

# The Michigan Business Law

## JOURNAL

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This column will highlight the Oakland County Business Court's Case Management Protocol ("Protocol") including recent changes to the Protocol<sup>1</sup> and briefly discuss developments in other Business Courts.<sup>1</sup> Unless exempted or modified, the Protocol applies to each Oakland County Business Court case. The changes to the Protocol align with a core purpose of the Business Courts in Michigan—the efficient resolution of business disputes. Summarizing the changes, the Oakland County Business Court stated:

Amendments to the Business Court Case Management Protocol include, but are not limited to, the adoption of the Protocol—subject to any mutually agreeable alternative procedures—as a Court Order for the governance of all business court cases, the expansion of topics to be discussed at the Case Management Conference, notification concerning the preservation of documents and proportionality in discovery, the basis for initial disclosures as well as a broader scope of information and documents qualifying as initial disclosures.<sup>2</sup>

### Oakland County Business Court

#### *Case Management Protocol:*

##### *Generally*

The Case Management Protocol will be adopted as a Court Order unless a party files "specific objections" prior to the Case Management Conference. Those objections must show good cause as to why the case should be exempted from the Protocol or why the Protocol should be modified for that case. The Protocol (including modifications, if any) will be incorporated into the Scheduling Order as an Order of the Court.

##### *Case Management Conference*

Parties with a case assigned to the Business Court can expect to discuss the Protocol's requirements at the initial Case Management Conference. Lead counsel are required to attend. At the conference, counsel and the

Court will discuss the relief requested in the complaint or counterclaim, amendment of pleadings, dispositive or injunctive motions, the need for a protective order and consent to the Court's Model Protective Order, timing issues, early alternative dispute resolution including designation of an agreed facilitator (mediator), modifications of the discovery protocols, anticipated discovery disputes,<sup>3</sup> and discovery of electronically stored information. Prior to the conference, counsel should meet to discuss these issues. Plaintiff's counsel must file a Joint Case Management Plan at least one week before the conference.

#### *Standard Discovery Protocol:*

##### *Generally*

A party disputing its discovery obligations under the Protocol must do so at the Case Management Conference. The Standard Discovery Protocols include a notice to preserve relevant or potentially relevant documents (including electronically stored information). Also, discovery "shall be proportional to the complexity and amount of the damages sought."<sup>4</sup>

The Oakland County Business Court also requires that certain "initial disclosures"<sup>5</sup> be made within 30 days of the Case Management Conference, regardless of whether such information was requested in discovery. Some of these "initial disclosures" include:

- The factual basis of the party's claims and defenses;
- The legal theories on which the party's claims or defenses are based;
- Identification of individuals likely to have discoverable information—along with the subjects of that information—whom the party may use to support its claims or defenses;
- A copy—or a description by category and location—of all documents, including electronically stored information, in a party's possession, custody, or control that such party may use to support its claims or defenses;
- A description by category and location of all documents that are not in the disclosing party's possession that the party may use to support its claims or defenses;
- A computation of each category of damages claimed by the disclosing party, who must make available for inspection and copying documents on which each computation is based (this includes materials bearing on the "nature and extent of injuries suffered");
- A copy of any relevant insurance, indemnity, or suretyship agreement; and
- The anticipated subject areas of expert testimony.

The discovery protocols also address a common discovery issue—the sequence of discovery. "A party is not excused from making disclosures because the party has not fully investigated the case or because the party challenges the sufficiency of another party's disclosures, or because another party has not made its disclosures." Thus, a party cannot claim timing or the lack of disclosures from the opposing side as a reason not to make its own disclosures.

#### *Written Discovery*

Under the Protocol, the Court will entertain motions to modify the discovery limitations below upon good cause, either initially or later in a case. Written discovery must be served sufficiently in advance of the discovery cutoff date, to allow the opposing party to respond prior to the cut-off date. Thus, the typical written request must be served at least 28 days prior to discovery cut-off. Discovery beyond this may be done by written stipulation, but only if it does not affect important deadlines. If the extension on discovery would affect such dates, a written motion demonstrating good cause must be filed as soon as the need becomes apparent.



Parties are encouraged to agree on limitations to discovery, including the number of written discovery requests and the timing and sequence of written discovery that will best serve the “speedy, just and efficient resolution of the matter.”<sup>6</sup>

Moreover, objections to discovery requests “shall be clear and concise. Boilerplate or ‘general’ objections are discouraged.” Furthermore, any document withheld based on privilege and generated before the litigation must be logged to allow the opposing party and the Court to assess the *prima facie* assertion of privilege. Lastly, when filing a motion to compel pursuant to MCR 2.309(C) or 2.310(C) (3), a party must state it “has in good faith conferred or attempted to confer with the party not making the disclosure to secure the disclosure without court action.”

### Depositions

Under the Protocol, parties are encouraged to place “limitations on the number and length of any depositions, including timing, location and sequencing” that will best serve the “speedy, just and efficient resolution of the matter.” “Inordinate breaks during depositions, gamesmanship, objections violative of MCR 2.306(C) (4), or uncivil behavior are inappropriate” and will be subject to sanctions.

### Electronic Discovery

Parties should also be prepared to discuss e-discovery at the Case Management Conference. Parties may agree to additional stipulations governing e-discovery, such as the Model Order from the U.S. District Court for the Eastern District of Michigan.<sup>7</sup>

### Model Forms and Orders

The Scheduling Order, which is issued to parties after the initial Case Management Conference, now addresses additional issues. The order now requires “initial disclosures” and eliminates the “heard by” date for dispositive motions. In addition, motions in limine must be heard no later than three weeks before trial. The Scheduling Order also adopts the

Model Protective Order and incorporates the Case Management Protocol as a Court Order.

The Model Stipulated Protective Order now provides for the maintenance and retention of files containing materials designated as “Confidential” in a secure location, subject to the statute of limitations. In general, this Model Protective Order will continue to be the default in litigation in the Oakland County Business Court.

## Developments in Other Business Courts

### Kent County

In the recent past, Kent County’s Business Court docket had been divided between two judges. That has changed. Judge Christopher P. Yates has resumed being the sole Business Court Judge for Kent County.

### Wayne County

The Wayne County Business Court launched a successful and well-attended First Annual Bench Bar Program on October 20, 2017. The Second Wayne County Business Court Bench Bar Conference is currently being planned for April 2018, with the specific date to be determined.

5. Counsel should expect other courts (and arbitrators) to consider requiring initial disclosures.

6. This is consistent with how the Michigan Court Rules are to be construed. MCR 1.105. (“These rules are to be construed to secure 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.”)

7. <https://www.mied.uscourts.gov/pdf-files/ParkerEsiOrderChecklist.pdf>.



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## NOTES

1. Judge James M. Alexander and Judge Wendy L. Potts are the Business Court Judges for Oakland County. <https://www.oakgov.com/courts/circuit/departments/business-court>.

2. Thank you to the Oakland County Business Court, whose announcement about the changes to the various Business Court documents has been helpful for this article.

3. The Oakland County Business Court uses experienced volunteer discovery facilitators, who assist counsel in resolving discovery disputes.

4. Factors relating to proportionality are discussed in further detail in Fed. R. Civ. P. 26(b)(1). These include “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”