



# The Michigan Business Law

JOURNAL

Volume 40  
Issue 1  
Spring 2020

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Published by THE BUSINESS LAW SECTION, State Bar of Michigan

This edition of *Touring the Business Courts* interviews retired Judge Judith A. Fullerton (veteran business court judge and the first business court judge in Genesee County), Judge T.J. Ackert (newly-appointed business court judge in Kent County), and Judge Martha D. Anderson (beginning her second year on the business court in Oakland County).

These three judges provide critical insight and advice to attorneys appearing before them, and about their business courts generally.

### Judge T.J. Ackert: Kent County

Judge T.J. Ackert was appointed to the Kent County Business Court in October 2019, and maintains both a civil/family docket and a business docket.

**Scheduling Conferences.** For Judge Ackert, the scheduling conference is a time for the court to meet with counsel for the parties and discuss various issues related to the case. Judge Ackert sends notifications for scheduling conferences once the answer is filed. No other filings before the scheduling conference are expected from counsel. However, counsel should be prepared to discuss issues such as: a potential timeline of the case; what counsel see as possible disputes moving forward; whether counsel believe regular conferences with the court will be necessary; and whether the parties are interested in doing business together moving forward (a common concern in business disputes).

**Disputes that Arise in the Case.** Judge Ackert emphasized that he is willing to meet with counsel to work through issues that arise in the case and to ensure that more complex and contentious cases stay on track. Such conferences can occur in person or over the phone, depending on where the parties and counsel are located; the court is flexible in this regard.

**Discovery Issues.** Significant amendments to the Michigan Court Rules relating to discovery went into effect on January 1, 2020. Certain of these amendments are related to ini-

tial disclosures (MCR 2.302) and limits on discovery (MCR 2.309). As to initial disclosures, Judge Ackert will require initial disclosures to be exchanged only in cases filed on or after January 1, 2020. However, Judge Ackert is open to parties exchanging initial disclosures in cases filed in late 2019 if the parties agree or if one of the parties makes this request. Judge Ackert also places an emphasis on the importance of ESI; he will work with the attorneys and parties to make sure the right processes are used to move things forward efficiently. As to the presumptive limits on discovery, Judge Ackert recognizes that such limits will work in certain cases but not others and will work with counsel to make these determinations.

Regarding discovery disputes, if the dispute arose under the pre-amendment court rules, the pre-amendment court rules will apply. Judge Ackert is open to the possibility of using a discovery mediator for discovery disputes in more complex cases.

**Mediation.** Judge Ackert encourages early mediation in business disputes, and indeed, his default is to order early mediation. This is because Judge Ackert believes that mediation assists parties in understanding their best- and worst-case scenarios, the costs to reach both results, and what needs to occur to achieve each scenario. Judge Ackert understands that some discovery before mediation may be helpful to resolving the case at early mediation; he is open to such discovery, with the remainder of discovery occurring after mediation. Parties opposing early mediation must provide a valid reason, with the understanding that mediation will occur at some point.

**Case Evaluation.** Judge Ackert prefers facilitative mediation as an ADR tool in business cases rather than case evaluation. However, if one of the parties demonstrates why case evaluation would be beneficial, Judge Ackert will consider ordering it. Generally, however, Judge Ackert believes that case evaluation has limited application in business cases.

**Advice to Litigators.** Judge Ackert encourages litigators to attach prior orders, transcripts, and exhibits to their filings. This makes it easier for him to review and locate past orders and transcripts, even though they might already be in the court's file.

**Advice to Transactional Attorneys.** When drafting agreements, provide examples of mathematical formulas. Draft the provisions tightly. These will narrow the scope of the disputes. Also consider sending the agreement to a CPA for review.

**Pet Peeves.** Judge Ackert advises counsel practicing in his court to keep the court informed of what is happening in the case. In return, the court will be responsive and try to be flexible. Judge Ackert explains, "We will try to work with you, but try to work with us." Additionally, civility is key. Judge Ackert summarizes what it means to be civil in this tense political climate: "Lawyers should take the lead in this society and show others what civility means. And when we stumble, and we all do, we need to apologize; and when someone apologizes, forgive them, don't hold it against them. Nobody knows what is going on in someone else's life. People are carrying burdens that sometimes get carried over into work and if it does and we snap, apologize, and the other person should forgive."

### Judge Martha Anderson: Oakland County

Judge Martha Anderson joined Oakland County's Business Court in January 2019.

**General Protocols.** Judge Anderson's general protocols can be found online at the court's website. However, a couple items should be noted. First, always provide the court with a hard copy of summary disposition motions and responses. For other motions and responses, Judge Anderson's staff will contact the attorneys if the court wants a hard copy. Second, hard copies of temporary restraining orders are strongly recommended. At the very least, Judge Anderson recommends that attorneys call the court and inform her clerk that a temporary

restraining motion has been filed; otherwise, it could be missed.

Next, for any emergency motion, inform Judge Anderson's staff that the motion is an *emergency* motion, so the court knows to treat it as such. Lastly, Judge Anderson adheres to the Oakland County Circuit Court Case Management Protocol and model protective order, which can be found on the court's website.

Status conferences are generally not automatic. Instead, Judge Anderson holds status conferences if a party requests one or if the case is not progressing in the usual course.

**Discovery Issues.** Judge Anderson typically utilizes Oakland County Circuit Court's voluntary discovery facilitator program. However, Judge Anderson will sometimes forgo discovery facilitation and hear discovery motions right away herself, in order to either understand the facts and background of certain cases, or if the cases have frequent discovery disputes.

Regarding initial disclosures, if the case was filed in 2019, initial disclosures will not be required before the case management conference. Instead, they will be discussed during the case management conference, with the court setting due dates during the conference. For cases filed in 2020, initial disclosures must be served consistent with the amendments.

As it relates to discovery disputes, Judge Anderson stated that parties should not file boilerplate discovery motions. Parties should be specific: which interrogatory is in dispute; what is lacking in the response; and what information are you seeking? The same is true for requests for production: what was requested; what was provided, if anything; what are you asking for? As with motions, boilerplate objections are similarly discouraged.

**Mediation.** Judge Anderson believes some cases are appropriate for early mediation, while other cases require some discovery before proceeding to mediation. As such, whether cases are ordered to early mediation

will depend on what the attorneys and parties believe is beneficial.

**Case Evaluation.** Judge Anderson orders case evaluation in approximately 50 percent of cases. Typically, case evaluation is ordered after mediation and following discovery. The parties can request to stipulate out of case evaluation or to stipulate to a different type of alternative dispute resolution process. The court will consider the parties' requests, but the ultimate decision will lie with the court.

**Reflections on the Business Court after 14 Months.** Judge Anderson has found that the attorneys appearing before her in the business court are generally prepared, the pleadings are well-written, and the proceedings move very smoothly. The cases are interesting, enjoyable, and engaging.

**Advice to Litigators.** Judge Anderson encourages the attorneys appearing before her to keep the cases moving. It does not benefit anyone to delay proceedings. Indeed, Judge Anderson will order show-cause hearings if parties have not complied with certain deadlines set by the court.

**Advice to Transactional Attorneys.** Judge Anderson advises attorneys drafting contracts to be clear on the responsibilities of everyone involved in a transaction. Furthermore, use simple language, so there is no question on what anyone means.

**Pet Peeves.** Attorneys should not call her staff to ask for legal advice. Additionally, attorneys should not call Judge Anderson's staff to inquire why an order was rejected when the rejection notification states explicitly the reason for the rejection.

Further, as a courtesy, attorneys should inform the court if they plan to adjourn a motion or if they have settled the disputed matter and no longer plan to hold the hearing. As Judge Anderson states, she and other judges *do* read the briefs and motions, and it is therefore courteous for counsel to let the judges know if a hearing will not occur. Judge Anderson prefers that parties do not adjourn the same motion more than three times. After that, parties must file a new mo-

tion. Otherwise, it will be unclear to the court whether there are new facts that the court should be aware of, or if there are disputed items no longer outstanding.

Most importantly, Judge Anderson expects attorneys appearing in front of her to (1) be prompt, (2) be prepared, and (3) be civil (to the court, and to the other side).

## Judge Judith Fullerton: Genesee County

Judge Fullerton was the first business court judge in Genesee County. Judge Fullerton retired from the bench in 2019.

**Most Common Cases.** While on the business court bench, Judge Fullerton commonly handled trade secret and non-compete cases. These cases, dealing with non-competition and non-solicitation provisions, came in every couple weeks. Judge Fullerton managed such cases by hearing them first thing in the morning, and the hearings would typically last a couple hours.

**Status Conference/Pre-Trial Conference.** Judge Fullerton believes that a pre-trial conference was an opportunity for the court to become familiar with the case. The conference was held two weeks after the answer was filed.

Judge Fullerton tried to move cases along for the parties, attempted to avoid any adjournments by the court, and honored attorney scheduling conflicts.

**Mediation and Case Evaluation.** Judge Fullerton generally did not bring up early mediation, but was amenable to an early settlement conference. Judge Fullerton paid special attention to the needs of the parties; therefore, if counsel requested early mediation, Judge Fullerton was open to this.

As for case evaluation, Judge Fullerton would order this if the parties asked, and she was open to a special panel. Thereafter, if case evaluation was not successful, Judge Fullerton would order mediation.

**Advice to Attorneys.** Judge Fullerton emphasized the importance of

organization. Attorneys should not scramble through papers to find an exhibit, especially in front of a jury. Attorneys should have all of their materials ready at hand. It would be better to ask the court for a short recess in order to organize your papers than to shuffle your materials around in front of the jury. Judge Fullerton also recommends having copies of all exhibits for the court and opposing counsel.

Communication is also key. There should be no surprises. Next, attorneys should be familiar with the court rules relating to jury instructions, and they should have a set of jury instructions ready on the first day of trial. Lastly, attorneys should remember that the court cannot always drop everything and handle a business court matter; most judges with business court dockets have other dockets.

**Surprises and Satisfactions.** Judge Fullerton's biggest surprise while serving on the business court was how often parties ignored their non-compete clauses. Her biggest satisfaction was that all of the attorneys she dealt with were high-level professionals, on top of everything, and extra prepared.

## Conclusion

Although each of the three judges interviewed for this column has differing lengths of tenure on the business court bench, certain themes resonate throughout the three interviews: (1) the business court judges take particularized interest in the cases and in hearing the attorneys' views of how the case should proceed (including preferences on early mediation), (2) civility is key, and (3) attorneys practicing in the business courts are generally doing a great job with professionalism and preparation.

Through these, and other important case management processes, the business courts are particularly well-suited to help the parties and attorneys reach an effective and timely resolution. As Judge Ackert stated, "Zealous advocacy is an art. I see my role on the court (as trying to shape the process of the case) as benefitting

all the parties and getting discovery completed, claims and defenses heard, and a resolution achieved."



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