. Viviano (Macomb); Hon. Daniel S. White (Monroe); Hon. Neil G. Mullally (Muskegon); Hon. James M. Alexander and Hon. Wendy L. Potts (Oakland); Hon. Jon A. Van Allsburg (Ottawa); Hon. M. Randall Jurrens (Saginaw); Hon. Daniel J. Kelly (St. Clair); Hon. Archie C. Brown (Washtenaw); and Hon. Maria L. Oxholm, Hon. Lita Masini Popke, and Hon. Brian R. Sullivan (Wayne).
3. A more complete summary of Michigan’s business court legislation appeared in Toering, *The New Michigan Business Court Legislation: Twelve Years in the Making* (January 2013) <[http://www.americanbar.org/publications/blt/2013/01/03\\_toering.html](http://www.americanbar.org/publications/blt/2013/01/03_toering.html)>; and Akers, *Michigan’s New Business Court Act Presents Opportunities and Challenges*, 33 Mich Bus LJ 11 (2013). All websites cited in this article were accessed October 22, 2015.
4. MCL 600.8033(3).
5. See Toering, *Michigan’s Business Courts and Commercial Litigation: Past, Present, and Future*, 93 Mich B J 26 (August 2014) <<http://www.michbar.org/file/journal/pdf/pdf4article2417.pdf>>.
6. “Evidence-based practices” have become increasingly important to all courts, not just the business courts. In fact, the judicial dashboard developed by SCAO encourages the use of “evidence-based practice[s].” Michigan Supreme Court State Court Administrative Office of Dispute Resolution, *Michigan Judges Guide to ADR Practice and Procedure* (2015), p. 15 <[http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR\\_Guide\\_04092015.pdf](http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR_Guide_04092015.pdf)>.
7. Hon. Christopher P. 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)>.
8. Chief Justice Robert P. Young Jr., *FY 2015 Budget Presentation* (March 12–13, 2014) <<http://courts.mi.gov/News-Events/Newsummary/Documents/ChiefJusticeYoungFY2015BudgetRemarks.pdf>>.
9. Participation in this informal questionnaire was entirely voluntary.
10. Michigan Courts, *Business Courts* <<http://courts.mi.gov/Administration/admin/op/Pages/Business-Courts.aspx>>.
11. Hon. John C. Foster, who presided over Macomb County’s Specialized Business Docket from November 1, 2011 through April 30, 2015, used this approach.
12. Administrative Order No. 2013-6.
13. The author thanks ADR expert Richard L. Hurford for his ideas on mediation and staged discovery, which have been helpful here. Some of his thoughts are also included in Foster, Hurford, & Toering, *Business Courts, Arbitration, and Pre-suit Mediation: A Modest Proposal for the Strategic Resolution of Business Disputes* (to be published in the *Michigan Business Law Journal*).
14. Hurford & Allen, *A Taxonomy of ADR: A Practical Guide to ADR Practices & Processes for Counsel* (2015) <<http://static1.squarespace.com/static/50dc72c3e4b0395512960a1c1/554b7b3fe4b0172baad01c53/1431010111052/Taxonomy+of+ADR+%28Revised+4-2015%29.pdf>>.
15. The *Taxonomy* was developed by the Macomb County Bar Association’s ADR Committee, including ADR practitioners Richard L. Hurford and Tracy L. Allen. It explores 25 different ADR processes and when each of those processes might be appropriate.
16. Michigan Supreme Court State Court Administrative Office of Dispute Resolution, *Michigan Judges Guide to ADR Practice and Procedure* (2015) <[http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR\\_Guide\\_04092015.pdf](http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR_Guide_04092015.pdf)>.
17. *Id.* at 9.
18. Several experts have examined the role of ADR and the business courts. See *Michigan’s Business Courts*, 93 Mich B J at 28, n. 13.
19. The rationale for early mediation along with a protocol for early mediation of shareholder disputes may be found in *Business Courts, Arbitration, and Pre-suit Mediation: A Modest Proposal for the Strategic Resolution of Business Disputes*.
20. See Macomb County Circuit Court, *Business Docket* <<http://circuitcourt.macombgov.org/CircuitCourt-BusinessDocket>>.
21. See Oakland County Business Court, *Stipulated 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. Michigan Courts, *Business Courts* <<http://courts.mi.gov/Administration/admin/op/Pages/Business-Courts.aspx>>.
23. Be especially careful if the case involves both claims that are defined as a “business or commercial dispute” and claims that are specifically excluded from that definition. See MCL 600.8035(3).
24. The “CB” case suffix now applies to “all claims in which all or part of the action includes a business or commercial dispute under MCL 600.8035.” Michigan Supreme Court State Court Administrative Office, *Memorandum* (May 28, 2015) <<http://courts.mi.gov/Administration/SCAO/OfficesPrograms/TCS/Documents/TCS%20Memoranda/TCS-2015-16.pdf>>.

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