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Touring the Business Courts

By Douglas L. Toering and James A. Buster

While many of the previous "Touring the Business Courts" columns have focused on Southeast Michigan, this column looks westward by interviewing Judges Joyce Draganchuk (Ingham County), Alexander C. Lipsey (Kalamazoo County), and Jon A. Van Allsburg (Ottawa County). During these separate interviews, the judges shared their thoughts on the role that early scheduling conferences and early mediation play in their flexible case management strategy, as well as advice for the bar practicing in their courtrooms.

Business Court Protocols

Status Conferences

The judges unanimously agreed that early judicial involvement is crucial to resolve the case efficiently. As Judge Van Allsburg stated, "I get involved quickly after an answer is filed; I generally hold a status conference within four weeks after the answer is filed." Judges Draganchuk and Lipsey also schedule early status conferences. Judge Draganchuk said that she particularly enjoys these early meetings: "this is my opportunity to get to know the issues and personalities involved in the case, to figure out what this particular case might need, and to become acquainted with counsel." Judge Lipsey concurred, adding "the initial status conference is critical. This could be the first time that counsel have met to discuss the case, and the discussions at the status conference really set the tone for the remainder of the litigation."

The judges cover the same topics at the initial status conference, but their approaches at the conference slightly vary. Before the conference, Judge Van Allsburg puts together a draft scheduling order that serves as an initial "guidepost" for discussing the case. But, he stressed that he is flexible with the parties: "I like having a draft product in front of me so that we can have something on paper and hit all the points; I have—and often do—deviate from this initial draft to adapt to the particular needs of the case." In contrast, Judge Draganchuk does not walk into the room with a draft scheduling order. "I do not walk in with a draft order because I want to get a feel for the case first and let the timeline arise organically as counsel and I discuss the case and its particular needs. Sometimes, a month or so of discovery is necessary; at other times, the parties are ready to go straight to mediation."

Judge Lipsey does not have a particular practice in terms of preparing a scheduling order in advance; rather, he emphasizes that, "the most important part of the process is that the scheduling order is tailored to the needs of the case. The business court statute charges us with handing these cases efficiently, and a thorough, productive initial status conference that results in a narrowly tailored scheduling order is one of the best ways to achieve this goal."

When asked about whether the judges consider speedy disposition to be synonymous with efficiency, each judge indicated that speed is a piece of the puzzle, but it is not the ultimate goal unto itself. As Judge Draganchuk stated, "the business court statute encourages us to handle cases efficiently, not as fast as possible. I do not operate a "rocket docket." Instead, my mission is to get the parties to resolve the case as early as practicable within the contours of the facts of that particular case. If the parties can mediate right after the status conference, that is amazing; if the parties need discovery first, that is fine too if that's what the case requires."

Mediation

In addition to holding early status conferences, Judges Lipsey, Draganchuk, and Van Allsburg regularly use mediation as a tool to efficiently resolve their cases. "In my experience, mediation has been a very effective tool in business cases; the question is usually when to utilize it," said Judge Lipsey. But, he added, "it's important that mediation be used in a strategic manner that is tailored to the needs of the case." To do this, the judges include the possibility of mediation as part of their early scheduling conference, giving the parties the opportunity to discuss possible resolutions early on. In regard to whether there is any particular timeline for early mediation, Judge Draganchuk said that she preferred to have the parties engage in mediation before depositions are taken. "Once depositions are taken, investment in the litigation begins to rise, and the parties tend to entrench and become angry at the other parties' testimony."

The judges unanimously agreed that they prefer mediation to case evaluation. Judge Lipsey elaborated, "case evaluation just isn't well suited to the complexity and economic realities of business litigation." But that is not to say it is never appropriate; each judge utilizes case evaluation to some extent. Judge Van Allsburg estimates that he has used case evaluation in less than 10 percent of his cases; meanwhile, Judge Draganchuk mainly reserves case evaluation for when the parties agree to it. Judge Lipsey said that he certainly prefers mediation to case evaluation, but he also said he would use case evaluation if he felt it would lead to a more efficient disposition of the case.

Discovery

The judges also apply a flexible approach to discovery. "Business court cases can be incredibly complex with a lot of moving parts, requiring a lot of discovery; other times, a business case is a relatively simply contract dispute requiring little to no discovery. Discovery should proceed according to the needs of that particular case, not based on a generic template," said Judge Van Allsburg. The judges also indicated that they have no issue deciding discovery motions, but the parties need to make a good faith effort to resolve the issues and handle the "low-hanging fruit" beforehand. Judge Van Allsburg noted his willingness to resolve some discovery disputes by conference call. As Judge Lipsey stated, "Especially in the business court, I have found that attorneys are collegial and can generally work through most discovery issues. This is precisely what

I expect them to do. So, when the parties come to me for a decision, it's usually because a legitimate dispute exists that I need to resolve." Judge Draganchuk's approach and expectations are similar to those of Judge Van Allsburg and Judge Lipsey, but she did want to reiterate that counsel should focus their motion papers on the specific discovery issues they cannot resolve. "I want counsel to know that discovery motions do not have to be painful. Keep it simple. *Be specific* about the issues you would like me to resolve and limit the motion to those issues; this is not the time to tell the court about all the reasons one party does not like opposing counsel or his or her client. In short, be clear, be concise, and be professional."

Advice from the Bench

Judge Draganchuk wished to emphasize two points to the bar. First, make sure briefing is thorough and well-organized. "Please include a table of contents and an index of authorities. Doing so makes it easier for me to track and verify your arguments. The more I have to search your brief to understand and find support for your arguments, the more distracted I am from the points you want me to focus on." Second, Judge Draganchuk emphasized that counsel should write the best brief they can because it has a substantial impact on the outcome of the case. "I thoroughly prepare for oral argument and like to rule from the bench. As a result, I rely heavily on the parties' briefing. The attorneys should not save their best articulated arguments for oral argument." Judge Draganchuk wanted to clarify, however, that oral argument is still important: "though I rely heavily on the parties' briefing and I have some idea of how I will rule, the parties' arguments can and often do change my mind."

Judge Lipsey wanted to convey how important it is to let him (and any judge) know about esoteric or highly specialized issues early on. Judge Lipsey elaborated, "this is important because it gives me time to think carefully about the issue and come to a well-reasoned, thoughtful conclusion." Judge Lipsey also had some advice for transactional attorneys: "I see a lot of non-compete and confidentiality cases and some of the biggest sticking points in these cases are whether the legitimate business interests are adequately identified in the contract. To encourage an efficient, consistent resolution of these cases, the parties should state very clearly what interests they are trying to protect and update the rationale over time if it changes. What may have been a protected interest years ago may not be one now."

Finally, Judge Van Allsburg emphasized the importance of professionalism and civility. "Although this is rarely an issue in the business courts, sometimes the attorneys in the case cast aspersions and engage in unproductive name calling. This does nothing for your case, and usually harms it." Judge Draganchuk agreed, saying "it is incredibly distracting to the court when attorneys are not civil with each other. It leaves a bad taste in the court's mouth and does a disservice to the client."

However, Judges Draganchuk, Lipsey, and Van Allsburg all recognize and appreciate the civility and professionalism that is generally exhibited by the business court bar, with rare exceptions. They all agreed that when they have a business case with counsel who act professionally, the case moves more smoothly, is generally resolved faster, and is more interesting all around.

Conclusion

As a whole, Judges Lipsey, Van Allsburg, and Draganchuk have been impressed with the quality of the business bar. Further, each judge agreed that the flexibility of the business court model allows them to narrowly tailor their approach to the unique circumstances of each case. As Judge Lipsey summarized, "no two business cases are quite the same: even when you deal with very similar legal issues, the personalities differ, and the underlying economic reality can vary widely. Because the business courts can be flexible, each of these cases can be resolved more quickly and efficiently than they might have been otherwise."

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