



The Michigan Business Law

JOURNAL

Volume 42
Issue 3
Fall 2022

CONTENTS

Section Matters

From the Desk of the Chairperson	1
Officers and Council Members	2
Committees and Directorships	3

Columns

Taking Care of Business: Business Identity Theft – Warning Signs and Preventative Measures <i>Alexis Lupo</i>	5
Tax Matters: An IRS Agent in Every Pot? <i>Eric M. Nemeth</i>	7
Technology Corner: One Wild Pitch – How a Video Game Reminds Us of Red Flags and Due Diligence for Emerging Technology <i>Jennifer A. Dukarski and Erin Malone</i>	8
Touring the Business Courts: Interviews with Judge Timothy P. Connors and Judge Victoria A. Valentine; Ten Years of Business Courts in Michigan <i>Douglas L. Toering, Ian Williamson, and Nicole B. Lockhart</i>	11

Articles

Courts Continue to Favor Enforcement of Arbitration Agreements <i>Thomas M. Schehr and Mark J. Makoski</i>	15
Michigan Financial Exploitation Prevention Act <i>David W. Barton</i>	19
The Power of Revocation and What It Means for Creditors <i>Michael S. McElwee</i>	25
"Lender Liability" Hurts – In re Bailey's Painful Reminder <i>Brendan G. Best</i>	28
The New Michigan Uniform Assignment of Rents Act <i>James L. Allen, Robert N. Bassel, and Paul R. Hage</i>	33

Case Digests

Index of Articles	54
ICLE Resources for Business Lawyers	60



Published by THE BUSINESS LAW SECTION, State Bar of Michigan

Interviews with Judge Timothy P. Connors and Judge Victoria A. Valentine; Ten Years of Business Courts in Michigan

In the issue, we interview Oakland County Business Court Judge Victoria A. Valentine and Washtenaw County Business Court Judge Timothy P. Connors. Both are fairly new to the business courts, although both spent considerable time on the circuit bench before being appointed to their respective business courts. Thereafter, we remember the tenth anniversary of the signing of the business court legislation on October 16, 2012.

Judge Victoria A. Valentine

Background

Judge Victoria A. Valentine was a judicial research attorney and business litigator prior to taking the bench. In November 2016, Judge Valentine was elected to the Oakland County Circuit Court and was assigned to the family court docket. In 2021, she was assigned to the civil/criminal docket where she assumed retired Judge James Alexander's criminal docket and Judge Michael Warren's civil docket.

Judge Valentine described family court as a "great experience. This is where most of the individuals in the community see and interact with the court. Face time with the community is beneficial;" yet, as expected, the incidents of abuse and neglect "were difficult to deal with on a personal level." On the juvenile docket, Judge Valentine also dealt with difficult problems. But, in keeping with her desire to assist the community, she collaborated with Judge Warren on the "Set and Reset" program to help juveniles define and execute their goals and to guide them so that they do not let mistakes define their future.

Approach to Business Court Cases

Judge Valentine's experience in the family court, combined with her 17 years of business litigation practice, helped in developing her collaborative, problem-solving approach to

complex, delicate, and frequently highly emotional disputes. This is the same approach she now employs on the business court. (She was appointed by the Michigan Supreme Court on June 15, 2022; her business court appointment will expire April 1, 2025.¹) On the business court bench, Judge Valentine succeeds Judge Martha Anderson and joins Judge Michael Warren.

Judge Valentine had served on the business court for only a few months at the time of this writing; but one thing is certain, "I love it," she says. Indeed, she is exposed to thought-provoking legal issues at every step of litigation, and she enjoys working with business litigators because they take their cases very seriously. As to her approach to business cases, "I want to build a better mousetrap," she says, echoing her collaborative approach to problem solving. (To that end, Judge Valentine has already arranged a roundtable discussion in the courthouse with over 100 lawyers present and spoke to the Oakland County Bar Association's Business Courts & Counsel Committee.) Judge Valentine urges litigators to inform her if anything in her court is not working in practice. She and Judge Warren recently reviewed and approved modifications to the Model Protective Order based on attorney feedback from the OCBA Business Courts & Counsel Committee. In addition, she and Judge Warren are actively considering whether to make any changes to the current business court protocol.

Comparing her current business court docket to her general civil docket, Judge Valentine observes that the business court currently has more summary disposition motions. Overall, however, the business court has fewer motions than in general civil. This could be due in part to the narrower focus of the business docket; also, since business litigators have frequently faced each other in other

business court matters, they are often able to resolve matters without filing motions.

Specific Protocols

For many judges, it is important to check a particular judge's protocol. This is certainly true for Judge Valentine. Her protocol is an excellent source of information on how Judge Valentine handles her business cases.² The protocol addresses summary disposition motions, emergency motions, motions for reconsideration, and adjournments.

As to motions for temporary restraining orders, Judge Valentine prefers that counsel provide notice to the opposing party if possible. Contact her research attorney when filing a TRO motion so that her chambers are aware of the motion.

Summary Disposition; Case Management Conferences

Regarding summary disposition motions, while MCR 2.116(C)(8)³ motions are pending, Judge Valentine authorizes discovery to continue. In deciding whether to file a (C)(8) motion, lawyers should ask themselves this: If the judge will allow an amendment (unless it is futile), "why file the motion?" Judge Valentine will entertain appropriate motions for a more definite statement.⁴ Additionally, she reminds litigators that if you attach documents outside the pleadings, it is no longer an MCR 2.116(C)(8) motion. What about MCR 2.116(C)(10)? According to Judge Valentine, it is generally prudent to wait to file a (C)(10)⁵ motion until the close of discovery. True, the moving parties often argue that no new information will be revealed during discovery; but, Judge Valentine notes, "until the discovery is completed, it is difficult for a judge to know what the evidence will show."

Judge Valentine's approach to motion hearings in the age of Covid is also collaborative and pragmatic.

Motion hearings are generally conducted via Zoom by default, but in-person proceedings are available upon request. Hearings on motions for temporary restraining orders and preliminary injunctions may be conducted in person. Trials are generally in person. As for oral argument, Judge Valentine comments, “I love it, and the lawyers like it.” Upon stipulation, she will issue an opinion without oral argument under MCR 2.119, or, if she believes that oral argument is not necessary, on occasion she may dispense with it pursuant to MCR 2.119(E)(3).

With regard to case management conferences, Judge Valentine has drafted a new notice of case management conference. After the defendant files an answer to the complaint, Judge Valentine’s staff issues the new notice of case management conference; the joint case management plan is due 14 days before the conference. This is in place of the previous one-week deadline. To ensure that attorneys move the case along, she sets a trial date 12 to 14 months out. Be prepared to discuss dates and prospects for settlement at the case management conference. Regarding amendment of pleadings, Judge Valentine does not automatically allow such amendments in the case management order; rather, she requires the party seeking the amendment to comply with the court rules, which typically require a stipulation from the opposing party or a motion for leave to amend. Regarding alternative dispute resolution, Judge Valentine waives case evaluation and does not mandate early mediation, but she permits the parties to stipulate to either.

Discovery; Motions to Compel

The discovery facilitation procedure is administered by the Circuit Court Committee of the Oakland County Bar Association. In keeping with her hands-on approach to resolving conflicts, Judge Valentine has not used a discovery facilitator thus far. “I like to read my own motions all the way through, and I want to know what’s

going on and what the issues are.” That being said, Judge Valentine, who formerly served as a discovery facilitator, is aware that the discovery facilitators do a “great job” and that judges and counsel do find the discovery facilitation process helpful.

Regarding motions to compel, the issues Judge Valentine typically sees are whether the interrogatory must be answered at all, whether the request is too broad, what documents are covered by the protective order, and whether particular documents should be “attorney eyes only.” Judge Valentine does consider appropriate sanctions under MCR 2.313 when requested.

Settlement Conferences

Many cases in the Oakland County Business Court are nonjury. In such cases, one issue is to what degree the assigned judge will also handle settlement conferences. Judge Valentine has not yet encountered this issue. In settlement conferences on the general civil docket, she had great success. (She has also served as settlement conference judge in out-county matters.) Judge Valentine will accommodate a request for a settlement conference from all counsel at any time, even during the discovery period.

In a settlement conference, Judge Valentine wants counsel to give her “real numbers.” She will not disclose them to the other side. But it does help her determine whether the parties are so far apart that continuing the settlement conference would not be fruitful and whether she should thus conclude the settlement conference.

Her protocol contains a link to her hearing calendar. There, you can find a suitable date for a settlement conference prior to contacting chambers. (Note that Judge Valentine generally avoids Tuesdays (criminal call) and Wednesday mornings for settlement conferences.) Her online docket also identifies other cases that are scheduled for motions or trial each day. Thus, if you have a case set for trial and you want to know if the case in front of yours will settle or go to trial,

you can contact the lawyers in the case set before yours.

Advice to Litigators

Asked for guidance to litigators, Judge Valentine provides helpful and practical advice:

- In motion practice, be candid with the judge. Acknowledge your weak points and explain them.
- “Walk the witness to the witness stand. It will relax the witness,” she explains. Remember that the witness has probably never been to court before; escorting the witness to the witness stand will prevent the witness from being disoriented and accidentally entering the jury box, for example.
- “Put your case on as quickly as possible. Be succinct.”
- “Be prepared.” Judges often “grasp things a lot quicker than you might think.”

Judge Valentine looks forward to bringing her cooperative approach to dispute resolution to the business court. “I recognize that in litigation, you really have to understand what is working outside of the courtroom,” she says. Thus, she wants to “know what the lawyers want.” Judge Valentine welcomes constructive suggestions in the procedural approach to “build a better mousetrap.”

Judge Timothy P. Connors

Background

Judge Timothy P. Connors, who has recently replaced the Honorable Archie Brown as Washtenaw County’s Business Court Judge, is no stranger to business law. Before taking the bench, Judge Connors practiced at a business law firm for 11 years. His focus was on insurance law, no fault, corporate law, and real estate. He became a state court district judge in 1991 and then a Washtenaw County Circuit Court judge, serving as Chief Judge for 11 years. The Michigan Supreme Court appointed Judge Connors to the Washtenaw County Business Court effective August 1,

2022. His current term as a business court judge expires April 1, 2025.⁶

Tribal Court; Peacemaking Court

As a circuit judge, Judge Connors has also served as Judge Pro Tem by appointment for the Little Traverse Bay Bands of Odawa Indians and is the Presiding Judge of the Washtenaw County Peacemaking Court. (Judge Terence J. Ackert, one of the current Kent County Business Court Judges, serves with Judge Connors on the Michigan Supreme Court's Tribal State Federal Forum.)

Restorative justice is a particular interest of Judge Connors. Although Judge Connors has always had a civil docket, he believes that the adversarial approach isn't always the best for every case. Rather, when appropriate, Judge Connors focuses on "preferred" dispute resolutions. In that regard, the Michigan Supreme Court approved and supported his suggestion about different approaches to cases (outside the typical "proceed to trial" approach), which led to state peacemaking/restorative justice courts. The inspiration for the state model was and continues to be tribal courts. Many tribal courts and the peacemaking court focus on peacemaking and restorative justice. Judge Connors has used this approach for the past ten years, and he will apply this approach to business court cases. That being said, Judge Connors observes that the ability to have a jury trial is a key part of the judicial system. In fact, he notes, "I love a jury trial. I love the courtroom. I would love to get back in front of a jury and try a case."

Approach to Business Cases

At the time of this writing, Judge Connors had been on the business court for under two months. He plans to use the same approach for the business court as he has used for the general civil cases. He treats general civil and business cases with the same openness and focus on creative solutions. Litigants in the business courts are "eager to get resolution," says Judge Connors. They want an end to uncertainty. But if a trial is neces-

sary, they want it done as quickly as possible. Likewise, the lawyers in the business court are eager, appreciative, and ready to work with him.

Judge Connors observes that in business cases, there is a greater emphasis on economic damages, whereas in the general civil docket, noneconomic damages play a bigger part. Judge Connors further notes that business cases have "ripple effects" on others (such as employees, vendors, customers) and on the community itself. Indeed, litigation with a smaller business can generate larger ripples because small businesses can be more vulnerable to loss of reputation, and they may need to continue to do business with the opposing parties (or at least in the same environment). For larger businesses, which can more readily afford litigation and the attendant risks, legal disputes often create fewer ripples to third parties. Accordingly, Judge Connors advises, "Look at how the case creates a ripple effect to the people involved. When you understand this, it helps fashion a solution." Further to that point, he notes that disputes involving small businesses—shareholder litigation, for example—can be emotional and driven by things other than just money. Therefore, Judge Connors finds it useful to steer the parties toward a solution short of trial whenever possible.

What does he like about being a business judge? For one, "You learn things about a business, what it does. I find that fascinating."

Protocol; Motions

Judge Connors conducts a case management conference early in the case. He discusses various aspects of the case, including mediation; he tries to be flexible on deadlines when it assists in a successful resolution of the case. Motion hearings occur on different days and times depending on the kind of case. Again, he is flexible. Communication is critical. Contact his clerk, Sherry Fire, for assistance and Central Assignment to schedule your hearings.

Given Judge Connors' emphasis on cooperative resolution of disputes where possible, Judge Connors asks that the parties make serious efforts to resolve a matter before a party files a motion.

Regarding the motion and brief, Judge Connors recommends counsel for the moving party address three rhetorical questions:

- "What do you want me to do?" Present the facts needed to resolve the issue. Don't brief the entire case; focus on what you want him as the judge to do.
- "How can I do it?" Cite a statute, caselaw, or court rule. The difference between "shall" and "may" in a statute or court rule is critical. Where "may" is used, acknowledge that this is not mandatory for the judge. Then proceed to explain why the court should nevertheless rule your client's way—present a solution that makes sense.
- "Why should I do it?" Here, do not underestimate the power of arguing that this is just, fair, and equitable.

As to motions for temporary restraining orders, Judge Connors tends towards skepticism except in rare cases where the facts clearly support a real risk of irreparable harm. Notwithstanding contractual provisions consenting to a TRO or an injunction, Judge Connors views decisions on injunctive relief as the province of the court alone.

While recognizing parties' rights to take discovery, Judge Connors observes that discovery can nevertheless be abusive. He expects counsel to make a real effort to address discovery disputes before coming to court. When disputes arise, discovery motions should be concise and clearly explain what you want and why you need it. He is open to using discovery mediation but will also take the time to work through more intractable disputes on the record if it appears

necessary — and he may impose sanctions if appropriate.

Judge Connors does not have a specific protocol on whether to permit discovery while a motion to dismiss under MCR 2.116(C)(8) is pending. These requests are done on a case-by-case basis. As for case evaluation, the parties must choose either case evaluation or mediation.

Hearings

As we have heard from many business court judges, Zoom is here to stay.⁷ Although Judge Connors himself prefers hearings in person, he recognizes the case is not about him; it is about the litigants.

In that regard, new MCR 2.408 applies to videoconferencing. Generally, trials and evidentiary hearings statewide will be in person, but most other court proceedings will presumed to be done by videoconferencing.

Conclusion

Judge Connors' appointment as a business court judge is fitting as he was an early advocate for business courts and involved with the adoption of business courts in Michigan. His advice to litigants based on his considerable experience, both in practice and on the bench, is prudent and practical: "Cut to the chase. I know you are good lawyers. Tell me about the problem and what I can do about it." "Your word is everything." Put yourself in the shoes of the people you are trying to persuade. The judge and jury are concerned about the impact of their decisions; they're not interested in name calling. Rather than trying to demean or embarrass, offer a solution. Remind yourself of the oath we took when we became lawyers.⁸ Treat others the way you want to be treated. Be respectful, truthful, compassionate, and caring; This is what makes you persuasive. Good behavior should be recognized and rewarded, but bad behavior is remembered. Being respectful and honest is persuasive. Do not allow others bait you. "Sometimes saying nothing and letting the other side dig

their own hole is best." It's not about you. It's about the client.

Ten Years of Business Courts in Michigan

On October 16, 2012, then Governor Rick Snyder signed the business court legislation.⁹ It was effective January 1, 2013. Since then, the business courts have been a fixture in Michigan jurisprudence. In fact, the business courts have implemented various protocols—including early case management conferences and early mediation—that have been adopted by many circuit courts throughout the state. Generally, counsel have found the business courts responsive to their clients' needs, and they have found that the business courts resolve cases efficiently and in a way that enhances the "accuracy, consistency, and predictability of decisions in business and commercial cases."¹⁰

NOTES

1. https://www.courts.michigan.gov/49d459/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/recent-court-appointments/2022-01_2022-06-15_formor_oaklandbusct.pdf.
2. <https://www.oakgov.com/courts/circuit/judges/civil-criminal/Pages/valentinev.aspx>.
3. MCR 2.116 C(8) "The opposing party has failed to state a claim on which relief can be granted."
4. MCR 2.115(A).
5. MCR 2.116 C (10) "Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."
6. https://www.courts.michigan.gov/4a1cb7/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/recent-court-appointments/2022-01_2022-07-27_formor_washtenawbusct.pdf.
7. This column is not a comment on, or an endorsement of, any particular videoconferencing platform.
8. <https://www.michbar.org/generalinfo/lawyersoath>.
9. MCL 600.8031 et seq.
10. MCL 600.8033(3)(c).



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. His practice includes commercial litigation including shareholder litigation and insurance litigation, business transactional matters, healthcare law, and business mediation.



Ian Williamson is a partner at Mantese Honigman and concentrates his litigation practice on commercial and shareholder disputes. He is also experienced in appellate practice and certain healthcare and land use matters.



Nicole B. Lockhart, an associate at Mantese Honigman, focuses her practice on business litigation, corporate internal investigations, shareholder/LLC member disputes, federal criminal defense, corporate fiduciary litigation, and contract disputes.