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Interviews with Judge Michael L. West, Judge Brian K. Kirkham, and MJI Director John R. Nizol

For this issue, we interview Judge Michael West of St. Clair County, Judge Brian Kirkham of Calhoun County, and John Nizol, the director of the Michigan Judicial Institute at the State Court Administrative Office.

Judge Michael L. West

Background

Judge West spent 30 years in private practice before he joined the bench in 2013. He began his legal career at a general practice firm that had a business division. After 10 years at that firm, Judge West became a solo practitioner, handling a variety of matters with an emphasis on courtroom and trial practice. He spent 20 years as a solo practitioner before he was elected to the St. Clair County bench for the 2013 term. Judge West shared a caseload with Judge Daniel J. Kelly for approximately one year before Judge Kelly retired at the end of 2020. Judge West replaced Judge Kelly on the business court in 2021.

Business Court Generally

Judge West estimates that there are approximately 10 to 12 new business court filings each year in St. Clair County, compared to the 160 to 180 new general civil cases he sees. Many of the business court cases are resolved without much court involvement.

When a litigant requests assignment to the business court, Judge West reviews the file to determine whether the matter qualifies for the business court docket. If the case is not eligible for the business court, Judge West issues an order stating that the case needs to be reassigned to the general civil division.

Mediation

Judge West will consider early facilitation (mediation) if the case needs immediate attention. He finds, however, that counsel typically want to engage in some discovery, although

he notes that the Court has the ability to order early facilitation. He determines this on a case-by-case basis, as “I think it’s helpful and I order early facilitation sporadically.”

Scheduling

After the answer has been filed, Judge West conducts a pretrial conference review and issues a comprehensive pretrial scheduling order that addresses discovery cutoff, witness deadlines, trial issues, and motion practice. Judge West selects the dates in his scheduling order without attorney input but gives the attorneys 14 days to object to the scheduling order (though that rarely happens).

Motions

Monday morning is motion day in Judge West’s court. “I decide very few matters without a hearing. The only time I do is if the motion is uncontested or should be uncontested.” Judge West will determine whether the hearing will be via Zoom or in person in the days before the Monday hearing. Judge West leaves it to attorneys to schedule motions when they want, though he has a limit of three summary disposition motions on Mondays.

As to particular motions, Judge West does not have a particular protocol for temporary restraining orders (TROs) or preliminary injunction motions—he seldom grants TRO motions, noting that it’s “a tall burden” and “the court rule is very clear and specific as to what has to be shown. More often than not, the lawyers don’t get close to where they need to be. I’ve also learned and believe that after 42 years in this business, there are very few true legal emergencies.” Generally, if he denies the TRO, he will issue a show cause order for a preliminary injunction hearing for the next motion call or whenever the attorneys want. “We make every effort to try to accommodate the preliminary injunction motion.”

In his courtroom, “we are about as in-person as we can possibly get.” Judge West will use Zoom for some proceedings, but all summary disposition motions and motions for entry of a default judgement are in person.

Discovery

As to discovery motions, Judge West hears such motions himself. He adds, however, “I try to make short work of them because they should be resolved between the attorneys, and I try to drive that point out.” He finds that typically, only the more convoluted discovery issues make it to hearing and that at least half of the motions resolve themselves before the hearing. Judge West has not used a discovery facilitator to date because he has not found a need for one, though he does not rule out the possibility for particular issues such as electronically stored information.

Summary Disposition

Judge West observes that he does not see as many summary disposition motions under MCR 2.116(C)(8) as he has in the past. He notes that the only way a (C)(8) motion is dispositive is if the amendment is futile. Regarding MCR 2.116(C)(10) motions, Judge West’s scheduling order makes clear that if discovery still needs to take place to resolve potential issues of fact, he expects litigants to do that before bringing the motion. His standard order states that “Motions pursuant to MCR 2.116(C)(10) or other fact driven motions that are filed prematurely and clearly subject to further factual development during discovery may be sanctioned.” Indeed, Judge West states, “If there’s factual development that can and needs to take place, that motion is premature.”

Settlement Conferences

The first settlement conference is held via Zoom and takes place right after mediation or case evaluation. Prior to Covid, these were held in person.

“We’d probably still be doing them [in person] if we didn’t have the Covid experience.” He adds that he misses doing settlement conferences in person. He found them “highly effective.” These gave everyone “a place to sit down and talk. In my view, that’s more effective.” Judge West still regularly orders case evaluation, though more often than not, business court litigants opt out of case evaluation and elect mediation. He does not mind a stipulated order to mediate as long as it is timely, names the mediator, and includes the mediation date.

The second settlement conference is not scheduled until the first conference is completed. It typically occurs a week or two before the trial date. This is an in-person conference, and attorneys, parties, and anyone with an interest in the case must appear. During these settlement conferences, Judge West is willing to meet with attorneys individually and even the parties if they wish. “By getting everyone here at the same place at the same time and have to sit down with the judge, we get things resolved.”

Regarding adjournments, Judge West will grant a stipulated order to adjourn the scheduling order on the first request. If there are additional requests to adjourn, he reviews the grounds carefully and may require a motion.

Advice

Judge West advises counsel to be prepared to address intensive questions in his court. “I’m very active on the bench in asking questions and I expect lawyers to be prepared.” He recommends that attorneys anticipate questions and be prepared to respond. For transactional attorneys, Judge West says, “I would encourage attorneys to be very cognizant of basic rules of contract construction and make every effort to avoid ambiguities. Once we determine your contract, or a portion of your contract, is ambiguous we enter the world of parole evidence and the contract you may have intended may not be the one you get.”

Judge Brian K. Kirkham

Background

Judge Brian Kirkham spent 33 years in private practice before joining the Calhoun County bench in 2013. During his years in private practice, Judge Kirkham handled family court, probate, business cases, and contract litigation. He was appointed to the bench by Governor Snyder in 2013, elected in 2014, and reelected in 2022. His term expires in 2028. In 2015, Judge Kirkham replaced Judge James Kingsley on the business court bench following Judge Kingsley’s retirement.

Business Court Generally

Currently, Judge Kirkham has 27 business court cases on his docket. He finds that much of the business court operates in the same fashion as general civil cases.

Motions

Although motion hearings on the general civil docket are on Monday mornings, Judge Kirkham holds business court motions on Wednesday afternoons to give those cases more time. “We do everything but the jury trials by Zoom. Anything that we can do, we do it by Zoom. I think that most of the attorneys like it.” Judge Kirkham does not decide motions on the papers; rather, he wants to hear the argument and have an opportunity to ask questions and hear counsel’s response. “That’s why we do those hearings on Wednesdays because it takes a lot of time. It really distills a lot of the issues for me when I have to write the opinions.”

As to TRO and preliminary injunction motions, Judge Kirkham looks to Judge Chris Yates’s work as a model. “Very typically, I don’t grant anything on an ex parte basis, especially if there’s an attorney on the other side. I won’t do it without hearing or a conference or something of that nature.” In deciding those motions, he will go through “every minute detail” that he considered or explain why he did not consider it in his orders.

Scheduling

Plaintiffs in Judge Kirkham’s court must obtain the scheduling order from the clerk’s office and serve it with the complaint. The scheduling order covers discovery, witness lists, amendments, status conferences, mediation, case evaluation, motion practice, settlement conferences, and trial issues. He takes the business court’s goal of efficiency seriously, although he finds that adjudicating business court cases takes far longer than other cases, and extending the summons causes the scheduling order dates to be missed. Judge Kirkham’s scheduling order states that requests to modify the order must be made and heard within 42 days after the case is filed.

Status Conferences

Sometimes Judge Kirkham will hold status conferences early in the case. During those conferences, he tries to give the parties two weeks to agree on a mediator and to schedule mediation approximately 30 days after the conference. Generally, he will hold a status conference only on attorney request or if the case has been delayed or is not progressing. “We are really receptive to these requests. I tell all attorneys—all they have to do is call us, and we’ll set up a phone status conference and we’ll get them in whenever we can get them in.” This is part of Judge Kirkham’s desire to resolve issues so that cases move along expeditiously.

Summary Disposition

For MCR 2.116(C)(8) motions, Judge Kirkham will typically grant time to develop the record before hearing the motion. He notes that once the party has taken the discovery, there’s no issue that the party hasn’t developed the record or needed something else. It is rare that Judge Kirkham will grant a motion for summary disposition before discovery is complete, even under (C)(7), (C)(8), or (C)(9). He will give litigants time to amend the complaint and the answer, so that when the dispositive motion is decid-

ed, it is very clear why it is being granted or denied.

Discovery

Judge Kirkham has referred parties to discovery masters to distill discovery issues. If the discovery master is unable to do so, Judge Kirkham will bring the dispute back to his court, though that is not common. He generally finds discovery masters are able to resolve the disputes.

Settlement Conferences

The scheduling order provides that a status conference shall be held no later than 42 days after the case is filed unless waived by the parties. Though he will consider input from the attorneys, Judge Kirkham likes these conferences to be in person so that the parties get a different perspective of the case. He is willing to hold multiple settlement conferences. Typically, a settlement conference will take place after mediation. If the parties tell him they need another mediation session, he will bring them back for another settlement conference after the second mediation. "It is not unusual to have multiple settlement conferences," he observes.

Mediation/Case Evaluation

Judge Kirkham does not order case evaluation, and finds that most often, the attorneys request mediation in lieu of case evaluation. "I don't find case evaluation to be very helpful in business court cases. Mediation is much better." Judge Kirkham does order mediation as early as he can, though he gives the parties some time for discovery before mediation. He has no problem with requests for multiple mediations.

Advice

Reflecting on litigators in the business court, Judge Kirkham observes that "most business court attorneys are excellent—they come prepared, they know the subject, they know their case." He appreciates this and advises attorneys to "be prepared and know your case." As for transactional attorneys, Judge Kirkham advises them to "anticipate and prepare for

whatever worst case scenario can happen" when drafting agreements. "Anticipate those things, prepare for those things and you'll save the clients a lot of money in the process of litigating things."

John R. Nizol

Background

For our interview, we submitted a list of written questions, which John Nizol graciously answered. Mr. Nizol graduated from Michigan State University School of Law. Following graduation, he worked as a research attorney at the Macomb County Circuit Court. From there, he became Legal Services Director and assisted former Chief Judge John C. Foster with establishing Macomb County's business court docket. After that, Mr. Nizol became the Deputy Court Administrator, responsible for the Circuit Court's Civil/Criminal Division. He also taught legal research and writing for paralegal students at Macomb Community College and organized trainings for court support staff at the circuit court, among other things.

Michigan Judicial Institute

Generally

Mr. Nizol has been the director at the Michigan Judicial Institute ("MJI") for two years. "Under the leadership of Chief Justice Clement, we've seen the enactment of mandatory continuing judicial education. This has been a fantastic opportunity to expand MJI's educational offerings, ensuring that all judicial officers in the state have plenty of convenient and relevant options for fulfilling these new educational requirements."

MJI is the training arm of the State Court Administrative Office ("SCAO"). It organizes training for judges, quasi-judicial officers, and court staff. Under the new rules concerning mandatory judicial education, MJI provides free training to all judicial officers in Michigan. This training is provided through a combination of remote and in-person sessions. For example, MJI offers

new judges an in-depth orientation program, holds monthly webinars geared towards judicial officers, conducts in-person regional judicial seminars throughout the state, and assists with the educational components of the Michigan Supreme Court's Judicial Conference for all state court judges, which includes significant educational programming. MJI also publishes numerous bench books and quick reference materials, which are available online. Although these reference materials are geared specifically to the needs of judicial officers, anyone is free to access those online publications.

MJI and Business Courts

MJI solicits feedback from the business court judges regarding training needs. Topics of interest to business court judges are available in many of MJI's programs and are particularly highlighted during the business court judges' meetings. The business court judges meet twice a year at events that MJI assists with. MJI supports the business court judges by providing educational training at their meetings. This year, one meeting was held remotely and the other meeting will be held in person.

MJI works closely with Justice Brian Zahra, the liaison justice for Michigan's business courts, in crafting programming to meet the educational needs of Michigan's business courts. In developing trainings, MJI also looks to the results of needs assessments where judges are invited to offer suggestions for future trainings.

Other Training for Business Court Judges

In between these meetings, many business court judges also attend the annual meeting of the American College of Business Court Judges. Other organizations, such as the National Judicial College, provide trainings on a variety of topics, including topics of interest to business court judges. Other organizations that offer trainings that may be of interest include the Institute for Continuing Legal

Education and the Michigan Judges Association.

Mandatory Continuing Judicial Education

The biggest change to MJI's role regarding the business court has been implementing mandatory continuing judicial education. These rules require sitting judges to take 24 hours of continuing education over a two-year period. The majority of these hours (18 hours) are focused on judicial practice and related areas. "Judicial Practice" is defined as "legal knowledge and ability, communication, and administrative capacity." As a result, MJI has been expanding its offerings across the board, and continues to be mindful of the varied dockets of the state's judicial officers and the need to provide them the educational tools and resources to continue to excel in their roles.



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. He is a 2021 recipient of the Stephen H. Schulman Outstanding Business Lawyer Award. His practice includes commercial litigation including shareholder litigation, business transactional matters, and health-care law.



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