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Judge James M. Alexander and recently retired Judge Wendy L. Potts (succeeded by Judge Martha D. Anderson on January 1, 2019) have presided over the Oakland County Business Court since it officially began on June 3, 2013. This article introduces the court and its inaugural judges, who have shared their views on case management and discovery and impart wisdom for both transactional attorneys and litigators.

## The Docket

There are two judges presiding over the Oakland County Business Court. The business court judges in Oakland County (and statewide) serve for a term of six years. (The term for each business court judge in Michigan officially expired April 1, 2019, although judges may seek reappointment by the Michigan Supreme Court.) Each business court judge in Oakland County has roughly 250 open business cases at any given time, as well as a criminal docket with 40-60 criminal cases at any given time. The State Court Administrative Office (SCAO) has recently completed a study of case weight times, which will be the basis for the upcoming Judicial Resource Recommendations (JRR) report (typically issued in July of every odd year). The JRR will be issuing a report this July, which may have an impact on the dockets of Oakland County and other courts.

## Case Management Protocol

The Oakland County Circuit Court has a specific Case Management Protocol[1] for its business court cases.[2] Judge Alexander believes that the business courts work only "if there is early, intense judicial involvement." According to Judge Alexander, Oakland County's Case Management Protocol is one of the ways the business judges achieve such involvement. He considers case management "a triage – it allows us to find problems... understand what the issues are, and the lawyers can understand how we manage."

### *The Joint Case Management Plan*

The Joint Case Management Plan is one of the main features of Oakland County Business Court's Case Management Protocol. According to Judge Potts, "the Case Management Plan makes case management more useful" because it "gives the attorneys an opportunity to discuss the case with each other prior to positions becoming entrenched." Judge Alexander emphasized this point: The Case Management Plan "requires lawyers to know the case when they come in and it allows [the judges] to get involved early on."

The Case Management Protocol directs counsel for the parties to confer in advance of the Case Management Conference (more on that later) to identify areas of agreement and disagreement on various issues, which will be incorporated in the Joint Case Management Plan. The plan must be filed by plaintiff's counsel at least one week in advance of the Case Management Conference. Judge Potts emphasized the submission ahead of the conference, calling it "critical" that the judges receive the plan in advance of the conference: "I'd like to know something about the case" before counsel come in.

The plan must set forth, among other things, the parties' positions on a variety of issues, including a good faith estimate of the amount of damages; any intention to file initial dispositive or injunctive motions and the proposed impact such motions will have on discovery; the timetable for the case including initial disclosures, date for discovery cutoff, and a mutually acceptable neutral mediator; and consent to the Court's Model Protective Order.[3] The Joint Case Management Plan will then be incorporated into an order.

### *The Case Management Conference*

The Oakland County Business Court's protocol includes a Case Management Conference, which is the first opportunity for the judge to talk with the lawyers. Lead counsel for the parties must attend the conference and be prepared to discuss the case. The parties, however, are not required to attend.

## Discovery and Facilitation

### *The Standard Discovery Protocol*

Another key aspect of the Case Management Protocol is the standard discovery protocol. The discovery protocol requires discovery be "proportional to the complexity and amount of damages sought." It includes a number of provisions "suggested to the parties as a starting point in order to streamline discovery, reduce costs, and engage in meaningful ADR processes as early in the litigation as practicable." The protocol (and the court) are serious about proportionality: "The court will consider principles of proportionality with regard to all discovery disputes."

The standard discovery protocol requires counsel to file initial disclosures within 30 days of the Case Management Conference. The concept behind the initial disclosure requirements is "know your case." According to Judge Alexander, there is "nothing worse than to look at a lawyer and ask them what their case is about and receive a blank stare in return." He added, "we have many cases and we don't want lawyers to waste time." The initial disclosures require the lawyers to know their case; this, in turn, enables the lawyers to help the judges get involved in their case.

### *Discovery Facilitation*

Like the general civil cases, the Oakland County Business Court uses voluntary discovery facilitators. For the business court, the discovery facilitators are also a part of the Business Court Advisory Committee. Typically, before a discovery motion is heard, the discovery facilitator meets with counsel before the Wednesday morning motion call to attempt to resolve the dispute. The business court has had a positive experience with the discovery facilitation program. Judge Potts called the program

"very successful" and essential to their caseload: Given the heavy caseload, managing the business docket "would be nearly impossible without the facilitators." Judge Alexander emphasized the need for the lawyers to communicate in advance of motion calls, as "90 percent of discovery disputes can be resolved if the attorney will pick up the phone."

*Early ADR*

The Oakland County Business Court typically emphasizes early ADR. Generally, the court will order mediation early in the case and allow sufficient discovery before the mediation to allow the mediation to be meaningful. That said, as Judge Alexander pointed out, little if any discovery is usually needed for low-dollar cases.

Early mediation is particularly helpful in cases where there is an ongoing business relationship that the parties would like to preserve, Judge Alexander noted. Also, Judge Potts observed that even if a mediation does not settle the case, it can narrow the issues. Case evaluation has not played a significant role in the business cases in Oakland County.

*Proposed Discovery Rule Changes*

The Michigan Supreme Court is considering 23 amendments to the discovery rules contained in the Michigan Court Rules. Some of these are patterned after the Oakland County Business Court's standard discovery protocol. Judge Alexander and Judge Potts are hopeful that the proposed rules will help reign in discovery so that it is not overly burdensome; they believe that the proportionality requirement will help to manage discovery. Judge Alexander added that "nobody tries cases anymore. Litigation has become a discovery fight... . It's hard to distill [11 million pages of ESI] to a judge or jury."

## Words of Wisdom

*Transactional Lawyers*

Judge Alexander would like to see more thoughtfulness in drafting documents: "Keep in mind the 'what if.' When you're writing things, if it's ambiguous, we will hold this against you. Six people who are lay people will be deciding [these things]."

*Litigators*

Judge Potts cautioned lawyers to read the Case Management Plan carefully before agreeing to it. "Too many lawyers say it's fine and don't get involved. If they're agreeing to things it could come back to haunt them." Judge Alexander's advice to litigators is "know your case" and to pick up the phone and communicate with the other side. Judge Potts echoed Judge Alexander's sentiment to pick up the phone and try to work things out, adding that lawyers should pick their battles.

*Respect*

The Golden Rule is important to Judge Alexander and Judge Potts. Business court cases often involve family businesses and ongoing business relationships. Judge Alexander would like to remind lawyers that "it's not personal – people try to make these cases personal and they're not. It's business." Judge Potts advised that "it's up to the lawyers to restrain their clients – tell them about the cost of [litigating on] principle and educate them so they can make a good business decision."

Respect and civility are two guiding principles that will go far for lawyers who appear in Oakland County Business Court. Indeed, both judges identified incivility as a pet peeve. Judge Potts admonished that "Incivility should not be tolerated. You're not doing your client any favors. You need preparation as opposed to drama and grandstanding." Judge Alexander added: "Civility and courtesy is going to be what I talk about most. That goes lawyer-to-lawyer and lawyer-to-staff."

## The Business Court's Development

Judge Alexander and Judge Potts have served as the Oakland County Business Court's first judges. Asked what her greatest satisfaction has been in the business court, Judge Potts quickly answered, "bringing parties together and creating resolution." Judge Alexander has enjoyed watching the court develop and putting policies and procedures in place that other courts now use as a model. He added that the court has achieved exactly what it set out to do: "Look at what the statute says – the business courts were created to get consistency and expertise. The consistency is there, the community knows what to expect when they come in here."

## The Future of the Business Court

Judge Wendy Potts retired in 2018 and was replaced by Judge Martha Anderson as of January 1, 2019. Both Judge Alexander's and Judge Anderson's terms expired on April 1, 2019, but they have been reappointed to another term.

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NOTES

1. For an in-depth discussion of Oakland County Business Court's Case Management Protocol, see *Touring the Business Courts*, 38 Bus. L. J. No. 1, Spring 2018, p. 12.

2. https://www.oakgov.com/courts/businesscourt/Documents/ocbc-pro-case-management.pdf.

3. https://www.oakgov.com/courts/businesscourt/Documents/mod-bc-pro_ord.pdf.

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