COMMERCE JUDGES SPEAK TO BAR
ON HANDLING CASES IN THE COMMERCE PROGRAM

by

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On Tuesday, June 13, 2006, Commerce Case Management Program Judges Albert W. Sheppard, Jr., Howland W. Abramson and Mark I. Bernstein addressed the Bar on "Handling Business Litigation in the Commerce Case Management Program." The Judges were joined on the Panel by two former Business Law Section Chairs, Gregory Mathews and Mitchell Bach, former Chairs of the Business Litigation Committee Darryl May and Eric Milby -- Milby being a member of the Section's Executive Committee and Bach being a former Business Litigation Chair as well -- and current Business Litigation Committee Chair Lee Applebaum.

The newest change in the Court, of course, is the addition of Judge Bernstein, who replaced Judge C. Darnell Jones, II on his becoming President Judge. Procedurally, recent changes include the re-assignment of non-jury, non-Commerce, cases from the Commerce Program docket, and the addition of the Abramson Protocols as a third means of alternative dispute resolution offered by the Court. The Panel also made clear that no consumer class actions of any nature will go into the Commerce Program's docket.

Judge Abramson explained the rationale behind the Abramson Protocols. The hybrid Court/Arbitration process gives parties who would otherwise use arbitration - but do not do so because of the lack of clear guidance on the law and lack of review by an authoritative body - an opportunity to have all three judges issue an opinion addressing the legal issues governing the dispute. The facts are then resolved by the arbitrators, subject to this clear guidance, who will presumably give a more reasoned decision that avoids the "split the baby" approach. Judge Abramson gave a similar talk on March 10, 2006 before the Business Litigation Committee, which is freely available on the "Podcasts" section of the Philadelphia Bar Association's website.

There was a nuts and bolts discussion of rules that had long been in place, as well as an overview of the nearly 700 Opinions issued by the Program Judges, each of which can be found on the Commerce Program website. The fact that there have been few changes, along with the large body of Opinions, reflects the stability of the Commerce Case Management Program. In one of the very few areas in which Commerce Program has been criticized - not necessarily with justification -- Judge *Pro Tem* settlement conferences, Greg Mathews discussed the work of the Commerce Program JPT Subcommittee of the Business Litigation Committee, which has offered a number of points for consideration to the Court on clarifying the JPTs' role, and defining the distinction between settlement conferences and a mediation process.

The interplay of mediation, settlement conferences and Court deadlines arose during this portion of the Panel's discussion. Judges Abramson and Bernstein indicated that the combination of an upcoming discovery deadline where significant discovery has yet to be taken, combined with a request for mediation and a stay and/or discovery extension, will not be looked on favorably. The likelihood of moving the trial date to accommodate mediation efforts is also subject to close scrutiny, and is not likely to be permitted.

Judge Bernstein adduced, however, that the parties have the ability to avoid this issue in most cases. The parties should not put themselves on the expedited track in any case in which they think mediation or settlement discussion issues might run up against the faster occurring deadlines for discovery and trial. Rather, the parties should recognize or anticipate this possibility, ask to have the case placed on one of the other two tracks, and give themselves

enough time to mediate or have settlement negotiations that will either succeed or fail well before the deadlines are upon them.

It was observed by some of the non-judge panelists that even though this is an individualized docket like federal court, there is no one playing the role of magistrate judge to whom the trial judges can readily send the parties to discuss settlement. This federal practice is part of a custom that alleviates the perception that one or the other party was weak in seeking settlement discussions.

In Common Pleas, however, the deadline itself sometimes becomes the force that focuses the parties on settlement. Although the Program rules allow for stays to mediate if the Court so orders, the trend in the Commerce Program would appear to be that these deadlines will not be moved. Consequently, the parties will either need to raise the issue of allowing time for mediation at the case management conference so the Court is apprised early on of the parties' interest in mediation as a possible avenue for settlement rather than a procedural device to extend the deadlines; or plan to voluntarily mediate within the existing deadlines.

Some panelists suggested that if the parties decide to seek an order from the Court to stay discovery or extend deadlines, they should do so well in advance of the deadline, when the Court may be more receptive, and if not, the parties still have enough time to address settlement or litigation. As stated above, to alleviate some of the problem, Judge Bernstein reiterated that parties should not choose the fastest docket option, but instead give themselves the time to negotiate and to meet the more extended deadlines if that fails.

On other practices, the Judges discussed that they were not keen on reply briefs, but would entertain them if timely received; though Judge Abramson stated he would want a letter in advance, explaining why a reply brief was actually needed, after which he would determine whether it should be filed. The Judges also indicated that, like federal court, motions for reconsideration should only be filed if there is something truly new or some essential point was missed, and not filed routinely. It was pointed out that the Commerce Program has opinions on that issue, and Judge Abramson has issued similar opinions prior to joining the Commerce Program, which will be posted as well.

The Judges and panel also discussed the practice of lawyer's granting discovery extensions to opposing counsel who then take advantage of that courtesy. It was suggested that in granting an extension to answer interrogatories or document requests, the extension clearly should be conditioned, up front, on the future response not simply being a set of general objections, but the complete answer to the factual questions posed or documents demanded. Further, as part of the extension agreement, any objections that were known or reasonably should have been known must be made within the original 30 day period.

The "forbearant" counsel in those circumstances, or other situations where certain courtesies are extended, should be conscientious about setting parameters on the courtesies, as the lack of civil behavior by an opponent may not be a basis in itself for extraordinary relief. Lawyers need not be abusive or overly aggressive, but nor can they be too passive if opposing counsel is truly taking advantage of the courtesies and time is elapsing with no real responses.

It was also observed that Preliminary Objections do not automatically stay discovery, and there is certainly no reason to put any hold on discovery when those Preliminary Objections would not even end the case if successful. If the Preliminary Objections would be dispositive if successful, and a party believes it would be useful to stay or extend discovery so as not to waste a client's money, then that matter should be brought by Motion to the Court's attention for

disposition, and not done on the basis of personal belief or private agreement in the face of a Court Ordered discovery schedule.

Additionally, Judge Bernstein noted in two circumstances where Motion for Judgment on the Pleadings practice might be superior to filing Preliminary Objections, and clearly put the increased use of that motion practice out for the Bar's consideration.

Finally, the Commerce Program Judges agree, concerning extensions of time for responding to Motions or Petitions, that if *all* counsel agree to an extension of time for a response to a motion or a petition by not more than thirty (30) days, then such a request should be made by letter addressed to Civil Administration (Room 296 City Hall). The request should not be addressed to the individual Judge. Such a request will generally be granted if received by Civil Administration within fifteen (15) days from the date of the filing of the motion or petition.