



The Michigan Business Law

JOURNAL

CONTENTS

Volume 40
Issue 2
Summer 2020

Section Matters

From the Desk of the Chairperson	1
Officers and Council Members	2
Committees and Directorships	3

Columns

Taking Care of Business: The Changing Landscape for Nonprofits <i>Alexis Derrossett</i>	5
Tax Matters <i>Eric M. Nemeth</i>	7
Technology Corner: Michigan Adopts Insurance Cybersecurity Law <i>Michael S. Khoury and Paul F. Doyle</i>	9
Touring the Business Courts <i>Douglas L. Toering and Ryan A. Hansen</i>	11
In-House Insight: Legal Best Practices for Nonprofits in the COVID-19 Era <i>Jordan B. Segal and Maria Toma</i>	15

Articles

Disaster Relief Philanthropy <i>Jennifer Oertel</i>	17
Managing Endowment Funds During an Economic Downturn <i>Celeste E. Arduino</i>	23
Program-Related Investments: Are They Too Risky? <i>Jay Long</i>	26
Community Foundations and Variance Power: A View from the Inside <i>Brett Hunkins</i>	31
Senior Secured Bank v. MCA: A Recurrent Financial Feud and How to Better Control the Damage Done <i>Stephen J. Brown</i>	36

Case Digests	45
Index of Articles	46



Published by THE BUSINESS LAW SECTION, State Bar of Michigan

Introduction

Traditionally, litigation has been handled in person, with attorneys physically present for status conferences, motion hearings, depositions, mediations, settlement conferences, arbitrations, and trials. Over the past several years, various courts have begun to conduct status conferences by telephone, as well as motion hearings by telephone or occasionally by videoconference. Thus, prior to the COVID-19 pandemic, courts were moving to greater electronic access. The pandemic accelerated these efforts almost overnight. The Michigan Business Court Judges we interviewed were unanimous on this point: Court proceedings by videoconferencing are here to stay. This then promises time and cost savings for the parties and counsel along with greater efficiency for the courts.

These technological changes are consistent with the purposes of the business court statute and the Michigan Court Rules. The statute encourages efficient resolution of business disputes with the “expertise, technology, and efficiency required by the information age economy.” MCL 600.8033(3). Likewise, MCR 1.105 states, “These rules are to be construed, administered, and employed by the parties and the court to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties.”

Today, business litigation is regularly conducted via Zoom, WebEx, or other video technologies. Michigan courts are holding hearings through Zoom and status conferences via telephone or Zoom.¹

At least one judge has tried a bench trial using Zoom, and other judges expect to do so in the near future. Mediations and arbitrations are also being conducted by Zoom or WebEx, and depositions are being scheduled in the same fashion.

Michigan Supreme Court Orders

When the COVID-19 pandemic hit, court access became severely limited for public health reasons. To allow justice to proceed, the business courts had to react quickly. To facilitate this, the Michigan Supreme Court issued various Administrative Orders and provided every judge in Michigan a private Zoom room with its own unique password. As a result, videoconferencing in the business courts (and other courts) has rapidly become commonplace.

Issued on March 15, 2020, Administrative Order 2020-1 provides that, “In civil cases, trial courts should maximize the use of technology to enable and/or require parties to participate remotely.”²

Then, on April 7, 2020, the court issued Administrative Order 2020-6.³ This authorized and required a good faith effort of judicial officers to conduct proceedings remotely (whether physically present in the courtroom or elsewhere), using two-way interactive videoconferencing technology or other remote participation tools, wherever possible.

Virtual and remote proceedings have resulted in their own set of procedures and issues. The State Court Administrative Office released the Michigan Trial Courts Virtual Courtroom Standards and Guidelines on April 7, 2020 (revised April 17, 2020).⁴ This resource contains various standards and best practices. These include the following.

Official Records

“Proceedings conducted via videoconferencing technology must be recorded by the court, except for those hearings that are not required to be recorded.”⁵ The recording must be “sufficient to produce a verbatim written transcript as if the hearing were held in person in the courtroom.”⁶

Attorney/Client Communications

The court “must provide a method to enable confidential communication between a party and the party’s

counsel.”⁷ Specifically, in Zoom, courts can allow attorneys to meet with their client in a breakout room.⁸

Public and Press Access

“Access to proceedings must be provided to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule.”⁹ There is also a guideline that courts should create a YouTube live stream channel.¹⁰ This is in furtherance of the ideal of open and transparent courts accessible to the public.

How Courts Are Using Remote Technology

Kalamazoo County Business Court

Judge Alexander C. Lipsey presides over the Kalamazoo County Business Court. (Like most other business court judges, he also has a mix of other civil and criminal cases.) Judge Lipsey has been conducting conferences and motion hearings (including a preliminary injunction hearing without witnesses) via Zoom. He also uses Zoom to conduct settlement conferences. Overall, Judge Lipsey is “very satisfied” with conducting settlement conferences via Zoom except for an occasional technical issue (probably unrelated to Zoom’s platform).

Kent County Business Court

Judge Christopher P. Yates and Judge T.J. Ackert have continued to conduct routine case conferences by Zoom as well as conference calls. In addition, both Judge Ackert and Judge Yates have maintained busy motion dockets using Zoom and conference calls, so only trials and complex evidentiary hearings have been significantly delayed by the pandemic. Significantly, both judges have had ample time to write opinions, so the Kent County Specialized Business Docket website contains a whole host of new opinions, and the backlog of motions under advisement has been reduced to almost zero. Judge Yates notes that virtual motion hearings are more

structured and tend to be shorter. He observed that the pandemic has “forced us to think about things in a new way.” He states that court proceedings by videoconferencing “will make the practice of law much more efficient.”

Finally, the Kent County Specialized Business Docket intends to resume in-person bench trials in July 2020.

Macomb County Business Court

Judge Richard L. Caretti and Judge Kathryn A. Viviano report that their courts run largely the same as pre-COVID, but virtually. No trials have occurred via videoconferencing yet, but all motions and hearings are on the record through Zoom and are livestreamed on YouTube for public access. Judge Viviano and Judge Caretti each have specific COVID-19 protocols. The Macomb County Circuit Court conducts case evaluations telephonically but may move to Zoom in the future.

Oakland County Business Court

Like many other courts, Oakland County Circuit Court is conducting almost everything by Zoom, including bench trials. In fact, Judge Martha D. Anderson recently concluded a bench trial by Zoom. She noted that it was particularly helpful to have all the exhibits in advance. Judge Anderson mentioned that during the bench trial, one person’s screen occasionally froze, but everyone was able to work around this. Judge James M. Alexander noted that virtual trials pose many unanswered problems, from constitutional issues (generally, in criminal cases) to sharing exhibits, to prompting witnesses off-screen. With respect to virtual technology in general, Judge Alexander reflected that “in 90 days, we have come a million miles.” He expects using technology in the courtroom to continue as the new normal. Judge Alexander also observed that this “saves lawyers time and clients money and is more efficient for the court.” The Oakland County Circuit Court uses Zoom to conduct case evaluations.

Saginaw County Business Court

Judge M. Randall Jurens has “tried to accommodate some business court matters during these extraordinary times. Particularly, things like case management conferences, status conferences, and motions (i.e. non-evidentiary hearings) can be successfully held by Zoom.”

Wayne County Business Court

Judge David J. Allen, Judge Edward Ewell Jr., Judge Muriel D. Hughes, Judge Lita M. Popke, and Judge Brian R. Sullivan believe that court proceedings by videoconferencing are here to stay. They each conduct settlement conferences and motion hearings using videoconferencing. Wayne County Circuit Court also uses videoconferencing to conduct case evaluations.

Issues with videoconferencing, according to Judge Ewell, include an occasional bad connection, poor lighting, or improper attire. These are the exceptions, however. As to the last, Judge Hughes recommends that parties and counsel dress for mediation the same way as they would dress for court. Furthermore, Judge Popke reminds counsel that “when the oral arguments are on YouTube, we are presenting to the public the judicial system, and it should appear as such.”

Judge Sullivan noted that certain hearings by videoconferencing work well, while others, especially those with witnesses, may not. He believes that there is no substitute for in-person interactions. However, as Judge Sullivan noted, to provide service and to be effective, courts will need to continue to allow remote access. Judge Sullivan added that the pre-COVID-19 trend to decide motions on the briefs is continuing.

Like Judge Sullivan, Judge Hughes decides many of her motions on the briefs, although she sets hearing dates for more complex motions or motions seeking an injunction. Emphasizing that “time is money,”¹¹ Judge Hughes observed that virtual hearings save time and money. Judge Popke stated, “I have conducted nu-

merous business court status conferences by Zoom and have found them to be efficient. Attorneys and the court are always prompt and generally conclude the matters in less than 30 minutes, with the exception of complex cases.” Moreover, with hearings by videoconferencing, attorneys can be in multiple courts (Wayne County then Kent County, for example) on the same morning. In general, she reports, judges and attorneys like hearings by videoconferencing.

As for scheduling, Judge Ewell notes that courts will experience a backlog on trials. He thus encourages settlement conferences, mediation, and arbitration to resolve cases earlier. Judge Hughes agrees. She added that bench trials are another option. Judge Allen concurs with and supports the observations of his Wayne County colleagues.

Overall

A number of judges observed that hearings by videoconferencing were shorter. The judges generally like the efficiency of videoconferencing for the parties and counsel (resulting in saving considerable time and expense by avoiding travel) and for the courts themselves.

At a recent meeting of the Michigan Business Court Judges, the judges indicated they were conducting virtual (Zoom) pretrial conferences, status conferences, and evidentiary hearings and are planning to hold virtual bench trials.

Virtual ADR

Overall, the consensus seems to be that ADR has hardly skipped a beat due to COVID-19. (All Community Dispute Resolution Programs provide mediation via Zoom.) Generally, mediators and arbitrators report that they continue to provide mediation and arbitration services by videoconferencing.

In his article, “Thoughts About My First Zoom Arbitration,”¹² Jonathan Frank observed that virtual arbitration is efficient because nobody has to travel. However, there are differences. Frank noted that emotion from parties was generally lost,

which can be both good and bad. Objections are hard to manage, as there is a slight delay in the transmission of the live stream. Frank suggested using a “visual stop sign” to make objections easier. He also noted that it was much harder to communicate with his client because they were not sitting next to each other in the same room; text messaging was an imperfect solution. Attorney Ian M. Williamson¹³ also recently handled an arbitration hearing via Zoom and found that while live testimony may often be preferable, witness examinations were more effective than he had anticipated. However, Williamson found the format more tiring than in-person proceedings due to the need to remain seated and focused on a screen for extended periods. He also experienced occasional issues with screens of witnesses or opposing counsel freezing up.

Regarding mediation by videoconferencing, the results appear mixed. Judge Alexander has heard that some attorneys like it, but others do not. There are benefits to in-person mediation, of course. Indeed, it is easier to get to “yes” when everyone is in the same room (or in nearby rooms). Conversely, it is easier for a party who is alone to say “no.” (This is presumably why judges have often required that parties with settlement authority personally attend settlement conferences.) In other cases, sometimes people just want to be heard. This may favor in-person mediation. But Judge Sullivan noted that in his experience, most parties have not found virtual mediation to be significantly different such that they would forego mediation if it were conducted by videoconferencing. Still, he believes the preference is for in-person mediation, if possible.

Retired Wayne County Business Court Judge Daniel P. Ryan has successfully used WebEx for years in mediations with people who live out of state or internationally. That said, Judge Ryan also noted some problems with videoconferencing, including web connection/camera problems, the fact that it is easier for

parties to say “no,” and lack of formality in how parties dress and conduct themselves (which may lead to a view that the proceedings are not as serious as they would be for an in-person mediation.) Judge Ryan also spoke to another COVID-19-related issue on settlements. As a result of COVID-19-related delays, some parties are delaying settlements (to allow them to delay payment); other parties use the uncertainty of COVID-19 as a negotiating tool (“Settle now, or your case will be delayed due to COVID”).

Going Forward

COVID-19 has moved the legal world to integrate today’s technology into all aspects of business litigation, with the possible exception of jury trials. Video technology will still be used to conduct status conferences, motion hearings, evidentiary hearings, and bench trials after the pandemic is over. This will not be true in every case, of course. But it may well be that virtual court proceedings will become the rule rather than the exception post-COVID-19. Indeed, Michigan Supreme Court Chief Justice Bridget M. McCormack recently testified virtually to a United States House Judiciary Subcommittee. She observed that “this pandemic was not the disruption that any of us wanted, but it may be the disruption we needed to transform our judiciary into a more accessibl[e], transparent, efficient, and customer-friendly branch of government.”¹⁴

In general, virtual court proceedings are going very well. Whether jury trials can be conducted virtually remains to be seen; many judges are skeptical. Virtual ADR is here to stay as well, although time will tell whether mediation is more successful in person than by video. ADR in general will be high in demand, as trials are backlogged due to COVID-19-related delays.

Judge Jurrens summed it up, “As to the future, I fully anticipate that while some matters will eventually return to the courthouse proper (particularly [jury] trials), the pandemic has afforded us an opportunity to

experience and appreciate the utility and efficiency of virtual meetings; so I feel confident this new way of conducting some court proceedings is here to stay.”

The use of technology, albeit accelerated by COVID-19, helps fulfill the mandate in the business court statute to resolve business disputes efficiently with technology. (As many judges observed, the jury is out on whether jury trials can be effectively conducted by videoconferencing.) Regardless of what the future holds, technology such as videoconferencing in the courtroom (as well as in mediation and arbitration in certain circumstances) will be the new normal. Making litigation more efficient and inexpensive is a good thing.

NOTES

1. This column is not an endorsement of Zoom over any other technology or a critique of Zoom or any other technology. The emphasis on Zoom in this column is simply because Michigan’s state court judges each have a private Zoom room.

2. Administrative Order 2020-1, ¶ 2, https://www.iclc.org/contentfiles/MILawNews/rules/AO/2020-08_2020-0315_FormattedOrder_AO2020-1.pdf.

3. Administrative Order 2020-6, https://www.iclc.org/contentfiles/MILawNews/rules/AO/2020-08_2020-04-07_FormattedOrder_AO2020-6.pdf.

4. State Court Administrative Office, Michigan Trial Courts Virtual Courtroom Standards and Guidelines (Revised April 17, 2020), https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR_stdts.pdf.

5. *Id.* at p. 2, ¶ A(2).

6. *Id.*

7. *Id.* at p. 4, ¶ B(1).

8. *Id.*

9. *Id.* at p. 4, ¶ C(1).

10. *Id.*

11. Judge Hughes cited a recent poll of attorneys at a recent negligence-related webinar. Of the 55 attendees, 74% plan to argue motions by Zoom after the COVID-19 pandemic is over if that option is available.

12. <https://www.michbar.org/news/news-detail/nid/5716/Jonathan-B-Frank-Thoughts-About-My-First-Zoom-Arbitration>.

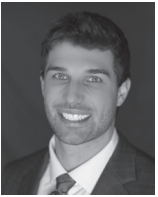
13. Williamson is a partner of the authors.

14. Testimony of Michigan Supreme Court Chief Justice Bridget M. McCormack before United States House Judiciary Subcommittee on Courts, Intellectual Property and the Internet (June 25, 2020). <https://www.mlive.com/public-interest/2020/06/technology-brought-much-needed-change-to-judicial-system-michigan-supreme-court-chief-justice-tells-congress.html>.



Douglas L. Toering of Mantese Honigman, PC, is a past chair of the SBM's Business Law Section, for which he chairs the Commercial Litigation

Committee and Business Courts Committee. His practice includes commercial litigation including shareholder litigation and insurance litigation, business transactional matters, healthcare law, and business mediation.



Ryan A. Hansen is an Associate at Mantese Honigman, PC, in Troy, Michigan. He specializes in commercial litigation, shareholder disputes, and class action law.