



# The Michigan Business Law

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## *Mediation Strategies Discussed at Statewide Business Courts Program; National Business Court Developments*

This issue begins with a summary of *Creative Case Resolution: The Art of Case Scheduling and Mediation*, a program on mediation, settlement conferences, and more, held on September 12, 2024, at the Michigan Hall of Justice in Lansing. We then highlight recent business court developments in several states.

### **Creative Case Resolution: The Art of Case Scheduling and Mediation**

On September 12, 2024, an interactive panel event, *Creative Case Resolution: The Art of Case Scheduling and Mediation*, was held at the Michigan Hall of Justice in Lansing. The program was attended by Michigan Supreme Court Justice Brian K. Zahra, most of Michigan's business court judges, and litigators from across the state. The panelists were Judges Terence J. Ackert (Kent County), Joyce A. Draganchuk (Ingham County), and Victoria A. Valentine (Oakland County); mediators Paul Monicatti and I.W. Winsten; and litigators Bruce A. Courtade, Jennifer M. Grieco, and Gerard V. Mantese. The event was coordinated through the efforts of John Nizol, Heather Leidi, and Jana-ya Royal from the Michigan Judicial Institute (MJI) and was co-sponsored by MJI and the Commercial Litigation Committee of the Business Law Section. Douglas L. Toering was the moderator. Below we summarize some of the key insights and best practices that were discussed.<sup>1</sup>

#### *Defining an "Effective Mediation Process."*

Under a results-based perspective, an effective mediation is one that either concludes with a settlement or lays the foundation for a future settlement. The mediation process should move the parties past initial posturing, narrow the distance between the parties' bottom-line figures, and illuminate the risks of proceeding with litigation (e.g., an uncertain outcome,

weaknesses in each side's position, etc.) as well as the benefits of settlement (e.g., greater flexibility in crafting a resolution that works for each party, moving on with life and business, reducing fees, etc.). Ideally, the mediation should not conclude without each side having presented its best offer. In any case, a mediation that does not produce a settlement should not be viewed as a "failure," and the mediator, counsel, and the parties should consider whether further settlement discussions would be appropriate.

Though achieving a resolution is certainly a key mediation objective, it is not the sole determinant of whether a mediation was effective. If a mediation produces a settlement but there was little meaningful client involvement, can this truly be considered an effective mediation? Will the client truly be satisfied with the result? Perhaps, then, the most important barometer of a mediation's efficacy is the degree to which the mediation was *client-centered*.

Less than 1.5% of civil cases are actually resolved through trial in Michigan's circuit courts,<sup>2</sup> which means that for many litigants, mediation is their "day in court." Mediation gives the parties the opportunity to express themselves to a third-party neutral and share their grievances. It is thus critical that the clients be empowered, involved, and informed during the mediation process. When the mediation concludes, the parties should be left with the feeling that they were heard and that the process was fair.

Another formulation of an "effective mediation" can be derived from the literature on alternative dispute resolution (ADR). Here, scholars have identified three different types of mediation: facilitative mediation (the parties communicate their mutual interests, and the mediator explores potential win-win outcomes); transformative mediation (the parties are challenged to see the issues from

all perspectives); and evaluative mediation (the mediator pushes back on the parties' positions and makes his or her own proposals for settlement). Depending on the circumstance, an effective mediation could include elements of all three of these approaches to mediation and encourage the parties and their attorneys to exchange ideas freely.

#### *How Can Judges, Mediators, and Litigators Make Mediations Most Effective?*

Unlike attorneys and mediators, of course, judges are not directly involved in mediations themselves. Nevertheless, judges can still play a critical role in ensuring that mediations are effective, including by facilitating discussions between adverse parties at status, scheduling, or pre-trial conferences. Oftentimes, parties and their counsel do not engage in direct discussions with the other side, which may result in excessively adversarial postures and a lack of fruitful settlement conversations. Judges have various opportunities (including at initial case management, status, and settlement conferences) to facilitate interactive, productive discussions between the opposing sides. Here, judges can help bridge the gap between the adverse parties' positions, open the channels of communication, and encourage the parties to mediate (if doing so would make sense given the circumstances of the case). Judges should also consider whether to order early mediation and whether it makes sense to order multiple mediations in a given case.

Mediators should develop trust with each side; parties need to have some degree of trust in the mediator who will communicate the settlement proposals. Additionally, one key function of the mediator is to identify and raise issues in the case that militate in favor of settlement, which the parties themselves may have overlooked. By finding practical problems

in the parties' positions, the mediator can remove the parties' rose-tinted glasses and encourage a reasonable resolution of the dispute. Mediators can also leverage the inherent uncertainty of the litigation process to drive settlement.

It was also expressed that litigators should engage in more communication with opposing counsel (preferably in person or by Zoom or a phone call). Open lines of communication between the lawyers can ease tension between each side, promote collaboration and civility, and lead to productive settlement discussions. With the new normal of remote proceedings, many newer attorneys have lost the opportunity to regularly attend court in person and to engage in face-to-face discussions with opposing counsel. It is thus incumbent upon more experienced attorneys to train junior attorneys at their firm with respect to the counseling aspect of being an attorney (e.g., helping a client navigate settlement, picking up the phone and initiating discussions with opposing counsel, etc.).

### *Mediation as a Process*

In a recent article in the Michigan Bar Journal, Thomas G. McNeill opined that mediation "is no longer a one-day event; it is a process."<sup>3</sup> Since every case is unique and mediation is decidedly not one-size-fits-all, the exact contours of the mediation process may look considerably different from case to case. Indeed, the beauty of mediation is that it enables the parties and the mediator to construct a creative solution that makes sense for the parties. Thus, parties effectively create their own mediation process.

That said, it was also discussed that one helpful tool mediators should consider when formulating a mediation process is a pre-mediation conference. Depending on the nature of the case, these meetings can be quite effective as they enable the mediator to build rapport and trust with the parties and their attorneys; it also provides the mediator with an opportunity to raise potential issues in the parties' positions and to encourage

the parties to view the case in a more reasonable light.

These pre-mediation conferences can either consist of separate meetings with the mediator and each side or joint sessions in which the mediator meets with all parties and counsel simultaneously in one conference room. At least one study linked joint mediation sessions to higher rates of settlement. The benefit of a joint session is that it directly exposes each party to contrary viewpoints, allows for greater flow of information, and activates creativity.

Ultimately, mediation should be focused on obtaining the best process possible — the specifics of that process will depend on the case at hand. Attorneys must strive to obtain the best results for their clients; judges, mediators, and litigators should work together to ensure that each mediation is a fair process that is likely resolve the case or narrow the number of triable issues.

As mentioned, mediation gives everyone involved the opportunity to explore creative solutions through most any creative process the parties agree on. The parties can choose from a variety of mediation processes. These range from traditional mediation, med/arb (mediation followed by arbitration), arb/med (mediation after arbitration has begun), direct exchange of expert opinions, and a myriad of other processes. The Michigan Judges Guide to ADR Practice and Procedure describes these and other techniques in greater detail.<sup>4</sup>

### *Additional ADR Resources*

For those interested in learning more about mediation and other forms of ADR, there are many resources available, including those offered by SCAO's Office of Dispute Resolution<sup>5</sup> as well as the Alternative Dispute Resolution Section of the State Bar of Michigan.<sup>6</sup>

## **Recent Business Court Developments<sup>7</sup>**

### *Indiana*

Earlier this year, Marion County Commercial Court Judge Heather

A. Welch retired, effective February 2, 2024. Judge Welch served on the Marion Superior Court (Indianapolis, IN) for 23 years and was a commercial court judge for almost eight of those years. In early August 2024, Judge Welch was named the Chair of the ABA Judicial Division. Judge Christina R. Klineman replaced Judge Welch as a commercial court judge in Marion Superior Court and serves as one of Indiana's ten commercial court judges.

### *Iowa*

Iowa's Business Specialty Court has recently experienced significant expansion as three new judges were appointed in late 2023: District Judges Rustin Davenport and David Odekirk, and Senior Judge Michael Schilling. These appointees were chosen based on their educational background, experience with business and complex commercial cases, and personal interest in business courts. Prior to these appointments, there were only two judges serving on the state's business court. Iowa expanded its business court in response to a significant increase in the number of cases being assigned to that court. Between 2013 and 2023, 204 cases had been assigned to Iowa's business court, 42 of which were assigned in 2023 alone.<sup>8</sup>

### *Michigan*

On March 18, 2024, Honorable Matthew J. McGivney took over as business court judge in the 44th Circuit Court (Livingston County), replacing the retired Judge Michael P. Hatty. Judge McGivney will fill the remainder of Judge Hatty's term as business court judge, which will expire on April 1, 2025. (The term for each Michigan business court judge will officially expire on April 1, 2025; however, judges may seek reappointment by Michigan's Supreme Court).<sup>9</sup>

Judge Timothy P. Connors is in his last term on the Washtenaw County Trial Court, where he manages the business court docket. He is in his 34th year on the bench. During that time, he has served by election or appointment as a state district court

judge, state probate court judge, state circuit court judge, and state tribal court judge. He will retire effective January 1, 2025. He plans to increase his teaching responsibilities at the University of Michigan Law School, Wayne State University Law School, and Vermont Law School as well as serving as a mediator and facilitator.

### *New York*

During June 2024, the New York Commercial Division Advisory Council held a weekly lunchtime lecture series. The series primarily focused on educating summer associates, judicial interns, and attorneys about the Commercial Division and about commercial practice generally. The speakers for each lecture included at least one Commercial Division Justice and various highly-respected commercial litigators. The program was made available to law firms throughout the country via Zoom.<sup>10</sup> The series was successful: the lectures were well-attended, and the audience reactions were positive.

### *North Carolina*

In 2025, North Carolina's business court will experience a number of personnel changes. Effective January 1, 2025, Judge Michael L. Robinson (Winston-Salem, N.C.) will take over as Chief Business Court Judge, replacing Judge Louis A. Bledsoe, III (Charlotte, N.C.) who is retiring. Judge Bledsoe has served on the business court bench since 2014 and has presided as chief judge since 2018. Judge Robinson has been a business court judge since 2016. Additionally, A. Todd Brown, a Charlotte attorney and the president of the North Carolina State Bar, was confirmed to a Special Superior Court judgeship and will be designated as a business court judge when he takes office.

On February 1, 2024, the North Carolina Administrative Office of the Courts issued its annual report for 2023, which provides a plethora of helpful information on the background of North Carolina's business court, key case statistics, and more.<sup>11</sup>

### *Oklahoma*

Oklahoma is considering whether to implement a business court program. On May 29, 2024, the state senate passed S.B. 473, which creates an 11-member task force charged to study business courts and to issue a report with various recommendations on issues such as business court jurisdiction and the appeals process. The report would be submitted by January 1, 2026. In support of the bill, Oklahoma Senate President Pro Tem Greg Treat noted that corporations are attracted to states with business courts because these specialized courts can efficiently resolve complex commercial disputes.

### *Texas*

This summer, Governor Greg Abbott appointed ten judges to Texas' nascent business court, which the legislature created in 2023. These appointments will expire on September 1, 2026; thereafter, the judges will be eligible for reappointment for successive two-year terms. Governor Abbott also appointed three justices to Texas' newly created Fifteenth Court of Appeals. The Fifteenth Court is vested with exclusive, statewide jurisdiction over appeals from the Texas Business Court as well as appeals involving the State of Texas. In late August 2024, the Texas Supreme Court upheld the constitutionality of the Fifteenth Court in the case *In re Dallas County*.<sup>12</sup> The Texas Business Court began receiving newly filed cases on September 1, 2024.

### *Utah*

In July 2024, Utah Governor Spencer J. Cox appointed Judge Rita Cornish as the first judge in Utah's new Business and Chancery Court, which was created in 2023. Judge Cornish has served on the Second District Court bench since 2021, and she currently serves on the Utah Supreme Court Advisory Committee on the Utah Rules of Civil Procedure.

### *Wisconsin*

Wisconsin has operated a pilot business court program since 2017. The Wisconsin Business Court Advisory Committee was tasked to create a report with a recommendation as to whether the pilot program should become permanent or be terminated. On May 30, 2024, the committee filed a petition with the state supreme court, requesting that the pilot be extended until July 31, 2026 to allow additional time for the committee to collect more data and prepare a final and complete report.<sup>13</sup> The supreme court agreed to hear the petition, solicited comments, and held a hearing on September 24, 2024. The court received many written comments from organizations, judges, and lawyers, some supporting extending the business court project and others opposing an extension. Ultimately, in a 4-3 vote, the supreme court denied the petition and terminated Wisconsin's business court program. Pending business court cases will continue to be adjudicated in that forum, but no new cases will be assigned to the business court moving forward.

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## NOTES

1. The summary of this program is just that—a summary of the discussion had at this event. It does not necessarily represent the views of MJI or any panelist or participant.
2. Michigan Courts, Guide to ADR Processes <<https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/guide-to-adr-processes/>> [https://perma.cc/M5FC-UMDX].
3. McNeill, Proposed advancements in mediation practices: Placing clients at the center of mediation, 103 Mich B J 16-19 (June 2024) <<https://www.michbar.org/Portals/0/barjournal/fullissues/June2024.pdf>> [https://perma.cc/AR4M-X2SP]. Jennifer M. Grieco wrote an insightful introduction to the ADR theme edition on behalf of the State Bar of Michigan ADR Section. See Grieco, Alternative Dispute Resolution, 103 Mich B J 14-15 (June 2024) <<https://www.michbar.org/Portals/0/barjournal/fullissues/June2024.pdf>> [https://perma.cc/AR4M-X2SP].
4. Michigan Judges Guide to ADR Practice and Procedure, <<https://www.courts.michigan.gov/4990cf/sitassets/offices/odr/adr-guide-04092015.pdf>>.
5. Michigan Courts, Office of Dispute Resolution <<https://www.courts.michigan.gov>>.

gov/administration/offices/office-of-dispute-resolution/> [https://perma.cc/ZX6E-6S4L].

6. State Bar of Michigan, Alternative Dispute Resolution Section <https://connect.michbar.org/adr/home> [https://perma.cc/LPA6-PAVK].

7. The authors thank Lee Applebaum and Mitchell L. Bach, both of Philadelphia, Robert L. Haig of New York City, and Michael W. Tankersley of Dallas for sharing updates on various business court developments throughout the country. For an excellent source about business court developments nationally, see [www.businesscourtsblog.com](http://www.businesscourtsblog.com).

8. Iowa Judicial Branch, Iowa Supreme Court Assigns Three Iowa Business Specialty Court Judges <https://www.iowacourts.gov/newsroom/news-releases/iowa-supreme-court-assigns-three-iowa-business-specialty-court-judges> [https://perma.cc/AA42-6D9E] (posted November 13, 2023) (all websites accessed September 24, 2024).

9. *See* MCL 600.8037; *see also* Order, ADM File No 2019-01 (2019), available at [https://perma.cc/CD5T-4TCY].

10. These lectures were recorded and are available at <https://www.businesscourtsblog.com/recordings-available-for-ny-commercial-division-advisory-council-lecture-series/> [https://perma.cc/RG65-7GYE].

11. *See* Report on North Carolina Business Court, available at <https://webservices.ncleg.gov/ViewDocSiteFile/83457> [https://perma.cc/9U3G-CL3E?type=image].

12. *In re Dallas Cty*, No 24-0426, 697 SW3d 142 (Tex Sup Ct Aug 23, 2024).

13. Mark Lisher, Backers of Wisconsin business courts fret for future of experiment, Badger Institute <https://www.badgerinstitute.org/backers-of-wisconsin-business-courts-fret-for-future-of-experiment/> [https://perma.cc/YQ4M-DA2U] (posted July 18, 2024).



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